

<b>Neiditch v William Penn Life Ins. Co. of N.Y.</b>
2016 NY Slip Op 32784(U)
February 3, 2016
Supreme Court, Nassau County
Docket Number: 600332/14
Judge: Jeffrey S. Brown
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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 13  
CYNTHIA NEIDITCH,

Plaintiff(s),

INDEX # 600332/14

Mot. Seq. 2

-against-

Mot. Date 12.1.15

Submit Date 1.19.16

THE WILLIAM PENN LIFE INSURANCE COMPANY  
OF NEW YORK,

Defendant(s).

-----X

The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit .....	2, 3, 4
Reply Affidavit.....	5
Memoranda of Law.....	6, 7

Plaintiff moves for an order: (1) pursuant to CPLR 3126, dismissing the amended answer of defendant for failure to comply with plaintiff's third notice for discovery and inspection; (2) pursuant to CPLR 3126, compelling defendant to comply with said demands; (3) that defendant has no evidence in support of its allegation that there was a material misrepresentation in the application as defined by Insurance Law §3105(b); and (4) that defendant has admitted that it has no evidence in support of its allegation that there was a material misrepresentation in the application as defined by Insurance Law §3105(b).

This is an action to recover the proceeds of a policy of life insurance. Plaintiff commenced this action with the filing of a summons and complaint on January 23, 2014. The complaint alleges that on June 8, 2012, defendant issued a life insurance policy to Gary Rachlin, naming plaintiff as beneficiary. After Rachlin's death on November 23, 2012, plaintiff made a

claim for the proceeds of the policy, which was denied by defendant. The denial was based on Rachlin's failure to disclose his hospitalization in June 2011 for an allergic reaction and numerous episodes of anaphylaxis with hospitalizations due to severe allergies. The complaint contains a single cause of action seeking a declaratory judgment that defendant breached its contract.

Defendant filed an answer on March 24, 2014, which includes an affirmative defense that if the representations of Rachlin in his application for life insurance had been complete and accurate, defendant would not have issued the subject life insurance policy. By order dated April 24, 2015, this court granted defendant's motion for leave to serve an amended answer containing additional affirmative defenses.

The matter was certified as ready for trial on May 19, 2015. By stipulation "so-ordered" by this court on December 8, 2015, the deadline for filing the note of issue was extended to March 19, 2016 and the deadline for filing motions for summary judgment was extended to June 17, 2016.

Section 3105(b)(1) of the Insurance Law provides that "[n]o 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."

An insurer may demonstrate the materiality of the misrepresentation by offering the affidavit of its underwriter and presenting documentation concerning its underwriting practices, such as underwriting manuals, bulletins, rules pertaining to similar risks, or the rating guidelines used by its underwriters (*James v Tower Ins. Co. of N.Y.*, 112 AD3d 786 [2d Dept 2013]; *Arch Specialty Ins. Co. v Kam Cheung Constr., Inc.*, 104 AD3d 599 [1st Dept 2013]). It may also be demonstrated by documents declining coverage to similarly situated applicants or disclaiming coverage to similarly situated insureds (*Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412 [1st Dept 2009]).

Plaintiff's third notice for discovery and inspection requested copies of insurance applications for similarly situated applicants to Rachlin who were denied coverage by defendant; copies of insurance applications, policies and cancellation letters for similarly situated insureds to Rachlin who were denied coverage during the contestability period by defendant; copies of insurance applications and policies for similarly situated insureds to Rachlin who were granted coverage by defendant, all for the period from 2010 to present. Plaintiff also requested documents evidencing that defendant would have charged a higher premium to Rachlin if he had disclosed his full medical history.

Defendant responded that plaintiff's demands seeking documents regarding similarly situated applicants or insureds to Rachlin were overbroad and ambiguous and requested the disclosure of protected medical information and requested disclosure which would be

unreasonable and burdensome. In response to plaintiff's demand regarding Rachlin's premium, defendant provided plaintiff with portions of an underwriting manual and underwriting guidelines.

Plaintiff argues that defendant's amended answer should be stricken because defendant has wilfully failed to comply with its request for information on similarly situated applicants and insureds. Defendant counters that the term "similarly situated" is completely ambiguous. Moreover, defendant submits the affidavit of its claims supervisor and the affidavit of the vice president of information technology of the parent company of defendant, which aver that the format in which defendant's voluminous records are maintained is not practically or accurately searchable for key words and even if it were, the records sought would contain privileged information regarding individuals not party to this action.

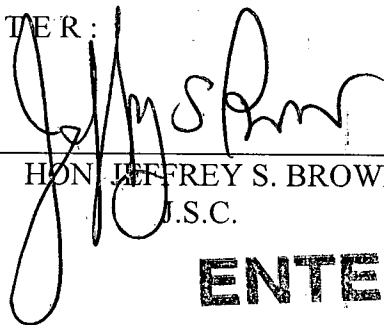
Defendant has sufficiently demonstrated that the search required to produce all documents responsive to plaintiff's third notice for discovery and inspection would be impracticable and unduly burdensome. Therefore, dismissal of defendant's amended answer pursuant to CPLR 3126(3) is unwarranted. However, since defendant claims that it cannot produce insurance applications and insurance policies for "similarly situated" applicants and insureds to Rachlin who were either denied coverage, had coverage cancelled during the contestability period, or were granted coverage by defendant, then defendant shall be precluded from relying upon any such documents in support of or in opposition to any motion for summary judgment in this matter or at the trial of this matter (CPLR 3126[2]).

Accordingly, plaintiff's motion is **granted to the extent** that defendant is hereby precluded from offering insurance applications and insurance policies for "similarly situated" applicants and insureds to Rachlin who were either denied coverage, had coverage cancelled during the contestability period, or were granted coverage by defendant, in support of or in opposition to any motion for summary judgment in this matter or at the trial of this matter unless such documents are produced to plaintiff's counsel within thirty (30) days of the date of this order. The motion is otherwise denied.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
February 3, 2016

ENTER:



HON. JEFFREY S. BROWN  
J.S.C.

**ENTERED**

FEB 08 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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