

<b>Charles v William Penn Life Ins. Co. of N.Y.</b>
2017 NY Slip Op 31306(U)
June 15, 2017
Supreme Court, New York County
Docket Number: 154111/15
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

TEDDY CHARLES,

Plaintiff,

-against-

Index No.: 154111/15  
**DECISION/ORDER**  
Mot. Seq. No. 001

WILLIAM PENN LIFE INSURANCE COMPANY  
OF NEW YORK,

Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion for leave to amend its answer and to seal portions of the record.

<b>Papers</b>	<b>Numbered</b>
Defendant's Notice of Motion .....	1
Defendant's Memorandum of Law .....	2
Plaintiff's Affirmation in Opposition .....	3
Plaintiff's Memorandum of Law .....	4
Defendant' Reply Memorandum of law .....	5

*Miller Eisenman & Kanuck, LLP*, New York (Michael P. Eisenman of counsel), for plaintiff.  
*Bleakley Platt & Schmidt, LLP*, White Plains (Robert D. Meade of counsel), for defendant.

Gerald Lebovits, J.

Defendant, William Penn Life Insurance Company of New York (Penn Life), moves under CPLR 3025 (b) for leave to serve an amended answer to add paragraphs 46 through 62 — attached to defendant's motion as Exhibit C — and for an order to direct the County Clerk's Office to file certain papers — Exhibit E to Victor Fonseca's affidavit and Exhibit E attached to Robert D. Meade's affidavit — under seal because the documents contain proprietary and confidential information. Plaintiff, Teddy Charles, is the beneficiary of a \$1.5 million life insurance policy issued by the defendant and applied by his late spouse, Yuna Park, who died on July 26, 2013. After defendant denied plaintiff's claim for benefits on June 26, 2014, plaintiff commenced this case on April 24, 2015, to recover the proceeds of the insurance policy. Defendant denied the claim because Park made material misrepresentations in her application. According to defendant, defendant would not have issued the policy had Park disclosed that she had a liver disease, or disorder, and was treated for having a tumor.

## I. Defendant's CPLR 3025 (b) Motion

Defendant's motion is granted. Under CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." A court has broad discretion to grant a motion for leave to amend a pleading unless the proposed amendment would cause surprise or prejudice to the opposing party or if the proposed amendment is palpably insufficient or patently devoid of merit. (*Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920, 922 [2d Dept 2015]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011].) To demonstrate prejudice, a party must show that it has been hindered in preparing its case or prevented from "taking some measure in support of his position." (*Kocourek*, 85 AD3d at 504.)

On June 26, 2014, defendant informed plaintiff that Park made misrepresentations on her life-insurance application — her medical history, tests, and biopsy report noting that she had inflammatory pseudo tumor — and that it is rescinding the policy. (Affirmation in Opposition, Exhibit B.) Defendant reserved its right to assert additional defenses or grounds for rescinding the policy. (Affirmation in Opposition, Exhibit B.) In its first affirmative defense, defendant had asserted that Park failed to disclose to defendant the tests and consultations she had with physicians that revealed she was suffering from pseudotumor of the liver.

After this litigation commenced but before defendant was deposed, defendant sent plaintiff an amended denial letter. (Affirmation in Opposition, Exhibit I.) Defendant explained that Park's biopsy report also revealed that she had a related condition known as sclerosing cholangitis. (Affirmation in Opposition, Exhibit I.) According to defendant's underwriting guidelines, had Park disclosed this condition or disclosed that a biopsy had been performed, defendant would have declined her application. (Affirmation in Opposition, Exhibit I.)

Defendant's proposed amendments have merit. Defendant's first defense is that Park made misrepresentations on her application about inflammatory pseudo tumor. The second and third affirmative defenses supplement the first defense by adding another basis for Park's misrepresentations — sclerosing cholangitis — that she failed to disclose on her application. (See *Kerrigan v Metro. Life Ins. Co.*, 117 AD3d 562, 563-564 [2d Dept 2014] ["Equally unavailing is plaintiff's assertion that defendants should be precluded from referring to the more specific facts referenced in the February 24, 2004 letter, which referenced additional treatment for myocardial infarction, uncontrolled hypertension, and noncompliance with medication, as the second letter provided additional facts supporting the same basis for claim denial, namely the decedent's medical history."], citing *Abreu v Huang*, 300 AD2d 420 [2d Dept 2002].) Defendant's proposed affirmative defenses are based on decedent's misrepresentations of her medical history and condition and based on the same biopsy report that defendant relied on in asserting its first affirmative defense.

Defendant has not waived these defenses. (See *Agrawal v Metro. Life Ins. Co.*, 89 AD3d 503, 504 [1st Dept 2011].) In *Agrawal*, the court determined that the insurance company waived two defenses — that decedent misrepresented her medical history and misrepresented her in-force insurance — because defendant denied insurance on the sole basis that the decedent misrepresented her net worth. (*Id.*) The *Agrawal* court held that "[d]efendant's failure to assert the other defenses in its initial repudiation constitutes a waiver of those defenses for purposes of

denying liability under the policies.” (*Id.*) Here, defendant has maintained since June 2014 that Park misrepresented her medical history. Defendant’s second and third proposed amendments supplement the first affirmative defense.

Plaintiff is not prejudiced or surprised. Examinations before trial have not yet been completed. Plaintiff has not yet filed its note of issue. Plaintiff has not been hindered in preparing its case. Plaintiff has had the biopsy report in its possession since at least December 2014.

Defendant shows proof that it sent plaintiff’s counsel Park’s medical records, including the biopsy report, on December 31, 2014 — four months before plaintiff commenced this action. (Notice of Motion, Affidavit of Robert D. Meade, May 10, 2016, at ¶ 6.) The results from Park’s biopsy “have always been a focus of the denial of [plaintiff’s] claim.” (Notice of Motion, Affidavit of Robert D. Meade, May 10, 2016, at ¶ 6.) Plaintiff’s counsel does not say when he received the biopsy report; he states only that he is perplexed that defendant would have sent documents before this litigation commenced. (Affirmation in Opposition, at ¶ 12.)

Plaintiff also notes that defendant’s underwriting policies provide that defendant may deny a claim for sclerosing cholangitis but not for inflammatory pseudo tumor. That argument goes to the issue of whether Park’s misrepresentation was material — an issue for trial. Whether Park misrepresented information on her insurance application and whether Park’s misrepresentations were material to defendant will be resolved at trial. (*See Modern Hold. Co. v Ridgewood Savings Bank*, 210 AD2d 465, 466 [2d Dept 1994].)

## II. Defendant’s Motion for Sealing

- Defendant’s motion to seal several exhibits attached to the motion papers is granted.

Defendant also seeks an order directing the New York County Clerk to seal Exhibit E to Victor Fonseca’s affidavit and Exhibit E to Robert D. Meade’s affidavit. Defendant argues that these documents contain proprietary and confidential information.

The public “is entitled to access to judicial proceedings and court records.” (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010], citing *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 501 [2d Dept 2007].) A party “seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.” (*Mosallem*, 76 AD3d at 349, citing *Mancheski*, 39 AD3d at 502.) Before sealing court records, a court must provide a written finding of good cause as required under the Uniform Rules for Trial Courts. (*Mosallem*, 76 AD3d at 349-353; 22 NYCRR § 216.1 [a].) A court’s finding of good cause “presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant.” (*Mosallem*, 76 AD3d at 349, citing *Mancheski*, 39 AD3d at 502.) A court may seal court records if the records contain “trade secrets, confidential business information, or proprietary information.” (*Maxim Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].)

Defendant has established good cause for sealing several exhibits to the court records. Defendant states that it uses the “General Reinsurance (‘Gen Re’) manual in the underwriting of applications and on claims determinations. The provisions of the manual are considered

proprietary by Gen Re and [defendant] is required to protect the confidentiality of such information.” (Notice of Motion, Affidavit of Robert D. Meade, May 10, 2016, at ¶ 19.) The manual lists the various medical conditions and tests in which defendant would form the basis to issue insurance policies and determine claims. Exhibit E to Victor Fonseca’s affidavit (NYSCEF document #11) and Exhibit E to Robert D. Meade’s affidavit (NYSCEF document #18) shall be sealed.

The court notes that plaintiff’s Affirmation in Opposition, Exhibit H, also contains defendant’s manual, marked as sub-Exhibit A, three pages (NYSCEF document # 36), and it shall also be sealed.

Accordingly, it is hereby

ORDERED that defendant’s motion for leave to amend its answer to add the second and the third affirmative defenses is granted. The amended answer, attached to defendant’s motion as Exhibit C, is deemed served and filed. The County Clerk’s Office is directed to amend its records accordingly; and it is further

ORDERED that defendant’s motion to seal is granted and the County Clerk’s Office is directed to seal the following documents (1) Exhibit E to Victor Fonseca’s affidavit, NYSCEF document #11; (2) Exhibit E to Robert D. Meade’s affidavit, NYSCEF document #18; and (3) plaintiff’s Affirmation in Opposition, Exhibit H, sub-Exhibit A, which contains three pages to defendant’s confidential manual, NYSCEF document # 36; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on plaintiff and on the County Clerk’s Office; and it is further

ORDERED that the parties appear in Part 7, at 60 Centre Street, room 345, for a compliance conference on August 10, 2017, at 10 a.m.

Dated: June 15, 2017



J.S.C.

**HON. GERALD LBOVITS**  
J.S.C.