SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

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THE UNITED STATES LIFE INSURANCE COMPANY
IN THE CITY OF NEW YORK

Plaintiff,

Index No. 652009/11

-against-

SERGE FREUND.

Defendant.

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Peter H. Moulton, J.S.C.:

Plaintiff moves for summary judgment for the return of commissions (the "Commissions") earned by defendant (hereafter the "producer"[1] or "defendant") in connection with two life insurance policies taken out by Abraham Schon, insuring the life of Celia Schon. Originally, plaintiff sought $491,978.00, but that amount was reduced by ongoing offsets from other monies owed to defendant.[2] Plaintiff seeks the return of the Commissions under Section 2 (e) of the Producer's Contract dated June 5, 2005, signed by plaintiff's General Agent Barbara Crowley and defendant (the

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[1]The Department of Financial Services defines a producer as any person required to be licensed to sell, solicit or negotiate insurance. A producer can be an agent, broker, consultant, reinsurance intermediary or excess lines broker; the license indicates the category. Defendant holds a New Jersey license.

[2]According to the affidavit of Jalen Lohman dated October 7, 2013, the amount was $134,267.73.

"Producer's Contract"). The return is sought on the basis that premiums were refunded to Abraham Schon in connection with the settlement of a lawsuit brought by plaintiff against Schon for alleged material misrepresentations on the life insurance applications. The parties agree that the crux of this dispute is the interpretation of Section 2 (e).

Arguments

Plaintiff's moving papers maintain that the "clear" language of Section 2 (e), and the uncontested fact that plaintiff returned the premiums in the Schon transaction, requires that the court grant its motion.

Defendant opposes the motion on the basis that plaintiff is not entitled to repayment of the Commissions because they were not paid to him, but rather, were paid to Prosperity Asset Management Company, Inc. ("Prosperity") as reflected by a corrected 1099-Misc tax form issued by plaintiff.[3] On or about July 5, 2005 defendant assigned his entitlement to all his commissions on all US Life policies to Prosperity.[4] Because Prosperity (and not defendant)

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[3]The 1099-Misc was first issued by plaintiff to defendant but a corrected 1099-Misc was subsequently issued to Prosperity. The Commissions were paid to Prosperity between June 30, 2005 and November 10, 2006.

[4]The Assignment between defendant and Prosperity, dated July 5, 2005 (the "Assignment"), states in relevant part:

> In consideration of one dollar the receipt of which is hereby acknowledged Serge Freund (thereinafter called

was paid the Commissions as a result of the Assignment, defendant contends that the Commissions were not "received" under Section 2 (e), and therefore, defendant is not obligated to repay them. Defendant cites the Oxford Dictionary which defines "receive" as to "be given, presented with, or paid"; and here defendant was not "given" any money. If the court does not find that the term "received" unambiguously refers to commissions only received by defendant, then an issue of fact is raised as to the meaning of the term. Further, the Producer's Contract's provisions regarding assignments "both contradict each other" and the "ambiguity raises both an issue of fact and is to be interpreted against the drafter US Life."[5] Additionally, defendant asserts that plaintiff's "course of conduct" in paying Prosperity the Commissions and issuing the 1099-Misc to that company, "modified the agreement with

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> Assignor), hereby assign(s), transfer(s), release(s) and set(s) unto Prosperity Asset Mgmt Inc (hereinafter called Assignee) . . . all of Assignor's right, title, interest, claim and demand, in and to Prosperity Asset Mgmt Inc commissions which may now be payable or may hereafter become due and payable under the terms of the agreement.

The Assignment also includes a box which is checked certifying that the assignment is made "Because Assignee will service the policies herein described." It also contains the statement that it is "subject to . . . the Company's and General Agent's right of offset as provided in the agreement between the Assignor and the General Agent."

[5]Defendant asserts that the ambiguity is whether an assignment is permitted in the first instance and urges the court to apply the doctrine of "contra Proferentum."

Freund."

In response to these arguments, plaintiff stresses that the Section 2 (e) does not state that the commissions must be received by defendant himself. The provision only states that commissions must be "received" - - meaning that if any person or entity "received" commissions pursuant to the Producer's Contract, defendant would nevertheless be obligated to repay them under Section 2 (e). Plaintiff contrasts the language under Section 2 (e) with another provision in the Producer's Contract on premiums which refers to premiums "received **by the Producer**" (emphasis added). Plaintiff further asserts that defendant "effectively received the commissions at issue, notwithstanding the assignment, because he had the power to dispose of them, and he exercised that power by directing their payment to Prosperity rather than himself." Defendant also received the Commissions "since he also controlled the assignee, Prosperity." Moreover, the Assignment was only limited to the assignment of Commissions earned by defendant and "did not include the delegation of Freud's duties and obligations under the contract." Therefore, because the duties and obligations of the Producer's Contract included the obligation to repay the Commissions, and that obligation was not assigned, that obligation remained with defendant who is "personally responsible to repay all commissions." Plaintiff asserts that there is also no ambiguity or conflict regarding the assignment provisions because

they pertain to separate and distinct contracts.

Discussion

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Kesselman v Lever House Rest.*, 29 AD3d 302, 303 (1st Dept 2006), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *Id.*

A contract is considered clear if, on its face, it is reasonably susceptible to only one meaning. *See White v Continental Cas. Co.*, 9 NY3d 264 [2007]; *Greenfield v Philles Records*, 98 NY2d 562 [2002]). A contract is ambiguous where on its face, it is reasonably susceptible of more than one interpretation. *See Chimart Assoc. v Paul*, 66 NY2d 570 [1986]). The initial determination on whether a writing is ambiguous is within the exclusive province of the court. *See Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25[2008]); *see also Hirsch v Food Resources, Inc.*, 24 AD3d 293 (1st Dept 2005).

A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be interpreted as to give effect to its general purpose

(*Williams Press v State of New York*, 37 NY2d 434, 440 [1975]), and the language will be interpreted according to its plain meaning. *See Cellular Tel. Co. v 210 E. 86th St. Corp.*, 44 AD3d 77 (1st Dept 2007); *New York Prop. Holding Corp. v Rosa*, 26 AD3d 186 (1st Dept 2006). Courts should avoid any interpretation which would contract terms meaningless. *See Two Guys From Harrison-N.Y. Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396,403 (1984).

Section 2 (e) provides in relevant part:

> If the Company shall, either during the continuance of the Contract or after its termination, return the premium on any policy for any reason, the Producer agrees to repay all commissions **received** on premiums so returned to the General Agent or the Company upon demand.

(emphasis added).

The word "received" is not defined, but means exactly what defendant asserts, i.e., "given, presented with, or paid." The issue however is not with the definition of the word "received" but rather with who must have "received" the Commissions in order to trigger the repayment obligation. The fact that the word "received" is not thereafter modified by the words "by the Producer" is instructive when compared to Section 3 (f), which uses the terms "received by the Producer." Section 3 (f) provides in relevant part:

> All premiums **received by the Producer** for the Company shall be immediately paid over to the General Agent.

(emphasis added).

The court must conclude that the omission of the words "by the Producer" was intentional if used in one part of the Producer's Contract but not in another, and, that the parties did not intend to limit the repayment obligation in the manner suggested by defendant. Defendant's reading would impose a limitation on Section 2 (e) in the event that commissions are assigned - - which is exactly what defendant argues here.[6] Nothing in the Producer's Contract suggests that the parties intended to limit plaintiff's right to the return of commissions received on premiums. Section 2 (e) expresses no such limitation and in fact supports an expansive reading by providing for the return of a premium on "any policy" and "for any reason." Presumably, that is why the Assignment and Release of Assignment, which defendant signed two years later on behalf of Prosperity (the "Release of Assignment"), caution that they are "subject to . . . the Company's and General Agent's right of offset as provided in the agreement between the Assignor and the General Agent."[7] While the provision should have, and could have, been crafted in a manner which would express the intent more plainly, that does not translate into an ambiguity.

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[6]The court notes that plaintiff's remedy cannot be to sue Prosperity for the repayment of Commissions because Section 2 (e) does not bind Prosperity as a non-party to the Producer's Contract.

[7]Section 2 (d) of the Producer's Contract provides that "Any monies due the Producer hereunder shall be subject to reduction or offset for any indebtedness of the Producer to the General Agent or the Company."

Further, even assuming that an appellate court would find differently (i.e., that an ambiguity exists), defendant controlled Prosperity and therefore, effectively "received" the money. The court cannot turn a blind eye to the realities of what transpired, merely because Prosperity is a corporation with a separate legal identity. Defendant signed the Assignment for himself (as an individual). The Prosperity signature line reads "SAME AS ABOVE." Additionally, defendant signed the Release of Assignment on behalf of Prosperity. He has also not disputed that he controls Prosperity, nor does he dispute that has the power to manipulate that entity in any way he chooses.

The fact that plaintiff paid the Commissions to Prosperity and issued a revised 1099-Misc does not, as defendant asserts, "modif[y] the agreement with Freund." It appears that defendant's argument is that these facts or "course of conduct" results in a waiver of the repayment provision. Waiver may not be inferred "to frustrate the reasonable expectations of the parties ... when they have expressly agreed otherwise." *Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 (1984). A "waiver is an intentional relinquishment of a known right and should not be lightly presumed" and "is not to be inferred from a doubtful or equivocal act." *EchoStar Satellite, L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 (1st Dept 2010) (internal quotation marks and citation omitted). Waiver is not created by "[n]egligence,

oversight or thoughtlessness" *Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 (1917). The court cannot find such a waiver, based on plaintiff's recognition and approval of the Assignment, which was requested by defendant, for his own benefit.

It is unnecessary to address plaintiff's remaining argument regarding the scope of Assignment (which is written on plaintiff's own form) and its purported omission of language delegating defendant's "duties and obligations under the contract."[8]

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted on liability; and it is further

ORDERED that the issue of damages is held in abeyance; and it is further

ORDERED that because the amount due to plaintiff (originally $491,978.00), has been reduced to a lesser amount by ongoing offsets, the parties shall attempt to agree on the amount outstanding, if any, without prejudice to defendant's position that no amount is due in this lawsuit and without prejudice to defendant's right to appeal this decision; and it is further

ORDERED that if the parties cannot agree, the parties shall

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[8]Defendant's argument, that there is an ambiguity in whether an assignment is permitted in the first instance is a smoke screen. The argument is made so that the document would be construed against the drafter. However, whether a producer is entitled to make an assignment is not an issue here, and in any event, the provisions are not in conflict because they relate to different contracts.

submit further proof on this issue.

This Constitutes the Decision and Order of the Court.

Dated: January 13, 2015

ENTER:

J.S.C.

HON. PETER H. MOULTON