

<b>Metropolitan Life Ins. Co. v Levitanskaya</b>
2015 NY Slip Op 31231(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 160118/13
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiffs,

Index No. 160118/13

-against-

**DECISION/ORDER**

OLGA LEVITANSKAYA,

Defendant.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Metropolitan Life Insurance Company (“MetLife”) commenced the instant action against defendant Olga Levitanskaya seeking a declaratory judgment that an insurance policy issued to defendant is null and void *ab initio*. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its complaint. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. In or around February 2011, defendant applied to MetLife for a disability income insurance policy by answering questions contained in a MetLife application form (the “Application”). The Application included detailed questions regarding defendant’s past medical history, including, *inter alia*, information about doctors from whom she received treatment and any treatment she received for different illnesses, diseases and symptoms

in the past five years. Specifically, Question 4(a) and (b) of Part B of the Application asked defendant to provide the name and contact information of her personal/primary care physician as well as the date and reason for her last consultation. In response, defendant provided the information for Dr. Oksana Levitansky and stated that the last consultation she had with Dr. Levitansky was in January 2010 for the treatment of the “common cold.” Further, Question 5 of Part B of the Application asked, *inter alia*, “[h]ave you EVER received treatment, attention, or advice for; or been diagnosed as having...any disease, disorder or deformity of the bones...including the spine; any neck or back problems...any disease or disorder of the liver...colitis...fatigue...dizziness...migraine headaches....?” Defendant answered “No” to each of these questions. On or about February 4, 2011, defendant signed the Application.

On or about February 22, 2011, MetLife conducted an interview with the defendant based on the Application. During the interview, defendant confirmed that her last visit with Dr. Levitansky was in 2010 for the common cold. She also answered “no” when asked whether she had consulted with any specialists, counselors, psychiatrists, chiropractors, therapists, social workers, health facilities or other practitioners in the past five years. On or about February 25, 2011, defendant underwent a Part II Paramedical/Medical Exam and completed a Paramedical/Medical Exam form (the “Exam Form”). The Exam Form asked defendant further detailed questions regarding defendant’s medical history and past medical treatments, such as, *inter alia*, whether defendant received treatment for or has been told that she has diseases such as headaches...colitis...disorder of the muscles; bones; spine...” and whether, in the past five years, defendant has had any medical tests, checkups, consultations or has been recommended to have any treatments, surgery, medical tests or medication. To each question, defendant responded

“no” and signed the Exam Form.

On or about April 29, 2011, defendant signed an Application Amendment (the “Amendment”) which amended the Application as follows:

The answer to question #14a on page 6 is n/a.

My 2010 well woman’s physical was routine in nature. This physical was not a follow up to nor treatment for any pre-existing condition, nor was this physical prompted by any symptoms, injury, disease or complaints. The results of this physical were normal, with no abnormalities found and no diagnosis made. I was not referred to any other physician nor was I recommended to have any follow up care, testing, surgery or other procedures. I was not given nor prescribed any medications, nor was I recommended to consider any medication, treatment or follow up care.

In reliance upon the statements, representations and answers made by defendant in the Application, Exam Form and the Amendment, MetLife issued the disability insurance policy No. 6631130 AH (the “Policy”) to defendant with an effective date of February 23, 2011.

In or around April 2013, defendant made a claim to MetLife for disability benefits under the Policy. In the course of investigating defendant’s claim, MetLife alleges that it discovered that defendant had made false and fraudulent statements, misrepresentations and omissions of material fact in the Application, Exam Form and Amendment. Specifically, MetLife obtained a copy of defendant’s medical records from Dr. Levitansky which, MetLife asserts, directly contradict the information provided by defendant in her application. The records demonstrate that defendant visited Dr. Levitansky twenty-four separate times between August 12, 2009 and April 5, 2011 for issues such as, *inter alia*, dizziness and giddiness described as vertigo, cervical spine disorder, headaches, malaise, fatigue, neck pain with radiculopathy, shoulder pain, abdominal pain, helicobacter pylori gastritis (“H. pylori”), reflux esophagitis and dyspepsia.

The records also demonstrate that defendant visited Susan Ramdhaney, M.D., a gastroenterologist, on February 1, 2011 and again on February 23, 2011, complaining of abdominal pain, and that Dr. Ramdhaney recommended an EGD given defendant's history of H. pylori and that she start on Prevpac therapy and continue therapy for two months. As part of MetLife's review of defendant's disability claim, she was interviewed regarding the misrepresentations and omissions set forth above and she admitted that

I have treated with [Dr. Levitansky] since 1994 for various conditions and for regular checkups and physicals. When I completed my application for insurance on 2/4/11, I did not indicate my treatment with Dr. Ramdhaney as I considered it a regular checkup. I continued working until June 2011 and I did not consider any of my conditions treated for disabling.

By letter to defendant dated August 20, 2013, MetLife rescinded the Policy based on defendant's misrepresentations. Thereafter, MetLife commenced the instant action seeking a declaratory judgment that the Policy is void *ab initio* based on the material misrepresentations and omissions of material facts made by defendant with the intent to deceive in her application for the Policy and that thus, Met Life has no liability thereunder. Met Life now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in

admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

Pursuant to New York Insurance Law (“Insurance Law”) § 3105

(a) A representation is a statement as to past or present fact, made to the insurer by...the applicant for insurance...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.

(b)(1) 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.

New York courts consider a misrepresentation material if the “failure to furnish a true answer defeats or seriously interferes with the exercise of the insurance company’s right to accept or reject the application.” *Process Plants Corp. v. Beneficial Nat’l Life Ins. Co.*, 53 A.D.2d 214, 217 (1<sup>st</sup> Dept 1976), *aff’d* 42 N.Y.2d 928 (1977). *See also Aguilar v. U.S. Life Ins. Co.*, 162 A.D.2d 209, 210-11 (1<sup>st</sup> Dept 1990)(the misrepresentation must only “substantially thwart[] the purpose for which the information is demanded and induce[] action which the insurance company might otherwise not have taken.”) To establish that a misrepresentation on an insurance application is material as a matter of law, an insurer must submit “an affidavit from [the insurer’s underwriter] and excerpts from its underwriting guidelines establish[ing] that the insurer would not have issued the policy if it had known the true nature of the risk.” *128 Hester LLC v. N.Y. Marine and Gen. Ins. Co.*, 126 A.D.3d 447 (1<sup>st</sup> Dept 2015). “Under New York law, an insurance policy issued in reliance on material misrepresentations is void from its inception.” *Chi. Ins. Co. v. Kreitzer & Vogelmann*, 265 F. Supp. 2d 335, 336 (S.D.N.Y. 2003).

In the instant action, MetLife's motion for summary judgment is granted as it has established that defendant made material misrepresentations on the Application, Exam Form and Amendment; that such material misrepresentations interfered with the exercise of MetLife's right to accept or reject defendant's Application; and that the material misrepresentations substantially thwarted the purpose for which the information was demanded and induced MetLife to issue defendant the Policy, an action it might otherwise not have taken had it known the true nature of the risk. MetLife has provided the affidavit of Cynthia Jones, an Underwriting Manager in the Individual Disability Underwriting Department at MetLife, who affirms that during MetLife's investigation of defendant's disability claim, she discovered that defendant had materially misrepresented her past medical history on the Application, Exam Form and Amendment after reviewing defendant's medical records. Additionally, Ms. Jones affirms that in 2011, when MetLife issued defendant the Policy, it utilized its IDI Underwriting Medical Manual (the "Guidelines") in underwriting applications for disability insurance. Ms. Jones affirms that based on said Guidelines, the underwriter is required to further investigate certain medical issues, such as dizziness, and that certain disorders, such as cervical or thoracic disc disease, require exclusion riders to exclude benefits for said disorders. Ms. Jones affirms that based on the Guidelines, "MetLife would not have issued the Policy as written, if at all, had Defendant disclosed her accurate medical history, including, but not limited to, her chronic dizziness, giddiness and cervical spine disorder, and her history of headaches, fatigue, malaise, neck and shoulder pain symptoms, h. pylori gastritis, abdominal pain, dyspepsia, and reflux esophagitis, most of which were ongoing at the time Defendant applied for the Policy." Ms. Jones further affirms that "MetLife would have required, at a minimum, that the Policy contain various

additional exclusions, and at most, MetLife would have postponed or denied the application outright.” Finally, Ms. Jones affirms that “Defendant’s failure to disclose her accurate medical history precluded MetLife from properly evaluating and understanding the risk it was assuming, and, as a result, induced MetLife into issuing a policy that it would not otherwise have issued to Defendant.”

In response, defendant has failed to raise an issue of fact sufficient to defeat plaintiff’s motion for summary judgment. Defendant’s assertion that summary judgment should be denied on the ground that she never deceived MetLife in any of her answers in the Application is without merit. Specifically, she asserts that “[a]ll answers provided by [her] were true to the best of [her] knowledge” and that MetLife’s allegations against her are “based on [Dr. Levitansky’s] notes related to common cold symptoms and complain[t]s from [herself]” and that “whatever [Dr. Levitansky] wrote in her personal notes is her own medical opinion and interpretation of [defendant’s] common cold symptoms.” Additionally, defendant asserts that her “gastroenterology visit only proves [her] perfect health condition at that time.” However, such assertions are insufficient to defeat plaintiff’s motion as they are merely self-serving and conclusory. It is well-settled that mere conclusions, unsupported by competent and admissible evidence, are insufficient to defeat a motion for summary judgment. *New York Nat’l Bank v. Harris*, 182 A.D.2d 680 (2d Dept 1992). In her opposition, defendant does not dispute that she had a history of radiating neck and shoulder pain symptoms, recurrent abdominal pain and h. pylori gastritis, dyspepsia, chronic dizziness, fatigue, malaise and headaches. Rather, she merely asserts that her undisclosed medical history only related to her “common cold symptoms.” However, defendant’s belief as to the cause of her medical conditions is irrelevant

