Neiditch v William Penn Life Ins. Co. of N.Y.

2017 NY Slip Op 32372(U)

February 24, 2017

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),

-against-

THE WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant(s).

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INDEX # 600332/14
Mot. Seq. 6
Mot. Date 1.18.17
Submit Date 1.18.17

XXX

The following papers were read on this motion: Papers Numbered

Notice of Motion, Memorandum, Exhibits Annexed..... 1
Memoradum of Law in Opposition..... 2
Memorandum of Law in Reply..... 3

Plaintiff moves pursuant to CPLR 2221(d) for an order granting reargument with respect to this court's decision (Brown, J. November 23, 2016) and upon granting reargument denying defendant's cross-motion for summary judgment and remanding this case to the trial assignment part for trial.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. (CPLR 2221[d][2]; *see*, *Haque v. Daddazio*, 84 A.D.3d 940 [2d Dept 2011]). It is not designed as a vehicle to afford the unsuccessful party with successive opportunities to argue once again the very questions previously decided, or to present arguments different from those originally presented. (*Ahmed v. Pannone*, 116 AD3d 802 [2d Dept 2014]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*V. Veeraswamy Realty v Yenom Corp.*, 71 A.D.3d 874 [2d Dept 2010];

Amato v. Lord & Taylor, Inc., 10 A.D.3d 374, 375 [2d Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Haque*, 84 A.D.3d 940). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked. (*Hoffmann v. Debello-Teheny*, 27 A.D.3d 743 [2d Dept 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion. (*Barrett v. Jeannot*, 18 A.D.3d 679 [2d Dept 2005]).

This is an action to recover the proceeds of a life insurance policy. Plaintiff contends that this court failed to apply the correct legal standard to the evidence submitted by defendant in support of its summary judgment motion. More specially, plaintiff argues that this court failed to take cognizance of the quality and nature of the evidence offered in support of defendant's claim that the alleged "material misrepresentations" were in fact material to defendant's underwriting decision. It is undisputed that the decedent failed to report in his application for life insurance previous hospitalizations pertaining to severe allergies. It is defendant's position that the alleged omissions amount to a material misrepresentation because if it had known of the previous hospitalizations, it would not have approved the decedent's application under the terms that it did.

> "[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented." (*Zilkha v. Mutual Life Ins. Co. of N.Y.*, 287 A.D.2d 713, 714 [2001]; *see Schirmer v. Penkert,* 41 A.D.3d 688, 690 [2007]; Insurance Law § 3105[b]). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*Schirmer v. Penkert,* 41 A.D.3d at 690–691; *see Parmar v. Hermitage Ins. Co.*, 21 A.D.3d 538, 540 [2005]; *Curanovic v. New York Cent. Mut. Fire Ins. Co.*, 307 A.D.2d 435, 437 [2003]).
> (*Varshavskaya v. Metro. Life Ins. Co.*, 68 A.D.3d 855, 856 (2d Dept. 2009); *see also James v Tower Insurance Co. Of New York*, 112 AD3d 786 (2d Dept. 2013).

The insurer may also demonstrate materiality by producing documents declining coverage to similarly situated applicants or disclaiming coverage to similarly situated applicants. (*Kiss Constr. NY, Inc. v. Rutgers Cas. Ins. Co.*, 61 A.D.3d 412 [1st Dept 2009]).

Plaintiff's own recitation of the law makes clear that in proving materiality "[r]elevant documentation . . . includes insurance company underwriting manuals, rules, or bulletins which

pertain to insuring similar risks" but "[a] conclusory statement by an insurance company employee that the company would not have insured the applicant if it had known the facts allegedly misrepresented is, in and of itself, insufficient to establish that the misrepresentation was material." (Payne & Wilson, 31 New York Practice, New York Insurance Law § 33:30).

Plaintiff argues that the two affidavits submitted by defendant in support of its cross-motion were inadmissible, self-serving and conclusory. Further, plaintiff argues that defendant failed to produce documentary evidence in discovery and as a result it would be impossible to prove materiality. The court notes that in its short form order dated February 3, 2016 defendant was conditionally precluded from offering insurance applications and insurance policies for "similarly situated" applicants and insureds who were either denied coverage or had coverage cancelled during the contestability period or were granted coverage in support or opposition to any summary judgment motion. In addition, plaintiff argues that defendant must produce evidence that is clear and substantially uncontradicted that due to the insured's alleged misrepresentation, defendant was induced to accept an application that would otherwise been refused.

Plaintiff argues that this court relied upon inadmissible and insufficient affidavits rather than mandatory documentary evidence concerning defendant's underwriting practices. The plaintiff argues that defendant's own underwriting guidelines dictate that an applicant with a history of anaphylaxis which occurred more than a year from the date of the application, as was the case with the decedent, would incur an increase in premium rates and/or would not be rated "preferred." Nevertheless, the plaintiff argues that notwithstanding the decedent's disclosure of a hospitalization in connection with anaphylaxis, he was granted a preferred-plus rating. Finally, plaintiff argues that the submitted testimony and documentation demonstrates that defendant's underwriting guidelines were merely suggested, not mandatory.

In opposition to this motion, defendant argues that the affidavit of Mark Boudreaux submitted on its motion for summary judgment explains that if the decedent had disclosed his health history, he would have referred the file to Dr. Feingold. In turn, Dr. Feingold stated that if this information was disclosed, the application would have been rejected or any offer would have been made at a very significant increase in premium. Further, underwriting materials in support of its cross-motion were submitted to this court. Dr. Feingold explained that William Penn uses the General Reinsurance underwriting manual (Gen Re) when a condition is not discussed in the underwriting manual of Legal and General America, the parent company of the defendant. Defendant argues that it submitted the applicable provisions of the Gen Re which provide that recurrent episodes of anaphylaxis involving the throat or larynx require referral to the medical director (indicated as "RMD") and a substantial increase over the standard premium would be indicated.

Indeed, in support of its cross-motion, defendant submitted an affidavit from Mark Boudreaux, the senior underwriting consultant who reviewed and approved the decedent's

application. Defendant also submitted an affidavit from Robert Feingold, MD, defendant's vice president and medical director.

Mr. Boudreaux stated in his affidavit that the Gen Re manual is used when the condition in issue is not covered by the underwriting manual utilized by William Penn. Attached were the relevant sections of the Gen Re manual. The manual provides that a single episode of anaphylaxis involving the throat or larynx is to be rated as follows: "Within 1 year + 50; thereafter + 0, PNA." A recurrent episode is rated as follows: RMD + 100 up." This means if a single episode of anaphylaxis occurred at least one year earlier and involved the throat or larynx, there is no increase in premium above the standard premium but a preferred rating is not required. If there is a single episode of anaphylaxis more than a year earlier which did not involve the throat or larynx, there would be no negative underwriting effect. Despite reporting only a single episode of anaphylaxis, defendant later learned that the decedent was hospitalized on several other occasions for anaphylaxis attacks. According to the manual, recurrent episodes of anaphylaxis involving the throat or larynx must be referred to the medical director. Any policy approved by the medical director must be at a + 100 (4 table) increase in premium. The Gen Re manual clearly shows that a single episode of anaphylaxis is treated differently than a recurrent episode involving the throat or larynx.

Here, the defendant insurer demonstrated its prima facie entitlement to judgment as a matter of law. The defendant established that the decedent's misrepresentation was material as a matter of law by submitting the affidavits of its senior underwriting consultant, its medical director, as well as the relevant portions of its underwriting manual which showed that the defendant would not have issued the same policy if the correct information pertaining to his prior medical condition had been disclosed in the application. (*See Varshavskaya*, 68 A.D.3d at 856 [insurer established material misrepresentation "by submitt[ing] an affidavit of its associate chief underwriter and relevant portions of its underwriting manual which showed that the defendant would not have issued the same policy if the correct information pertaining to his income had been disclosed in the application"]); *Roudneva v. Bankers Life Ins. Co. of N.Y.*, 35 A.D.3d 580, 581 [2d Dept 2006]; *Gugleotti v. Lincoln Sec. Life Ins. Co.*, 234 A.D.2d 514 [2d Dept 1996] [finding that sufficient evidence, including relevant portions of the defendant's underwriting manual and the Occupational Schedule of the North American Reinsurance Company Underwriting Manual, to establish that insured would have been charged a higher premium absent the misrepresentation]). As noted above, materiality can be demonstrated by documentation concerning an insurer's underwriting practices, such as underwriting manuals, bulletins, ***or*** rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application. (*Varshavskaya*, 68 A.D.3d at 856). As a result, the absence of discovery with respect to similarly situated applicants does not preclude defendant from demonstrating materiality in this case.

Upon reargument, the court adheres to its original decision. The motion, therefore is **denied**.

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

Dated: Mineola, New York
February 24, 2017

ENTER:

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

ENTERED
FEB 28 2017
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COUNTY CLERK'S OFFICE

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