[* 1]

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. HON. CAROL EDMEAD PART 35
Justice

Ashkenazi

-v-

AXA Equitable Life

INDEX NO. 115034/07
MOTION DATE 5/3/10
MOTION SEQ. NO. 007
MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	____
Answering Affidavits - Exhibits ____	____
Replying Affidavits ____	____

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers

FILED
MAY 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of plaintiff's motion for reargument based on plaintiff's contention that outstanding discovery rendered summary judgment premature is granted; however, upon reargument, the Court adheres to its earlier determination; and it is further

ORDERED the branch of plaintiff's motion for reargument based on plaintiff's contention that the Court improperly held that rescission was warranted based on the misrepresentation that the purpose of the policies were charitable in nature, is denied; and it is further

ORDERED that the branch of plaintiff's motion for renewal based on the claim that defendant failed to tender premiums is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 5/10/10

ENTER: _____, J.S.C.
HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

ALEXANDER ASHKENAZI AS TRUSTEE OF THE ZABLIDOWSKY LIFE INSURANCE TRUST,

Plaintiff,

Index No.: 115034/07

-against-

AXA EQUITABLE LIFE INSURANCE COMPANY,

Defendant.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover death benefit proceeds from certain life insurance policies, plaintiff moves to renew and reargue this Court's decision which granted defendant AXA Equitable Life Insurance Company ("defendant") summary judgment dismissing plaintiff's claim for breach of contract and granting defendant's counterclaim for rescission of the policies.

Factual Background

Plaintiff Alexander Ashkenazi as Trustee of the Zablidowsky Life Insurance Trust ("plaintiff") sought to recover the proceeds of two life insurance policies issued by defendant upon the life of Estelle Zablidowsky (the "Insured"). Defendant denied plaintiff's claim for benefits upon the policies, claiming that the application contained misrepresentations concerning the insured's financial condition. Defendant then sought to rescind the policies by issuing a check to plaintiff refunding the premiums paid on the policies.

Plaintiff maintained that even if the Insured misrepresented her financial condition, the misrepresentations were not material to the issuance of the policies since they do not increase or decrease the risk taken by the insurer. Plaintiff also contended that since the financial condition

of an insured does not relate in any way to the insured's life expectancy, defendant would have issued the policy no matter what the Insured's financial condition was at the time of application. Thus, plaintiff requested that defendant produce evidence of other similar risks in order to determine defendant's past behavior, *i.e.*, "applications of policies [defendant] issued in the four year period surrounding the [Insured's] application to insureds over 80 years old with a face value over $5 million." (Plaintiff's Memorandum of Law, dated October 11, 2009, p. 11).

Defendant filed a motion for summary judgment claiming that based on defendant's underwriting guidelines and the underwriter's affidavit, defendant established that it would not have issued the policies had the Insured been truthful about her financial condition. The Court granted defendant's motion.

The Court held:

> . . . the record demonstrates that the Insured's representations in both applications concerning her financial worth, and the representation in the $3 million policy concerning the existence of other life insurance policies, were false.
> (Decision, pg. 11)

As to the remaining issue of whether defendant established, as a matter of law, that the misrepresentations above were "material" under New York Insurance Law, the Court held:

> . . . to establish materiality of misrepresentations in an application for insurance, as would warrant rescission of the policy, the insurer must submit documentation such as the insurer's underwriting manual which pertains to insuring similar risks, and testimony of the insurer's underwriter or other qualified employee . . . .
> (Decision, pg. 13)
>
> * * *
>
> The Underwriting Guidelines herein, *i.e.*, the economic-related basis and tables, support the affidavits of the underwriters wherein they explain that the policies at issue would not have been approved but for the misrepresentations made by the Insured.
> (Decision, pg. 19)
>
> * * *
>
> . . . discovery of other "policies AXA issued in the four year period surrounding the

Zablidowsky application to insureds over 80 years old and with a face value of over 5 million" is unwarranted and would not, in any event, lead to any material facts that would raise an issue as to whether AXA would have denied the applications if it had knowledge of the Insured's true financial net worth.

First, the Court did not direct the production of such records, but in fact, denied the request and no renewal or reargument motion was made by the Trustee.

* * *

In any event, the discovery sought by the Trustee . . would not reveal that AXA did not rely upon or consider the financial net worth of such applicants or even the Insured.

(Decision, pg. 19).

* * *

. . . the applications in and of themselves would be inconclusive, as applied to the Trustee's theory of the case. The parties would be required to open every file of such application, determine what AXA relied upon, and to what degree, where such determinations are made on a case by case basis, since policies issued to individuals "66 and over" are given "IC [Individual Consideration]." Such discovery would be warranted if this were a class action, but such is not the case. . . . Such discovery would not disclose whether AXA rescinds policies based on falsely reported net worth. The applications would not show or establish that net worth was not a material factor for AXA. Unlike the cases cited by the Trustee, where discovery of other policies was based on a particular illness that was undisclosed, the undisclosed fact at issue is the fact that the net worth of the Insured was less than $225,000, which, according to AXA, would never support the policies issue[d]. Applications of 80-year old individuals for $5 million policies would not establish that individuals, such as the Insured, having a net worth of less than $225,000 were still issued policies of $5 or $3 million. The discovery sought is not directly relevant to the breach of contract claim, and is remote to the specific issue at hand.

(Decision, pgs. 20-21).

In support of its motion, defendant argues that further discovery of defendant is warranted. Under New York Insurance Law § 3105(c), when "determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible." Caselaw holds that an insurer that seeks to void a policy for material misrepresentations must produce other similar policies containing similar representations. The motion was made while document production was pending and before defendant's deposition was conducted. Defendant has not produced the most

relevant documents and the underwriters that submitted affidavits need to be deposed. Because the evidence in support of plaintiff's position was not produced in discovery, plaintiff could not prove that defendant would have issued the policies anyway. Thus, summary judgment should have been denied as premature.

Plaintiff also argues that the application for the policies did not ask whether a charity was the beneficiary. The Court held that the policies should be rescinded for also failing to disclose that the policies were benefitting a charity. The application, however, did not ask whether the policies were to benefit a charity. New York Insurance Law § 3204(a)(1) provides that every life insurance policy "shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any writing, unless a copy thereof is endorsed upon or attached to the policy or contract when issued." New York Insurance Law § 3204(a)(2) provides that no policy application "shall be admissible in evidence unless a true copy was attached to such policy or contract when issued." The policies likewise provided that the "policy and the application for the policy . . . constitute the entire contract between the parties. All statements made in the application will be deemed representations and not warranties. No statement will be used in defense of a claim under the policy unless it is contained in the application, and a copy of the application is attached to the policy when issued." Since the application did not ask whether or not the policies will benefit a charity, rescission cannot be granted on that ground.

In support of renewal, plaintiff argues that by keeping the premiums, defendant has not surrendered every right under the policy as required to rescind the policies. Thus, defendant cannot rescind without returning the premium amount of $481,515.42 to plaintiff. The checks defendant offered in return were not cashed and have expired. Thus, renewal is warranted based

on defendant's failure to tender premiums, and rescission cannot be granted without also ordering defendant to refund the premiums with interest.

In opposition, defendant argues that reargument is unwarranted as plaintiff failed to demonstrate that this Court overlooked or misapprehended a single fact or legal principle. Plaintiff presents the same arguments it raised in its original opposition papers. Further, plaintiff tries to improperly interject what appears to be a new argument into the case - that the Court erred when it supposedly "held that the policies should be rescinded not only for financial misrepresentations but also for failing to disclose that the policies were to benefit a charity." Such argument is premised on a misstatement of the Court's decision; the Court did not hold that an additional basis to rescind the policies was the failure to disclose the purported charitable purpose behind the policies. Rather, the Court merely observed that those misrepresentations would have been material to the underwriting process not only under the estate planning guidelines, but also under the charitable purpose financial guidelines (if the alleged charitable purpose had been disclosed).

In the event that this Court grants reargument, defendant submits that this Court's decision should not be disturbed. Defendant argues that it provided overwhelming evidence of the falsity of several misrepresentations in the Insured's applications, and plaintiff did not present any evidence suggesting that the statements were true. Defendant also presented overwhelming evidence that these misrepresentations were material to its underwriting decision, including: (a) defendant's underwriting guidelines and policies, (b) defendant's contemporaneous records reflecting its express reliance on the misrepresentations made in the applications, (c) a detailed affidavit from Underwriter James Godin ("Underwriter Godin") who personally relied on the

misrepresentations made in the applications, and (d) a detailed affidavit from Underwriter Barbara Peterson ("Underwriter Peterson") who further explained defendant's policies and testified that defendant's guidelines would have prohibited the issuance of these policies if the truth had been known by defendant. Plaintiff did not raise an issue of material fact as to the materiality of the misrepresentations, but requested further discovery which had already been denied by this Court and which would not have raised a genuine issue in this case.

Defendant further argues that plaintiff's motion to renew is improperly captioned, as plaintiff failed to identify any "new fact" or any purported "change in the law," that would alter the outcome. Indeed, the cases relied on by plaintiff all pre-date the Court's opinion in this case, and thus, could certainly not be considered a "change in the law," as required by CPLR 2221. Further, the "fact" that defendant offered to refund the premiums to plaintiff and that plaintiff rejected that offer and instead chose to bring suit to enforce the policies was set forth in defendant's Answer, as well as in the summary judgment papers, and is certainly not new. Moreover, the motion should be denied because a motion to renew (like a motion to reargue) is never the proper vehicle to present a new argument. Plaintiff's argument that rescission cannot be granted without a refund of the premiums paid by it was never pleaded in plaintiff's Complaint or Answer to Counterclaims. Plaintiff never argued in its underlying papers that a return of the premiums was a condition precedent to defendant's claim for rescission, or that resolution of that issue was a condition precedent to this Court granting the relief sought by defendant. Moreover, plaintiff failed to present any "reasonable justification for the failure to present" any new fact on the prior motion. Thus, argues defendant, plaintiff's motion should be denied under CPLR 2221(e).

In the event this Court grants renewal, defendant submits that plaintiff's demand should be denied because: (a) under CPLR 3004, a proper claim for rescission cannot be denied merely because a refund of premiums has not yet been made or directed, (b) a refund of premiums is not to be made where an insurance policy was procured by fraud, as was the case here, (c) plaintiff's new demand for a refund is barred by plaintiff's unclean hands, and (d) any demand for the refund of premiums is premature, given that defendant will likely be entitled to substantial damages against plaintiff on its remaining claim for fraud, and so any return of premiums should be applied first as an offset against those damages.

And, under the motion to reargue standard, plaintiff fails to identify any fact or law that this Court misapprehended or overlooked in issuing its decision. And, the argument that the Court cannot order rescission without also ordering a refund of premiums to plaintiff was never before raised by plaintiff , and thus, cannot be considered under reargument.

In reply, plaintiff argues that defendant citation to unpublished California caselaw is inaccurate as the case cited obligates defendant to return premiums to effectuate a rescission. Further, CPLR § 3004 allows the court to order the premiums returned either before or after the declaration has been issued. The CPLR section does not allow defendant to keep the premiums after a rescission is granted but rather allows defendant to seek a rescission even though it had not turned over the premiums. But once a declaration is issued rescinding the policies, defendant must refund the premiums. By removing "tendering back premiums" as a condition to bringing an action for rescission, CPLR § 3004 allowed defendant to commence this action even had it not tendered the premiums but it does not allow to rescind the policy and keep the premiums. By allowing defendant to rescind but also keep the premiums, defendant has been unjustly enriched

by the transaction. It accepted hundreds of thousands of dollars in premiums and gave nothing in return and defendant's claim that it paid commissions in excess of the premiums received is factually inaccurate. Moreover, defendant's agent contracts allow it to charge back the commissions paid in the event of a rescission.

By evading discovery defendant failed to prove that it would have rejected the risk had it known the Insured's true net worth. It is undisputed that the Insured's financial condition did not increase or decrease the risk defendant assumed when it issued the policies. The only way, therefore, for defendant to prove that it is not using the financial representations as a pretext to void an $8 million death claim is to ascertain whether or not defendant regularly issued policies that failed to meet the financial requirements of its underwriting guidelines. Thus, the Court directed defendant to produce records of its other policies for similar risks. In similar cases, the court ordered the production of the exact discovery that plaintiff seeks here, and the discovery revealed that the insurers, recognizing that financial condition of an insured does not increase its risk, regularly ignored its guidelines and issued policies far in excess of the insured's net worth. Caselaw holds that the self-supporting affidavit of defendant's underwriters, together with citation to the guidelines is not enough. Defendant's motion should have been denied since it is not supported by any specific applicants who were denied coverage under similar circumstances. In fact, the fact that this motion was made at this juncture is a calculated move by defendant to avoid the court's directive to produce the policies.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended

the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Reargument based on plaintiff's contention that outstanding discovery rendered summary judgment premature is granted, based on plaintiff's argument that the Court misapplied caselaw pertaining to the evidence or discovery an insurer must produce when attempting to void a policy. However, upon reargument, the Court adheres to its earlier determination. Plaintiff's broad discovery request for "applications of 80-year old individuals for $5 million policies" for a four year period surrounding the Insured's applications herein would not establish that individuals having a net worth of less than $225,000 were still issued policies of $5 or $3 million, especially where policies issued to individuals more than 66 years old are issued on a case by case basis. Such discovery would not tend to show whether defendant voided policies containing misrepresentations of financial net worth. Moreover, the Court never directed defendant to produce such discovery, but instead, directed plaintiff to provide defendant with the transcript of proceedings in U.S. Life v Grunhut, and there is no indication that plaintiff ever

provided defendant with such transcript, as required.

Reargument based on plaintiff's contention that the Court improperly held that rescission was warranted on the ground that the Insured misrepresented that the purpose of the policies were charitable in nature is also denied. The Court did not hold that the charitable purpose of the policies constituted a misrepresentation, but rather, in discussing the issue of the materiality of the false financial misrepresentations, merely articulated what was stated in the affidavit of Underwriter Peterson. To be clear, the Court held, on the issue of materiality, that the Insured's "representations in both applications concerning her financial worth, and the representation in the $3 million policy concerning the existence of other life insurance policies, were false" and then determined whether these two misrepresentations were material as a matter of law. As the Court did not rely on any "misrepresentations that were not made," concerning the charitable purpose of the policies, reargument on this ground is denied.

Renewal

Renewal based on the claim that defendant failed to tender premiums is denied. A motion for leave to renew under CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed. 1999]). A motion to renew, "is intended to draw the court's attention to new or

additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529 NYS2d 277).

The purported "new" fact on which plaintiff's renewal motion is based is that defendant has not tendered the premiums. However, such fact is not new. Defendant alleged, in its Answer and Counterclaims, that it tendered two checks representing the premiums paid on the policies at issue and interest (¶22), and plaintiff provides no excuse for failing to previously argue that it was entitled to a new check. Further, plaintiff never argued in its underlying opposition that it was entitled to a return of the premiums as a condition of granting rescission of the policy in favor of defendant. Thus, there is no basis for this Court to entertain plaintiff's request for a return of the premiums under renewal or reargument.

It is noted that defendant in fact tendered two checks, and it was plaintiff who allowed the checks to become expired. In any event, plaintiff is entitled to a return of premiums upon a rescission of an insurance policy (*see Myers v Equitable Life Assur. Soc. of U. S.*, 60 AD2d 942, 401 NYS2d 325 [3d Dept 1978]; *Kiss Const. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 877 NYS2d 253 [1st Dept 2009] (where policy was void *ab initio* based on the material misrepresentations in the insurance application, insurer is obligated to refund plaintiff's premium payments), the grant of such relief is premature, in light of any potential set off defendant may be entitled to by virtue of its pending claim of fraud against plaintiff, *i.e.*, the alleged commissions defendant paid to agents on the policies that have now been rescinded, which commission payments exceed the premium payments made on the policies. Thus, such claim for the return of premiums, though not properly before the Court, is premature.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for reargument based on plaintiff's contention that outstanding discovery rendered summary judgment premature is granted; however, upon reargument, the Court adheres to its earlier determination; and it is further

ORDERED the branch of plaintiff's motion for reargument based on plaintiff's contention that the Court improperly held that rescission was warranted based on the misrepresentation that the purpose of the policies were charitable in nature, is denied; and it is further

ORDERED that the branch of plaintiff's motion for renewal based on the claim that defendant failed to tender premiums is denied; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 10, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD