SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 15**

CYNTHIA NEIDITCH,

Plaintiff(s),

INDEX # 600332/14
Mot. Seq. 1
Mot. Date 3.20.15
Submit Date 3.20.15

-against-

THE WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant(s).

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3
Memoranda of Law.....	4, 5

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Defendant moves for an order granting it leave to serve an amended answer in the form attached to the moving papers.

This is an action to recover the proceeds of a policy of life insurance. The action for a breach of contract was commenced on January 23, 2014. Defendant served an answer to the summons and complaint on March 24, 2014. Counsel for defendant alleges that the insured made material representations concerning his health on the application for life insurance and that there were additional medical events suffered by the insured that were not disclosed as part of the application. As a result, the plaintiff beneficiary of the policy is not be able to recover the proceeds.

The policy was sold to the insured by a non-party broker, Lawrence Davis who was deposed on February 4, 2015. Based on responses to questions posed during this deposition by plaintiff's attorney, counsel for defendant alleges that plaintiff will seek to recover based upon the theory that the incorrect answers contained in the application concerning the insured's medical history were made by the broker or general agent and not the insured.

Although defendant contends that Lawrence Davis testified at his deposition that the information with respect to the medical history came from the insured, the proposed affirmative defenses are necessary in the event plaintiff's counsel relies on Mr. Davis' testimony at trial. Similar questioning was asked of the William Penn Claims Supervisor Vincent Fonseca at his deposition on February 6, 2015.

The proposed amended answer contains additional affirmative defenses.

In opposition, counsel for plaintiff contends that defendant failed to make the requisite showing. Discovery has been completed and plaintiff contends that it would be prejudicial to permit this amended answer. Further, the insurance policy that defendant intends to rely upon had been in its possession since June 8, 2012, eighteen months prior to the commencement of this action.

Plaintiff contends the new affirmative defenses are based upon the decedent's alleged failure to read and/or repudiate the policy. Defendant alleged that it could not include those defenses since it had to confirm the contents of the subject policy delivered to the decedent. However, nowhere in defendant's papers does it suggest that the contents of the clause would have been different from the policy it had in its possession since the delivery of the subject policy to the decedent. Further, affirmative defenses third, fourth and fifth are examples of pro forma defenses which insurers use all of the time and they should have been included in defendant's initial answer. Plaintiff has prosecuted this action based upon defendant's alleged theory. As a result, plaintiff was not provided with the opportunity to question defendant's representatives regarding to these affirmative defenses. Finally, the fourth and fifth affirmative defenses are insufficient and palpably improper since the defendants failed to assert the necessary elements of waiver and estoppel.

In reply, counsel for defendant states that it would be unrealistic for defendant to have anticipated such testimony from Lawrence Davis. The defense that an applicant failed to review the application when the policy was delivered can only be relevant when there is a claim that the beneficiary cannot be held responsible for a misrepresentation since the representations made in the application were allegedly made by someone other than the insured. The proposed affirmative defenses do not change the nature of the defense of material misrepresentation.

Vincent Fonseca, the Claims Supervisor for William Penn Life Insurance Co. states that their files contained an actual copy of the policy in question. Since the plaintiff failed to submit the original policy with her claim, the relevant file was not copied and sent to their attorney. It was not until very recently that he informed his attorney that the file contained the actual policy delivered to the insured.

The decision whether to allow a pleading to be amended rests within the sound discretion of the court. (*Pagan v. Quinn,* 51 AD3d 1299 [3rd Dept. 2008]; *Trataros Const. Inc. v. New York City School Const. Authority*, 46 AD3d 874 [2nd Dept. 2007]). Leave to amend a pleading will be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party. (*Shovak v. Long Island Commercial Bank*, 50 AD3d 1118, 1120 [2nd Dept. 2008], lv to appeal dismissed in part, denied in part 11 NY3d 762 [2008]; *Lucido v. Mancuso,* 49 AD3d 220, 245 [2nd Dept. 2008]; *Bolanowski v. Trustees of Columbia University in City of New* York, 21 AD3d 340 [2nd Dept. 2005]). To establish prejudice, which must be significant, there must be some indication that the opposing party has incurred some change in position or hindrance in the preparation of the case which could have been avoided had the original pleading contained the proposed amendment. (*Spitzer v. Schussel*, 48 AD3d 233 [1st Dept. 2008]).

"In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom (*see, Caruso v. Anpro, Ltd.*, 215 AD2d 713; *Pellegrino v. New York City Tr. Auth.*, 177 AD2d 554, 557). A proposed amendment that creates prejudice or surprise to the opposing party should not be permitted (*see, Corsale v. Pantry Pride Supermarket*, 197 AD2d 659, 660). In addition, the court must examine the underlying merit of the proposed amendment since to do otherwise would be a waste of judicial resources (*see, McKiernan v. McKiernan*, 207 AD2d 825)." (*Sidor v Zuhoski,* 257 AD2d 564 [2d Dept. 1999]).

Further, "An insurer does not waive defenses of which it was ignorant at the time it drafted its original letter of disclaimer and its initial verified answer (*see, Luria Bros. & Co. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1090 [2d Circ.]; see also, *Guberman v. William Penn Life Ins. Co. of N.Y.*, 146 AD2d 8). Nor is the defendant estopped from raising the defenses that emerged unexpectedly during discovery, since it was ignorant of the facts underlying those defenses when it first disclaimed and answered (*see, Guberman, supra; see also*, *Bleckner v. General Acc. Ins. Co. of Am.*, 713 F.Supp. 642, 651–652), . . . " (*Modern Holding Co. v. Ridgewood Savings Bank,* 210 AD2d 465 [2nd Dept. 1994]).

Finally, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b]; *Aurora Loan Servs., LLC v. Thomas*, 70 AD3d 986, 987; *Tyson v. Tower Ins. Co. of N.Y.*, 68 AD3d 977, 979)." (*Turturro v City of New York* , 77 AD3d 732 [2nd Dept. 2010]).

With respect to the application in general, the first answer was served in March of 2014. The application to amend the answer was served in February 2015. The delay was not unreasonable in light of the completion of the non-party deposition in February 2015. Based upon the deposition testimony, the amended answer is proper. Plaintiff failed to offer any demonstrable prejudice or surprise directly resulting from the short delay. The need for additional discovery and the expense for additional discovery is not significant prejudice resulting from the delay.

With respect to plaintiff's argument concerning the fourth (waiver) and fifth (estoppel) affirmative defenses, plaintiff contends that they are palpably insufficient. CPLR 3013 provides in relevant part that a pleading should be sufficiently particular to give notice of the transaction or occurrence intended to be proved and the material elements of each defense. A review of the proposed affirmative defenses reveal that the fourth affirmative defense incorporates the factual allegations in the third proposed affirmative defense. Likewise, the fifth proposed affirmative defense relates back to the fourth which in turn relates back to the third.

With respect to the aforesaid drafting, the material elements that are the substantive constituents of the affirmative defense (similar to a complaint see *Gershon v Goldberg,* 30 AD3d322 [2nd Dept. 2006]) must be somewhat verbalized within the four corners of this answer. (see gen CPLR 3013 McKinney's Consolidated Laws of New York C3013:3 page 160. A reading of the answer provides the necessary elements of these affirmative defenses.

The motion is granted. The attached proposed amended complaint is deemed served upon service of a copy of this order with notice of entry upon counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: Mineola, New York
April 24, 2015

ENTER:

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J.S.C.

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