

**United States Life Ins. Co. in the City of N.Y. v
Menche**

2013 NY Slip Op 30453(U)

February 28, 2013

Supreme Court, New York County

Docket Number: 101353/2010

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

The United States Life Insurance Company in the City of New York,

Plaintiff,

-v-

Solomon Menche, et al.,

Defendants.

INDEX NO. 101353/10

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL NO. _____

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

PAPERS NUMBERED
1-7
8/10
9

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 is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

FILED

MAR 07 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/29/13

[Signature]

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

-----X
The United States Life Insurance
Company in the City of New York,

Plaintiff,

Index
Number:

-against-

101353/2010

Solomon Menche, The Solomon
Menche Irrevocable Life
Insurance Trust, Rochelle Menche,
as trustee of the Solomon Menche
Irrevocable Life Insurance Trust,
Pinchas Menche, as trustee of
the Solomon Menche Irrevocable
Life Insurance Trust, David
Mendelovitz, and Centurion
Agency, Ltd.

Defendants.

-----X
Donna M. Mills, J.:

FILED

MAR 07 2013

NEW YORK
COUNTY CLERK'S OFFICE

Defendants move, pursuant to CPLR 3212, for summary
judgement, dismissing plaintiff's complaint and plaintiff cross-
moves, pursuant to CPLR 3212, for summary judgment. The action
against Centurion Agency, Ltd. was discontinued by stipulation
dated April 26, 2010.

Parties' Allegations

Plaintiff is an insurance company that issued a life
insurance policy, number WHE0051280, in the amount of \$5 million
(the First Policy) to the Solomon Menche Irrevocable Life
Insurance Trust (the Trust) and a life insurance policy in the
amount of \$5 million, number WH00194460, (the Second Policy,

together, the Policies) to the Trust (complaint, ¶¶ 1, 6, 8; admitted in answer, ¶¶ 1, 6, 8). The Policies insure the life of Solomon Menche (Menche) (complaint, ¶¶ 1, 7; admitted in answer, ¶¶ 1, 7).

Rochelle Menche (Rochelle) is Menche's wife and a trustee of the Trust and Pinchas Menche is a trustee of the Trust (complaint, ¶¶ 9, 10; admitted in answer, ¶¶ 9, 10). David Mendelovitz presented the application (the Application) for the Policies to plaintiff (complaint, ¶ 11; admitted in answer, ¶ 11).

The Application was completed by Menche on January 22, 2008 and contained a question on his health relating to any prior heart disease, high blood pressure or other heart disorders and Menche answered negatively (complaint, ¶¶ 13, 22, 24-25; admitted in answer, ¶¶ 13, 22, 24-25). The Application contained a question relating to whether Menche had a lung condition such as asthma, bronchitis, sleep apnea or any other breathing disorder and Menche answered negatively (complaint, ¶¶ 26-27; admitted in answer, ¶¶ 26-27). The Application also contained a question relating to any seizures, brain disorder or other mental or nervous disorder by Menche and he answered negatively (complaint, ¶¶ 28-29; admitted in answer, ¶¶ 28-29).

The Application contained a question as to any medication, treatment or therapy and Menche identified lipitor as his answer

(complaint, ¶¶ 30-31; admitted in answer, ¶¶ 30-31). The Application further contained a question seeking information as to any other illnesses or tests and Menche identified an annual checkup, a stress test and a colonoscopy (complaint, ¶¶ 32-33; admitted in answer, ¶¶ 32-33). The Application contained a clause stating that the answers provided were "[t]rue and complete to the best of [his] knowledge" and Menche signed the Application (complaint, ¶ 37; admitted in answer, ¶ 37).

On February 2, 2008, plaintiff issued a policy in the amount of \$10 million and shortly thereafter, on March 7, 2008, reissued two separate policies, the First and Second Policies, in the amount of \$5 million each (complaint, ¶¶ 39, 42-43; admitted in answer, ¶¶ 39, 42-43).

Plaintiff alleges that the answers to the questions on Menche's physical and mental condition were false, that Menche had undergone heart tests and that he suffered from panic attacks, that he had a current prescription for klonopin and that he was diagnosed with sleep apnea (complaint, ¶¶ 46-52). It asserts that, had it known of Menche's true condition, it would not have issued the Policies and it seeks declaratory relief that the Policies be cancelled and rescinded and damages based upon fraud against Menche, the Trust, Rochelle and Pinchas and damages against Mendelovitz based upon breach of contract, breach of fiduciary duty and negligence.

Menche contends that he paid the premiums for the Policies in the amount of \$20,900 for each Policy for the first year in February or March 2008 and that, on March 3, 2009, he paid the premiums for the Policies in the amount of \$20,900 for each Policy for the second year (Menche affidavit, ¶ 3). He states that, on or about February 20, 2010, he received the bills for the premiums for the Policies in the amount of \$20,900 for each Policy and that on February 25, 2010, he paid both premiums (*id.*).

Menche states that, as of August 13, 2009, plaintiff was aware, as a result of its investigation, that Menche had a sleep apnea condition, that he had been referred to a cardiologist for arrhythmia and that a prescription for klonopin had been issued to him (*id.*, ¶ 4). He contends that plaintiff's acceptance and retention of the premiums until June 3, 2010 warrant dismissal of the complaint, asserting that plaintiff waived its right to rescind the Policies.

Plaintiff commenced this action on February 1, 2010 by filing a summons and complaint. It contends that in August 2009, it received Menche's medical records, which indicated heart issues, panic attacks, the prescription for klonopin and the sleep apnea condition (Cicchi affidavit, ¶¶ 10-13). It states that it relied upon Menche's statements in issuing the Policies and that if it knew "the true facts" as to Menche's condition, it

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would not have issued the Policies (*id.*, ¶ 14). It further states that premium payments are sent to a lockbox, administered by Citibank, which automatically deposits the funds into plaintiff's account and that plaintiff does not have access to checks sent to the lockbox (Sutton affidavit, ¶¶ 2-3). It seeks summary judgment.

The court notes that Menche has not opposed dismissal of his counter claim under General Business Law § 349 and, since such a claim must be addressed to harm to consumers generally and this dispute solely involves private parties, Menche's counter claim under General Business Law § 349 is dismissed (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]).

Similarly, the court notes that Menche seeks dismissal of plaintiff's complaint based upon plaintiff's acceptance and retention of the third-year premiums and that this constitutes a waiver of plaintiff's right to rescind the Policies. This argument is addressed solely to the portion of plaintiff's complaint that seeks rescission and not to plaintiff's claim for damages based upon fraud and misrepresentation or plaintiff's claims against Mendelovitz. Therefore, the portion of Menche's motion that seeks dismissal of plaintiff's complaint, except for the rescission claim, is denied.

Summary Judgment

A party seeking summary judgment must make a prima facie

case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Fraud

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]).

Waiver

"[W]aiver requires no more than the voluntary and intentional abandonment of a known right which, but for the

waiver, would have been enforceable" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). However, a waiver "should not be lightly presumed ... [but rather demonstrated by] a clear manifestation of intent by defendant to relinquish the protection of the contractual [provision]" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

Acceptance of Premiums By an Insurer

There is a special type of waiver applicable to the circumstance where an insurer accepts and retains premiums. "[W]here an insurer accepts premiums after learning of an event allowing for cancellation of the policy, the insurer has waived the right to cancel or rescind [the policy]" (*Security Mut. Life Ins. Co. of N.Y. v Rodriguez*, 65 AD3d 1, 7 [1st Dept 2009], quoting *Continental Ins. Co. v Helmsley Enters.*, 211 AD2d 589, 589 [1st Dept 1995]). Acceptance of premiums for three months after commencement of an action to rescind the policy has also been held to constitute a waiver of the insurer's right to rescind the policy (*United States Life Ins. Co. in the City of N.Y. v Grunhut*, 83 AD3d 528, 529 [1st Dept 2011]).

The court should look at the insurer's conduct "after obtaining sufficient knowledge of alleged misrepresentations by an insured [;and] ... an insurer that accepts premiums after

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learning of facts that it believes entitles it to rescind the policy has waived the right to rescind" (*United States Life Ins. Co. in the City of N.Y. v Blumenfeld*, 92 AD3d 487, 488-489 [1st Dept 2012]).

Discussion

Initially, the court notes that on plaintiff's cross motion, plaintiff has failed to proffer any evidence as to conduct by any party except Menche and Mendelovitz. It has failed to present any evidence that Mendelovitz was aware of the purported inaccuracies in the Application. It has also failed to present any evidence as to Menche's intent and this is a necessary element of its fraud claim against Menche (*Eurycleia*, 12 NY3d at 559). Therefore, the portion of plaintiff's motion that seeks summary judgment against defendants, except for the General Business Law § 349 counterclaim, is denied.

As to plaintiff's claim for rescission of the Policies, the evidence presented is that on August 13, 2009, plaintiff was aware of facts, learned through examination of Menche's medical records that lead it to believe that Menche had misrepresented facts in the Application relating to his physical and mental condition (Cicchi affidavit, ¶ 10), that it commenced this action more than 5 months later on February 1, 2010, that plaintiff received the premiums for the Policies on or about February 25, 2010 and that it issued checks representing a return of the

premiums and sent them to Menche on or about June 3, 2010 (Kahn affirmation, Exhibit C). The court notes that plaintiff did not identify any conduct that it took between August 13, 2009 and February 1, 2010. Neither has it presented any evidence of when it learned of the payment of premiums for the Policies nor what actions it took before it sought to return the premiums on June 3, 2010 (Sutton affidavit; Kahn affirmation, Exhibit C).

While a short delay in retaining the premiums might be considered inadvertence and thus excusable (*Security Mut.*, 65 AD3d at 7), an unexplained delay of three months has been held to constitute waiver of an insurer's right to rescind a policy (*Grunhut*, 83 AD3d at 529). Moreover, in this case, plaintiff also failed "to rescind [the Policies] promptly after obtaining sufficient knowledge of alleged misrepresentations by [Menche, the insured and this] constitutes ratification of the [Policies]" (*Blumenfeld*, 92 AD3d at 488). Commencement of this action more than five months after plaintiff learned of Menche's alleged misrepresentations cannot be considered prompt action. Accordingly, the portion of Menche's motion that seeks summary judgment dismissing plaintiff's claim for rescission of the Policies is granted.

Order

It is, therefore,


ORDERED that defendants' motion for summary judgment is

granted to the extent of dismissing the portion of plaintiff's complaint that seeks to rescind policies WHE0051280 and WH00194460 and is otherwise denied; and it is further

ORDERED that plaintiff's cross motion that seeks summary judgment is granted to the extent of dismissing the counterclaim under General Business Law § 349 and is otherwise denied.

Dated: *Feb. 28*, 2013

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

MAR 07 2013

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