Status Conference October 3, 2011
3x

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

----------X

ALEXANDER MANCONE,

Plaintiff,

-against -

RUDOLF ASSOCIATES INC., DAVID W. RUDOLF, HARTFORD LIFE INSURANCE COMPANY, AND PHOENIX LIFE INSURANCE COMPANY

Defendants.

----------X

DECISION/ORDER

Index No. 1421-2009

Sequence Nos. 3, 4 & 5

LUBELL, J.

The following papers were considered in connection with this motion **(Sequence 3**) by the defendant, Hartford Life Insurance Company, for an Order pursuant to the CPLR §3212, granting summary judgment to the defendant, Hartford Life Insurance Company, dismissing this action in its entirety, with prejudice, and for such other, further and different relief as this Court may deem just and proper; this motion (**Sequence 4)** by defendants, Rudolf Associates, Inc. and David W. Rudolf, for (a) an Order granting partial Summary Judgment to the Rudolf Defendants on the second cause of action and (b) for such other and further relief as this Court may deem just and proper; and; this motion **(Sequence 5)** by plaintiff for an order pursuant to CPLR §3212 granting Summary Judgment to Plaintiff on all causes of action set forth in the Complaint and such other and further relief as is just and proper:

PAPERS	**NUMBERED**
Motion (defendant Hartford)/Affidavit	1
Memorandum of Law in Support of Hartford's Motion	2
Affirmation of Michael H. Bernstein/Exhibits H-T	3
Affirmation of Beverly Rohlik/Exhibits E-G	4
Affidavit of Nancy Krogstad/Exhibits A-B	5A
Affidavit of Nancy Krogstad/Exhibits C-D (II of II)	5B

Cross-Motion (Rudolf Associates)/ Affirmation in Support	6
Affirmation of Scott Tenenbaum in Support	7
Memorandum of Law In Support of Cross-Motion	8
Memorandum of Law by Plaintiff's Attorneys	9
Affirmation in Opposition to Motion and Support of Cross-Motion by Plaintiff's Attorneys	10
Cross-Motion by Plaintiff's Attorneys/ Affirmations	11
Memorandum of Law by Plaintiff's Attorneys	12
Opposition to Cross-Motion of Plaintiff by Rudolf Defendants	13
Reply Memorandum of Law in Opposition to Plaintiff's Cross Motion	14
Reply Memorandum of Law in Support of Plaintiff's Rudolf defendants Cross-Motion	15
Reply Memorandum of Law in Support of Plaintiff's Cross-Motion	16
Reply Memorandum of Law in Support of Plaintiff's Cross-Motion	17

Plaintiff Alexander Mancone ("Plaintiff"), as beneficiary of a $200,000 life insurance policy (the "Policy") issued on the life of his late wife, Lois Mancone ("Decedent"), by defendant Hartford Life Insurance Company ("Hartford") through, defendants Rudolf Associates Inc. and David W. Rudolf (collectively "Rudolf"), brings this action in response to Hartford's determination to apply the two-year suicide exclusion provision of the Policy upon ascertaining that Decedent took her own life within said exclusionary period as measured from the date issuance of the Policy.

The principal issue raised herein is whether or not and, if so, to what extent Hartford or Rudolf failed to comply with 11 NYCRR §51 ("Regulation 60") or otherwise breached their duties thereunder upon the issuance of the Hartford policy in light of an earlier and since surrendered $200,000 policy issued by defendant Phoenix Life Insurance Policy ("Phoenix").

Regulation 60 is essentially an insurance disclosure statute created "[t]o protect the interests of the public by establishing minimum standards of conduct to be observed in the replacement or proposed replacement of life insurance policies…." 11 NYCRR § 51.2 (b). Pursuant to Regulation 60, a replacement policy is created when a new life insurance policy is:

> purchased and delivered or issued for delivery in New York and it is known to the department licensee that, as part of the transaction, existing life insurance policies or annuity contracts have been or are likely to be: (1) lapsed, surrendered, partially surrendered, forfeited, assigned to the insurer replacing the life insurance policy or annuity contract, or otherwise terminated…

(11 NYCRR § 51.2 [a][1]). Furthermore, it sets forth a process to initially determine whether a replacement policy is involved, and serves to collect information about existing policies. Among other things, it also requires the agent or broker to present a completed side-by-side comparison of the old and new products to allow an applicant to make an informed decision.

The following undisputed facts set the stage for this action.

In 2001, the Decedent hired Rudolf Associates, Inc. and/or David W. Rudolf (collectively "Rudolf") to obtain a life insurance policy. Rudolf is a broker licensed by the State of New York with extensive knowledge of Regulation 60 as is exemplified by his deposition testimony. Rudolf testified that he is familiar with Regulation 60, has received training concerning the requirements of Regulation 60 and how to complete the associated disclosure forms. Furthermore, Rudolf expressed knowledge of the purpose of the regulation and how to comply with it.

On August 30, 2001, the Decedent, through Rudolf, ultimately purchased a life insurance policy issued by Phoenix Life Insurance Company with a face value of $200,000. The policy remained in full force and effect until her November 29, 2007 surrender of same to Phoenix through Rudolf.

In October of 2007, just one month before Decedent's surrender of the Phoenix Policy, the Decedent sought to purchase additional life insurance through Rudolf because she had recently quit smoking and believed that she could get a better rated policy. Rudolf sent the Decedent several proposals from different insurance companies, including one from Hartford.

The Decedent decided to apply for a Hartford Universal Life

Insurance Policy ("UL") which had a total benefit of $200,000. The application was submitted to Hartford on October 11, 2007. As required by Regulation 60, included with the application was a Definition of Replacement form. The Definition of Replacement form sets forth specific questions to determine whether an applicant is "replacing or otherwise changing the status of existing life insurance policies" for the purpose of ensuring that the applicant receives proper disclosure from the Agent if such a replacement is occurring. Completed by Rudolf, the Definition of Replacement form indicated that the Hartford policy would not be a replacement policy. The form was separately signed and executed by both the Decedent applicant and Rudolf, as Regulation 60 requires.

Even though Hartford's application requires the disclosure of existing life insurance policies, Rudolf checked the "No" box, thereby indicating that the Decedent did not then have an existing life insurance policy. This was done even though it was Rudolf who had procured the Phoenix Policy for the Decedent in 2001 and, in fact, the policy was still outstanding. Furthermore, the Hartford application, completed by Rudolf, indicated not only that the Decedent did not have any life insurance policies in effect, but that there was no intention that any active policy be replaced or that it was likely that any existing life insurance policy would be replaced as a result of the issuance of the UL Policy.

Hartford declined the coverage for which the Decedent applied due to an underwriting determination concerning her health, including her history of smoking. Hartford informed Rudolf that the Decedent would need to purchase a nicotine rated Policy (the "VUL Policy") at a higher premium than Rudolf had initially presented to the Decedent.

Meanwhile and pending the issuance of the VUL Policy, on November 29, 2007, the Decedent, with the assistance of Rudolf, surrendered her existing Phoenix Policy to Phoenix in return for its cash surrender value.

On December 13, 2007, several weeks after the surrender of the Phoenix Policy, the VUL Policy was issued via an amendment to the original October 11, 2007 application (the "Amendment"). Hartford proceeded by way of Amendment to the original application, as opposed to requiring the completion of a full second application for insurance. Although there does not appear to be a regulatory prohibition against that procedure, had Hartford required the completion of a new application, Rudolf and the Decedent would again have been faced with the question of

whether there was an existing policy or if there had been a recently surrendered one.

The Decedent signed and submitted the Amendment on December 20, 2007. The Amendment set forth relevant changes to the original October 11, 2007 application, including, among other things, that the Policy the Decedent was purchasing would be nicotine rated with a proper adjustment of premiums. The Amendment did not include any questions regarding existing or surrendered policies. At this point, a mere month after the surrender of the Phoenix Policy, neither Rudolf nor the Decedent amended the application to reflect the surrender of the Phoenix Policy or otherwise indicated that a replacement of that policy was intended or likely to occur due to Hartford's issuance of the VUL Policy. To satisfy the Regulation 60 requirement that each application for insurance contain a completed Definition of Replacement form signed by the applicant and the agent or broker", Hartford simply attached the Amendment to the original October 11, 2007 application which it had in its possession. There is no showing, however, that Hartford had any reason to believe that any further action was necessary.

The Decedent committed suicide on June 28, 2008, which was approximately seven months after she had purchased the VUL Policy and within the two year exclusionary period contained therein. On July 7, 2008, Plaintiff submitted a claim to Hartford for the proceeds of the insured's VUL Policy. Hartford denied Plaintiff's claim on March 17, 2010, after reviewing the Death Certificate which stated the Decedent had committed suicide. In accordance with the VUL Policy's suicide provision, Hartford paid the Plaintiff an amount equal to the premiums that had been paid up to that date.

The principal contention advanced by Plaintiff, husband, against Rudolf, the agent, concerns the violations of Regulation 60. Specifically, Plaintiff alleges that Rudolf knew or should have known that the Policy was a "replacement policy" as defined under Regulation 60. The Plaintiff also alleges that Rudolf further violated Regulation 60 in that he "knowingly had the Decedent complete a false application for insurance, failed to provide the Decedent with the required disclosure statements and knowingly failed to provide either Hartford or Phoenix with all of the information" required under Regulation 60.

Defendant Rudolf is seeking partial summary judgment dismissing the second cause of action of Plaintiff's complaint because he alleges that the Hartford VUL Policy did not replace the Phoenix Policy. Furthermore, Rudolf contends that he was in full compliance with Regulation 60.

The motion is denied. Contrary to Rudolf's contention, there are material questions of fact as to whether Rudolf was in full and material compliance with Regulation 60 with respect to the underlying life insurance transaction including, but not limited to: whether Rudolf knew or should have known of Decedent's intentions with respect to the Phoenix Policy; whether, upon later assisting her in surrendering said policy, said acts complied with Regulation 60; and, whether under the facts and circumstances as eventually determined, the VUL can be considered a replacement policy of the Phoenix Policy.

The principal contention by the Plaintiff against Hartford is that his wife, the Decedent, had an existing life insurance policy in effect at the time she applied to Hartford; thus, the Policy should be considered a "replacement policy" under Regulation 60. Further, the Plaintiff alleges that since the Policy should be deemed a replacement policy, its date of issuance should relate back to the effective date of the Phoenix Policy and therefore, Hartford is estopped from invoking the Hartford Policy's two year suicide clause. Lastly, the Plaintiff contends that Hartford failed to properly inform and train its agents in accordance with Regulation 60.

Hartford denies the Plaintiff's contentions, and maintains the position that it was in full compliance with Regulation 60. Also, Hartford denies any negligence in training and/or supervising Rudolf, or that Hartford "had any legal duty to supervise or control the behavior of an independent agent."

The Court finds that, in the first instance, Hartford has come forward with a sufficient showing that, as matter of law, it is entitled to summary judgment in its favor.

The existence of the Phoenix Policy was never disclosed to Hartford either by the Decedent or Rudolf, the agent who filled out the application on Decedent's behalf, and neither the Decedent nor Rudolf amended the October 11, 2007 application to reflect that Decedent had recently surrendered her Phoenix Policy or that a replacement of that policy had or was likely to occur as a result of Hartford's issuance of the VUL (11 NYCRR 51.2[a]).

Because of the misrepresentations made by the Decedent and/or Rudolf concerning the non-existence of any other life insurance policy at the time of her application, Hartford reasonably determined that a replacement "had not and was not likely to occur" nor did it have any reason to belief otherwise.

Secondly, the Court is satisfied that Hartford reasonably concluded that the Regulation 60 requirement that each application be accompanied by a "Definition of Replacement" form was satisfied. The Decedent and Rudolf had completed and signed a Definition of Replacement form with the original application to which the Amendment was attached. Regulation 60 does not require that a new "Definition of Replacement" form be submitted with an amendment to a life insurance application and, under the circumstances as reasonably viewed *by Hartford*, it would not appear that such an obligation should be imputed by the Court.

The Court is also satisfied that no material questions of fact stand in the way of Hartford's position that there is no merit to or material facts as to whether Hartford failed to adequately train agents such as Rudolf regarding Regulation 60. Although Hartford does not provide direct or in-person training or instruction about Regulation 60 to such agents, it does provide broker dealers with information regarding Regulation 60 in the form of filed bulletins, which are then disseminated to their brokers and agents. Hartford publishes phone numbers and makes its personnel available for any questions about a particular situation that a broker or dealer may have, including cases involving Regulation 60. Hartford also provides instructions on how to complete the Regulation 60 paper work, and if any issues arise during that process, there is a Hartford Regulation 60 team accessible to the insurance agents to assist in resolving such problems. With respect to Rudolf, Rudolf testified during his deposition that he had previously communicated with the Hartford Regulation 60 team with questions, although not in regard to the case at hand. His deposition testimony demonstrates thorough familiarity with Regulation 60 such that, any failure on his part to have complied with same, cannot be attributed to Hartford.

The Court further rejects Plaintiff's contention that any liability assessed against Rudolf should be attributed to Hartford on a principal/agent theory. Plaintiff argues that Rudolf is an agent of Hartford because Rudolf's broker/dealer, Woodbury Financial, is a wholly owned subsidiary of Hartford.

The Court is not persuaded that the corporate/subsidiary relationship between Hartford and Woodbury creates an agency relationship between Hartford and Rudolf, such that Rudolf's actions or inactions should be assessed against Hartford. (See Travelers Ins. Co. v. Raulli & Sons, Inc., 21 AD3d 1299 [4th Dept 2005]; See N.Y. Ins. Law § 2101 (McKinney 2010) Indian Country v. Pennsylvania Lumbermens Mut. Ins. Co., 284 AD2d 712, 713 [3d Dept 2001]. Among other things, Rudolf did not exclusively sell Hartford insurance and in fact he had offered Decedent several other proposals for coverage from different carriers. Furthermore, a parent/subsidiary relationship, standing alone, isn not enough to impute Rudolf's actions to Hartford. (See Feszczyszyn v. Gen. Motors Corp., 248 AD2d 939 [4th Dept 1998]; Derso v. Volkswagen of Am., 159 AD2d 937 [4th Dept 1990]).

It is generally recognized that an insured is bound by the representations made in his or her application for insurance. "Whether or not [an insured] intended to provide inaccurate statements or misrepresentations at the time [the insured] filled out the application is irrelevant, as [the insured] is bound by those answers sworn to by signing the application." Curanovic v. New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 437 [3d Dept 2003]). As such, he or she is assumed to have reviewed the application for errors and omissions.

Here, there is no question that Decedent's application affirmatively states that Decedent did not have a life insurance policy in existence at the time she applied to Hartford, when this is not try. While this generally recognized rule may insulate Hartford from liability, the same cannot be conclusively said as to Rudolf. Regulation 60 is a consumer protection statute designed to "protect the interests of the public by establishing minimum standards of conduct to be observed in the replacement or proposed replacement of life insurance policies . . . " 11 NYCRR §51.1 (b). As such, it would be against public policy to hold the Decedent, and thus, Plaintiff to the "misrepresentations" made in the application where it may be found, after trial, that an insurance broker is equally if not more culpable for such misrepresentation or material ommissions.

In Tannenbaum v. Provident Mut. Life Ins. Co. of Philadelphia, 41 N.Y.2d 1087, 1089 (1977), the insured made material misrepresentations regarding his health. Nonetheless, since the agent violated insurance regulations pertaining to replacement policy procedures, the New York Court of Appeals held in favor of the insured and against the insurer. Upon doing so,

the Court stated:

> We recognize that the insured was not, or may not have been, completely faultless, . . . but what was done here was not only an individual wrong, it was also inconsistent with public policy. It has been noted that "[e]ven when the contracting parties are in pari delicto, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him" (3 Pomeroy's Equity Jurisprudence, § 941, pp 733-734 [5th ed]; see, also, Ford v Harrington, 16 NY 285, 291).

(Tannenbaum v. Provident Mut. Life Ins. Co. of Phila., 41 NY2d 1087, 1089 [1977]).

Upon review and consideration of all other arguments advanced in favor or opposition to the various motions and based upon the foregoing, it is hereby

ORDERED, that Hartford Life Insurance Company's motion for summary judgment dismissing the action in its entirety as against it is hereby granted; and, it is further

ORDERED, that the motions for summary judgment by Rudolf Associated, Inc. and David W. Rudolf and by Plaintiff are hereby denied.

All parties remaining in this action are directed to appear before the Court for a Status Conference on October 3, 2011 at 9:30 A.M.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
August 25, 2011

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

TO: Michael H. Bernstein, Esq.
Matthew P. Mazzola, Esq.
Sedgwick LLP
ATTORNEYS FOR DEFENDANT HARTFORD LIFE INSURANCE COMPANY
125 Broad Street - 39th Floor
New York, New York 10004

Edward H. Odesser, LLC
ATTORNEY FOR PLAINTIFF
81 Main Street - Suite 307
White Plains, New York 10601

Scott Tenenbaum, Esq.
Winget, Spadafora & Schwartzberg, LLP
ATTORNEYS FOR DEFENDANTS DAVID W. RUDOLF & RUDOLF ASSOCIATES, INC.
45 Broadway - 19th Floor
New York, New York 10006