

Kerrigan v Metropolitan Life Ins. Co.

2013 NY Slip Op 33591(U)

May 13, 2013

Supreme Court, New York County

Docket Number: 111775/03

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

*ELIZABETH FRANCES KERRIGAN, Individually and as
Executrix of the Last Will and Testament of THOMAS
W. CONNELLY, Deceased,*

Index No. 111775/03

Plaintiff,

MOTION DATE _____

-against-

MOTION SEQ. No. 002, 003

**METROPOLITAN LIFE INSURANCE COMPANY
and METLIFE, INC.,**

Defendant.

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-3

Answering Affidavits- Exhibits _____ 4-6

Replying Affidavits _____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/13/13

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

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

-----X

ELIZABETH FRANCES KERRIGAN, Individually and as
Executrix of the Last Will and Testament of THOMAS W.
CONNELLY, Deceased,

Plaintiff,

Index No.

-against-

111775/03

METROPOLITAN LIFE INSURANCE COMPANY and
METLIFE, INC.,

Defendants.

-----X

DONNA MILLS, J. :

For convenience, the following motions shall be consolidated.

In Motion Sequence No. 002, plaintiff moves for leave to amend the complaint and for summary judgment. Defendants cross-move for summary judgment dismissing the complaint. In Motion Sequence No. 003, defendants also move for summary judgment dismissing the complaint. Plaintiff cross-moves for: a protective order; for an order compelling disclosure; for an order precluding plaintiff's deposition; and for sanctions.

Plaintiff is the widow of Thomas W. Connelly (Connelly) and the main beneficiary of his life insurance policy. Defendants are his insurers. Plaintiff brings this action in order to recover a \$1,000,000 policy issued by defendants on Connelly. Connelly died in a construction accident on July 2, 2002. His policy went into effect on June 29, 2001. In a letter dated October 25, 2002, defendants notified plaintiff that coverage was denied on the ground that, in Connelly's policy application, he failed to disclose a hospital admission at Broward General Hospital in January 2001. Since Connelly died within the two-year contestability period, and since defendants claimed he made a material misrepresentation on his application, the policy was

declared void.

Plaintiff does not deny that Connelly failed to disclose the hospital admission to defendants. However, she argues that the material misrepresentation rule is not applicable here, because defendants were put on notice of a misrepresentation, and yet issued a policy to Connelly, as well as accepted his premiums. Under the principle of waiver and/or estoppel, defendants are purportedly obliged to enforce the policy and pay plaintiff.

Plaintiff contends that at the time of applying for the policy, Connelly underwent a medical examination under defendants' supervision. He was administered an EKG and blood and urine tests were taken. According to plaintiff, the results allegedly indicated that he suffered two prior heart attacks, was overweight and had diabetes, proteinuria (a sign of kidney disease) and high triglycerides. Plaintiff states that he had previously sought life insurance from three other insurers, which rejected his applications. In this case, rather than reject his application, defendants issued a policy to him. Because they considered Connelly a somewhat high health risk, defendants gave him a less favorable premium rate. Connelly dutifully paid the premiums until his fatal accident. Plaintiff states that the second heart attack was the reason for his admission to Broward General Hospital.

Plaintiff seeks leave to amend the complaint to add two bad faith claims, one grounded in fraud, the other grounded in gross negligence. She also seeks summary judgment on the existing claims, which consist of breach of contract and breach of the duty of good faith and fair dealing. She also seeks dismissal of defendants' counterclaim for rescission of the policy.

In opposition, defendants stand by their position of denying coverage on the ground of material misrepresentation. They deny any knowledge of this misrepresentation until the claim

was sought. They also deny acting in bad faith when they denied coverage to plaintiff and questioned her honesty. In addition, they cross-move for summary judgment dismissing the complaint, arguing that plaintiff has no viable claim against them.

SUMMARY JUDGMENT

In addition to the cross motion, defendants also move by separate motion for summary judgment, in effect for the same relief sought in the cross motion. They seek dismissal of the complaint and an order granting rescission. The court shall consider the motion and cross motion for summary judgment together.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “[W] here there is any doubt as to the existence of a triable issue of fact,” summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Pursuant to section 3203 (a) (3) of the Insurance Law, there is a two-year contestability period during which an insurance company may deny coverage based on a material misrepresentation made by an insured in the application. The material nature of the misrepresentation must be such that, had the insurer known the truth, it would not have issued

the policy. See *Mutual Benefit Life Ins. Co. v Schwartz*, 170 AD2d 359, 360 (1st Dept 1991).

Plaintiff cites case law which provides an exception to this rule, where the insurer acquires knowledge of the insured's misrepresentation, but fails to take appropriate measures after a reasonable time. In *United States Ins. Co. in the City of N. Y. v Blumenfeld*, (92 AD3d 487 [1st Dept 2012]), a life insurance company issued a policy on April 25, 2006, and, almost one year later, became aware of a fraud investigation that the insured had misrepresented her financial status. On April 22, 2008, the insurer sent a letter to the insured stating its intention to rescind the policy. Two days later, the insurer filed a declaratory judgment action against the insured. The First Department held that the insurer waived its right to rescind because, while a year earlier it had learned of the misrepresentation, it continued to accept the insured's premiums for almost a year. Thus, the failure to promptly rescind the policy after obtaining sufficient knowledge of the misrepresentation amounted to a ratification of the policy.

Plaintiff argues that the facts in this case would result in ratification of the policy and a waiver of defendants' right to rescind. At the time Connelly applied for the policy, his physical examination revealed significant health factors of which defendants were allegedly aware. According to plaintiff, he was known at that time to have had two previous heart attacks as well as specific illnesses. An affirmation from Dr. Theodore Tyberg, submitted by plaintiff, states that, upon examining Connelly's results from his EKG, taken during his examination, as well as the results of the urine and blood tests, he claims that said results put defendants on notice of all of the particular problems regarding Connelly's health.

Plaintiff contends that defendants, aware of her husband's condition during his application period, chose not to deny him a policy, but instead issued one, although demanding

higher premium payments. Though she admits that Connelly failed to disclose to defendants the fact of his admission to a hospital several years earlier upon suffering a heart attack, plaintiff asserts that this is irrelevant in light of defendants' previous awareness of his abnormal condition.

Plaintiff argues that defendants' conduct is a prime example of "postclaim underwriting." This purportedly occurs when an insurer waits until a claim has been filed to obtain information and make underwriting decisions which should have been made when the application for insurance was made, not after the policy was issued. Plaintiff contends that to do this would be financially advantageous, without regard to policy obligations.

Plaintiff argues that defendants' grounds for denial should be strictly limited to that contained in the October 25, 2002 denial letter, which made reference only generally to the January 2000 Broward General Hospital admission. Since a disclaimer of coverage must be made with a high degree of specificity, plaintiff claims that this letter is allegedly too general to actually void the policy. Plaintiff claims that the grounds for denial cannot be expanded to include additional information beyond that contained in the letter.

Defendants oppose plaintiff's motion for summary judgment and seek judgment dismissing the complaint. They argue that Connelly had not merely failed to disclose his admission to Broward General Hospital. They claim that at the time of his application, he represented to them on his application form that he had not been sick or seen any doctors recently; had not undergone observation or treatment at a hospital within the past five years and had not had a surgical operation; and had not been treated for coronary disease, heart disorder, high blood pressure or chest pain within the past 10 years. Defendants also state that he failed to

list his medications.

Defendants refute the waiver argument raised by plaintiff, arguing that they did not learn of Connelly's misrepresentation until the post-claim two-year contestability review. Based on that review, they rescinded the policy and attempted to return the premiums paid by Connelly, with interest. Moreover, they contend that knowledge acquired by others, such as Dr. Tyberg, cannot be imputed to them. They state that their underwriter wrote the subject policy based on information in his file, and was not aware of Connelly's history of cardiac disease. Thus, the underwriter only rated the policy for abnormal EKG results and elevated hemoglobin, without full knowledge of Connelly's concealed cardiac history.

Defendants also seek dismissal on the ground of unclean hands. They argue that plaintiff made misrepresentations during the post-claim interview.

Defendants seek dismissal on the ground that they had no knowledge of the details of the deceased's cardiac condition, and had no reason to know same. They contend that it was only after a claim on his insurance was forwarded that they discovered the truth. They insist that their letter of denial was valid, and that rescission of the policy had been properly made.

Plaintiff's main argument against disclaimer based on material misrepresentation is that during Connelly's examination, there was sufficient proof of his physical deficiencies for defendants to make further inquiries prior to issuing his policy. For example, according to Dr. Tyberg, the EKG would have provided proof of his prior heart attacks. Yet, it is settled that a failure to make further inquiry is not the equivalent of knowledge or a way of counteracting an insured's misrepresentation. "The test is not one of what prudent inquiry would have revealed. The question is whether the information given, although partial, was sufficiently indicative of

something more to be tantamount to notice of the unrevealed.”” *Kroski v Long Is. Sav. Bank FSB*, 261 AD2d 136, 137 (1st Dept 1999), quoting *Cherkes v Postal Life Ins. Co.*, 285 App Div 514, 516 (1st Dept 1955), *affd* 309 NY 964 (1956). “Under New York law, an insurer is not required to verify medical records that the insured has represented were negative as to health conditions inquired about.” *Kroski*, 261 AD2d at 137.

The evidence provided by the parties clearly shows that Connelly made misrepresentations on the application form with respect to his heart condition. There was no obligation on defendants’ part to make further inquiries as to whether he was actually telling the truth at the time. As for the letter, defendants had a right to disclaim coverage based on his failure to disclose his admission to the hospital, although they failed to specify the reason for his admission. Plaintiff admittedly knew the reason for his admission at the time.

Regarding the EKG results, the findings of Dr. Tyberg are those of an expert interpreting the medical information. However, these findings do not raise a material issue of fact as to whether defendants acted reasonably in not making further inquiries or issuing the policy. The fact that they demanded higher than regular monthly premiums indicates reasonable conduct based on a review of Connelly’s medical history, intentionally limited as it was.

The court shall grant defendants’ motion for summary judgment dismissing the complaint. Plaintiff’s own summary judgment shall be denied. Her motion for leave to amend the complaint shall be denied as the proposed claims are lacking in merit. Her motion for disclosure and sanctions shall be denied as moot.

Accordingly, it is

ORDERED that plaintiff’s motion for leave to amend the complaint is denied; and it is

further

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for a protective order, for an order compelling disclosure, for an order precluding plaintiff's disposition, and for sanctions is denied; and it is

further


ORDERED that defendants' motion for summary judgment and cross motion for summary judgment are granted, and the complaint is dismissed with costs and disbursements to

defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further .

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 5 / 13 / 13

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.