[* 1]

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

PRESENT: York Justice

PART 2

Henriques, Devika

-v-

Metropolitan Life Ins.

INDEX NO. 109030/09

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Vacate Order

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/6/12

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

----------x

DEVIKA HENRIQUES,

Plaintiff,

Index No 109030/09

-against-

METROPOLITAN LIFE INS. CO. and JULIA FRAGA,

Defendants,

----------x

YORK, J.:

Defendants Metropolitan Life Ins. Co. ("MetLife") and Julia Fraga ("Fraga") brought an order to show cause (sequence No 3) to vacate an order of this court dated February 1, 2012 which denied defendants' motion for summary judgment (sequence No 2) for failure to appear at an oral hearing. The parties were heard on May 5, 2012, at which time the order of default was vacated, and the case was argued on its merits. The underlying motion for summary judgment is resolved as follows.

BACKGROUND

Ricardo Henriques ("Henriques"), a citizen of Guyana and permanent U.S. resident, applied for a life insurance policy in the amount of $500,000 with MeLife on July 5, 2007. Julia Fraga, an insurance agent for Metlife, assisted him with filling out an application. Pursuant to

MetLife underwriting guidelines, Henriques was ineligible for coverage with MetLife due to his frequent travel to Guyana. MetLife accepted a bid from Reinsurance Group of America ("RGA") to reinsure the applicant in the amount of $500,000 with a "standard" rating, and subsequently issued a life insurance policy to Henriques on August 23, 2007.

On September 10, 2008 Henriques applied to MetLife for a second life insurance policy, in the amount of $1,000,000. MetLife sought reinsurance for the same reasons, accepted a bid from SCOR Global Life's ("SCOR"), and issued the policy on October 1, 2008.

Ricardo Henriques died on November 24, 2008 of a gunshot wound while traveling in Guyana. Devika Henriques, Ricardo's widow, submitted a claim to MetLife for the proceeds of both policies on December 9, 2008. Both policies contain a provision that the policy can be contested in the first two years after the issuance. Since the death occurred within that period, MetLife undertook an investigation of the circumstances of the death and the policy's validity.

In the course of investigation, MetLife obtained Henriques' medical records from Dr. Shanti Harkisoon ("Dr. Harkisoon") and Dr. Godwin Njoku ("Dr. Njoku"). Dr. Harkisoon had seen Henriques on July 2, 2007 with followup examinations on July 25, 2007 and on March 19, 2008. Dr. Njoku examined Henriques on July 18, 2007 when he was substituting for Dr. Harkisoon. On July 2, 2007 Henriques complained to Dr. Harkisoon of chest pain. She ordered a number of tests of urine and blood. The test results showed an elevated Alanin Aminotransferase ("ALT") level which indicated liver inflammation. In her report written on July 2, 2007 Dr. Harkisoon checked a box indicating alcohol use and added the comment "Occasional drinking x case of beer, whole bottle" [sic]. Dr. Njoku's report of July 18 states "Patient has a history of Etoh [alcohol] abuse, quit drinking four weeks ago." The second blood test confirmed an elevated level of ALT. Dr. Harkisoon's follow-up report of July 25, 2007 added "chess pain resolved after

stopped drinking etoh." She noted that she counseled Henriques on cardiac risks, on alcohol use, need for diet modification and exercise. Henriques returned to Dr. Harkisoon on March 19, 2008 complaining of diarrhea and nausea, when the diagnosis was gastroenteritis and gastritis, conditions that worsen with alcohol consumption. Based on these records, MetLife concluded that Henriques consumed alcohol, had a history of alcohol abuse and was counseled by a physician regarding his alcohol abuse. It analyzed Henrique's answers to the application questions and determined that he failed to provide relevant information that would have affected issuance of the life insurance policy.

After MetLife had concluded its investigation, it sent a letter dated March 18, 2009 to Denvika Henriques rescinding the policies and offering to reimburse premiums received from the insured. It suggested that the matter could be taken up with the New York State Insurance Department. Such application followed. Answering an inquiry from the State Insurance Department, the MetLife representative referred to material representations on the part of Henriques and concluded that "If Mr. Henriques had disclosed the nature of these conditions and the treatment received for these conditions, his application would not have been approved as issued."

On June 15, 2009 plaintiff Devika Henriques started the current proceedings against MetLife and Julia Fraga. In the first and second causes of action plaintiff avers that defendants breached their contract of insurance and owe plaintiff $500,000 on the first policy plus additional $500,000 due to the accidental nature of the death, and 1,000,000 on the second policy plus interest, costs, disbursements and legal fees. The third cause of action is for the breach of a duty of good faith and fair dealing to plaintiff by both defendants, resulting in damages in amounts above

the face value of the two insurance policies. The fourth cause of action is for the violation of New York State General Business Law §349 with damages in excess of two million dollars.

Defendant MetLife counterclaimed for declaratory judgment rendering the insurance policies void *ab initio*. This motion for summary judgment is on the counterclaim for declaratory judgment, and to dismiss the complaint. Defendants specifically oppose claims against Fraga and a claim under General Business Law §349.

DISCUSSION

Claims against Defendant Fraga

This action arises out of two life insurance contracts between Ricardo Henriques and MetLife. Julia Frage served as a special insurance agent for MetLife in soliciting and arranging the life insurance policies. She herself is not a party to the contracts. As a general matter, agents acting for insurers within the course and scope of their agency are not personally liable on insurance contracts. All causes of action against her are thus dismissed.

Claims and Counterclaims Arising under the Insurance Policy

Defendant Metlife moves to dismiss the claims of Henriques' beneficiary under two life insurance policies on the ground that he made material misrepresentations about the state of his health in applying for these policies. The counterclaim for declaratory relief, making policies void *ab initio,* is on the same ground. Determining whether Henriques did make such misrepresentation will resolve the central controversy in this suit.

Representations on the insurance application

> A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.
>
> N.Y. Ins. Law § 3105(a)

MetLife considers it an established fact that Ricardo Henriques had a history of alcohol abuse, complained to doctors of health problems resulting from alcohol, and was counseled to limit alcohol consumption. It cites doctors' reports as evidence, and refers to parts of doctors' depositions to confirm what records show. The medical records point to an elevated level of ATL that may be indicative of alcohol abuse, contain scattered notes about patient's alcohol abuse, and mention risks of alcohol use, along with repeated advice to control weight and to exercise.

Plaintiff counters this evidence with affidavits from Ricardo Henriques' relatives – his widow, father and uncle – who all deny that he had a drinking problem. As self-interested as these affidavits of relatives may be, they are admissible evidence on this motion for summary judgment. She also adds other parts of doctors' depositions. Doctors Harkisoon and Njoku are the only two medical professionals who examined Henriques and who can interpret their own notes, and thus their depositions carry particular weight.

Dr. Harkisoon testified that the patient did not have chronic liver disease, and that elevated ALT results could be for various reasons, some of which – hepatitis, cancer, injury, viruses – she explicitly named. She further stated that notations about alcohol abuse were not based on physical examination and did not follow conclusively from the test. Analyzing other measurements from the tests, she did not find anything consistent with chronic alcohol abuse (Harkisoon Deposition 88:20-23). The notes say that Henriques' chest pain stopped when he stopped drinking alcohol.

This record was based on Henriques' own words. Questioned by the MetLife attorney, Dr. Harkisoon did not find any medical evidence to support this statement – the diagnosis of the inflammation of the chest wall, in her opinion, is typically the consequence of overexertion and not excessive drinking. Dr. Harkisoon never directed Henriques to seek alcoholic abuse counseling (*id* 88:24- 89:3). As to her own counseling about alcohol use, she said that she "counsels everybody when they drink about alcohol use and alcohol abuse," even if they don't have an alcohol problem.

> Q. Other than what he was saying to you, were there any clinical findings that lead you to believe or that there was conclusive evidence that there was alcohol abuse in this case?
>
> A. No

(Harkisoon Deposition, 193:23-194:4).

Dr. Njoku saw Henriques for a few minutes. Questioned four years later, he could not remember the patient. His records mention "alcohol abuse," as part of Henriques' social history , but he could not provide more details: in his terminology "alcohol abuse" could cover social drinking (Njoku Deposition 56:16-57:24). In his current practice he would have collected more information. Dr. Njoku did not see any abnormalities in the E.K.G., and reading his notes of a clinical examination, he did not find any signs indicating chronic alcohol use.

The only facts established conclusively by the medical records and depositions of doctors is that Henriques did consume alcohol, that he stopped drinking prior to his first visit to the doctor, and that his blood test results could, but need not necessarily be, related to drinking. The attorney for MetLife tried to elicit from both doctors a statement that alcohol abuse was the likely cause of Henriques' chest pain, while the attorney for plaintiff tried to elicit a statement that medical tests were inconsistent with heavy alcohol consumption. The doctors consistently declined to make either statement.

We now turn to the issue of Henriques' representation in applications for life insurance

policies. The application is part of the contract between Metlife and Henriques, as stated in the General Provisions of the insurance policy issued by MetLife. Courts employ the ordinary rules of construing contracts in determining whether the insured persons made misrepresentations within the definition of N.Y.Ins.Law § 3105 in applications. "Because insurance contracts are inevitably drafted by insurance companies, New York law construes insurance contracts in favor of the insured and resolves all ambiguities against the insurer." U.S. Fid. & Guar. Co. v Annunziata, 67 NY2d 229, 232; 501 N.Y.S.2d 790 [1986]; Miller v. Continental Ins. Co., 40 N.Y.2d 675, 678, 389 N.Y.S.2d 565 [1975]; Vella v Equit. Life Assur. Soc. of U.S., 887 F2d 388, 391-92 [2d Cir 1989]). This rule applies to questions in an insurance application. Whether a provision in a contract is ambiguous is a matter of law to be determined by the court. Greenfield v Philles Records, Inc., 98 NY2d 562, 569 750 N.Y.S.2d 565 [2002].

Question 4G on Part B of the 2007 application asks: "Has ANY person to be insured EVER received treatment from a physician or counselor regarding the use of alcohol, or the use of drugs, except for medicinal purposes; or received treatment or advice from an organization that assists those who have an alcohol or drug problem?" Henriques answered "No."

The question is not ambiguous and has only one meaning. It refers to treatment for alcohol dependency, and such treatment can be provided either by doctors or counselors, or specialized organizations such as Alcoholics Anonymous. From the context (treatment or advice) it is clear that the goal of such treatment is to get a person off alcohol or drugs. Henriques provided an honest answer, and there is no information in the record to suggest otherwise.

In a telephone interview which took place on August 7, 2007, prior to issuance of the 2007 policy, Henriques was asked the following questions:

Do you drink alcoholic beverages?

Have you ever been advised to limit your alcohol or sought counsel or medical attention because of your use of alcohol?

Have you ever been treated for the use of alcohol or drugs?

He answered "No" to all three questions.

Plaintiff claims that the first question related to the time of the interview, and that Henriques had stopped drinking sometime in mid-June of that year, according to medical records. As the question is formulated, it is not unreasonable for the applicant to understand it that sense. The third question is analogous to that on the written application, and the answer to it is not a misrepresentation. The second question is ambiguous: it does not specify whether advice concerns any limitation on alcohol consumption and what medical attention "because of your use of alcohol" consist of. Could Dr. Harkisoon's general counseling about the use of alcohol count as such advice? Was a visit to a doctor with a complaint of chest pain or food poisoning caused by the use of alcohol if Henriques himself believed that the condition worsened with alcohol consumption? It cannot be determined as a matter of law that Henriques' answer to this question was a misrepresentation – this issue is properly for a jury.

The question on the 2008 application reads: "Has the Proposed Insured ever sought, been advised to seek, or received counseling or treatment for the use of alcohol or drugs from a health professional or support group?" Another question asks: "Have you ever received treatment from a physician, practitioner, health facility or counselor regarding the use of alcohol... or been advised by a physician, practitioner, health facility or counselor to restrict the use of alcohol or drugs...?"

These questions are a variation on the question asked on the 2007 application. Both questions were answered in the negative, and the telephone interview with the same questions as in 2007 also elicited negative response. As far as treatment for the use of alcohol is concerned, the

negative answer reflects the real situation, while the answer about advice to restrict the use of alcohol cannot be found a misrepresentation as a matter of law.

Plaintiff has raised a triable issue of fact whether Henriques made any misrepresentations on his application for insurance policies.

Materiality of potential misrepresentations

> No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.
>
> N.Y. Ins. Law § 3105(b)(1)

While the materiality of a misrepresentation is ordinarily a jury question, it becomes a matter of law for the court's determination when the evidence concerning materiality is clear and substantially uncontradicted . Kiss Const. NY, Inc. v Rutgers Cas. Ins. Co., 61 AD3d 412, 413-14, 877 N.Y.S.2d 253 [1st Dept 2009] (internal citations omitted). In determining whether a misrepresentation is material to the risk, " [t]he question ... is not whether the company *might have issued* the policy even if the information had been furnished; the question in each case is whether the company had been induced to accept an application which *it might otherwise have refused.*' Aguillar v. U.S. Life Ins. Co., 162 A.D.2d 209, 210–211; 556 N.Y.S.2d 584 [1st Dept 1990] (emphasis in original). A court, in finding a material misrepresentation as a matter of law, generally relies upon two categories of evidence, an affidavit from the insurer's underwriter and the insurer's underwriting manual. Feldman v. Friedman, 241 A.D.2d 433, 434, 661 N.Y.S.2d 9 [1st Dept 1997]).

MetLife contends that it would not have issued the life insurance policy to Henriques had it known about what it calls his abuse of alcohol. Implied in this statement is that MetLife evaluated the risks of providing insurance to Henriques, and based on this evaluation made a decision to issue a standard policy. Evidence in the record, including the affidavit of the MetLife representative, Eileen Kosiner ("Kosiner"), established that MetLife declined to insure Henriques due to his frequent travels to Guayana. The reinsurance companies, using their own guidelines, agreed to reinsure the policy. Consequently, a contract of insurance was concluded between Henriques and MetLife. MetLife does not describe any decision process subsequent to the acceptance of an offer from reinsurance. It does not assert that it estimated risks other than travel related to the insured's lifestyle.

Plaintiff has submitted evidence that underwriters for MetLife allegedly responsible for making the final decision whether to insure Henriques, were not involved in further evaluation of his case once his file was submitted for reinsurance (Depositions of Janet Noren and Heather Barcia). This evidence is not controverted by defendant. In her affidavit Kosiner refers to her conversations with the reinsurance companies, in which unidentified representatives of those companies informed her that they would not have reinsured Henriques had they known about his alcohol consumption and doctor's advice to limit it. This reference to reinsurance companies strengthens plaintiff's case that the ultimate decision-makers in issuing insurance were these companies, and not MetLife. If this is the case, to prove that Henriques alleged misrepresentations were material for the decision to insure him, defendant would have to submit affidavits from representatives of reinsurers along with relevant guidelines.

Generally, a conclusory statement by an insurance company employee that the company would not have insured the applicant if it had known his or her true medical history is, in and of

itself, insufficient to establish that a misrepresentation was material. Documentation, such as the insurance company's underwriting manuals, rules or bulletins, which pertain to insuring similar risks, should be submitted. Wittner v IDS Ins. Co. of New York, 96 AD2d 1053; 466 N.Y.S.2d 480 [2d Dept 1983]. " Proof of defendant's underwriting practices with respect to applicants with similar histories is required." Alaz Sportswear v Pub. Serv. Mut. Ins. Co., 195 AD2d 357, 358; 600 N.Y.S.2d 63 [1st Dept 1993]. On this motion for summary judgment, the burden is on the movant to present its *prima facie* case with admissible evidence. MetLife's representative does not have first-have knowledge of the circumstances in which SCOR and RGA made their determination, and her affidavit contains only a hearsay information on this important issue.

Even assuming, for the sake of the argument, that MetLife made an independent determination on Henriques' health risks, the evidence it presented does not suggest that it would have made a different decision with additional information. MetLife's guidelines discuss risks arising out of alcohol abuse. They define alcohol abuse as "a pattern of heavy alcohol intake in a non-dependent person (no addiction) that may be associated with social, marital, occupational or legal dysfunction and harmful effects on health." The guidelines list patterns of alcohol consumption, and according to them, even a regular or social user of 2-3 drinks per day does not present insurance risk. MetLife never specified in which category it would have placed Henriques, if it had doctors' notes about his drinking patterns. Results of medical tests, such as ALT, were available to the insurer. In an e-mail to an investigator Kosiner asserts that the company would have subtracted 150 points from Henriques' evaluation on his first application, and 100 points on the second. This assessment is questioned by MetLife's own underwriters.(Noren Depositon 48:24-49:18; Barcia Deposition 70:13-71:1). In any case, there is no testimony that the reduction in points would have resulting in denial of a standard insurance policy. See Luisi v. American

General Life Ins. Co. of New York, 202 A.D.2d 303, 609 N.Y.S.2d 179 [1st Dep't 1994] (even though undisputed that the decedent insured was being treated for polycythemia (blood disorder) at the time he applied for the policy, the record does not establish which type of polycythemia was involved so as to determine whether his condition would have been disregarded, "rated for cause" or constituted the basis for rejection under defendant's medical underwriting manuals).

Whether the decision to issue a standard insurance coverage was taken by MetLife or reinsurers, Metlife failed to make out a *prima facie* case that the insured would have received a much less favorable policy or none at all had he answered questions on the application differently. MetLife is not entitled to grant of summary judgment on its counter-claim of declaratory relief, and to dismiss the claims of breach of contract.

Bad Faith

Plaintiff has pointed to several aspects of the handling of her application for life insurance proceeds. MetLife denied coverage submitting a garden-variety explanation for this decision both to Devika Henriques and the State Insurance Department. It did not disclose that it initially denied Henriques insurance application due to risks of his traveling to Guyana, and did not mention the role of reinsurance in issuing the policy. Plaintiff has sufficiently alleged that MetLife intentionally underplayed its knowledge of Henriques' health prior to issuing him life insurance policy, and later treated as an established fact that he abused alcohol while the evidence about it is at most inconclusive. All this raises issues of good faith in dealing with the insured and his beneficiary. At this stage the plaintiff's third cause of action for violation of good faith and fair dealing is preserved. If proven at trial, it could allow plaintiff to recover more than the face value due on the policies. Acquista v. New York Life Ins. Co., 285 A.D.2d, 81; 730 N.Y.S.2d 272 [1st Dep't 2001].

Claim under Business Law §349

Plaintiff bases her claim of deceptive trade practices, in violation of General Business Law §349, on the course of dealings with MetLife and its agent, Julia Fraga. The threshold aspect of the claim under §349 is that the alleged conduct is consumer-oriented. A transaction is consumer-oriented when "acts and practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank N.A., 85 N.Y.2d 20, 25; 623 N.Y.S.2d 529 (1995). To generalize beyond her particular circumstance, plaintiff concentrates on two issues. First, she claims that the questionnaire that MetLife uses for application purposes, in particular a question on alcohol consumption, is intentionally ambiguous. By not asking more precise questions, such as whether an applicant consumed alcohol in the last 30 days, or whether he drank in the past, MetLife interprets an honest answer as a misrepresentation. Second, MetLife provides reasons to deny payment of insurance proceeds which it knows are false. In plaintiff's view, the conduct is consumer-oriented, because "Defendants engage in procedures to avoid valid claims in the guise of "investigation of claims" made during the contestable period." This amounts to saying that MetLife, like any other insurance company, is interested in collecting insurance premiums and avoiding paying up, to the extent possible, when insurable events occur. This is not sufficient to state a claim of a deceptive practice affecting a larger community. To the extent there may have been deceptive behavior in relation to plaintiff, plaintiff may try to prove it on her third cause of action for bad faith.

CONCLUSION

For the foregoing reasons it is

ORDERED that part of defendants' motion for summary judgment to dismiss the first, second and third causes of action is denied; and it is further

ORDERED that part of defendants' motion to dismiss the fourth cause of action is granted; and it is further

ORDERED that defendant's counter-claim is denied; and it is further

ORDERED that the action is dismissed as against defendant Fraga.

FILED

JUN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/6/12

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.