SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54

Index Number : 156056/2015
SONTAG, GERSHON
vs
AMERICAN INTERNATIONAL
Sequence Number : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE 3/8/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 23-26
Answering Affidavits — Exhibits _____ **No(s).** 40
Replying Affidavits _____ **No(s).** 43

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

Dated: 5/1/17

SHIRLEY WERNER KORNREICH, J.S.C.
J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GERSHON SONTAG, as Trustee of the Esther Waxman Trust, dated December 12, 2012,

Plaintiff,

-against-

AMERCIAN INTERNATIONAL GROUP, INC., AMERICAN GENERAL LIFE INSURANCE COMPANY, a division of American International Group, Inc., and MOSHE LEBOVITS,

Defendants.

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Index No.: 156056/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Defendants American International Group, Inc. (AIG) and American General Life Insurance Company (American General) (collectively, the AIG Defendants) move, pursuant to CPLR 3211, to dismiss plaintiff Gershon Sontag's amended complaint (the AC). Seq. 002. Sontag opposes the motion. Sontag also moves, pursuant to CPLR 3215, for a default judgment against defendant Moshe Lebovits. Seq. 003. Lebovits did not respond to the motion, nor has he appeared in this action. For the reasons that follow, the AIG Defendants' motion to dismiss is granted and Sontag's default judgment motion is denied.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the AC (*see* Dkt. 17)[1] and the documentary evidence submitted by the parties.

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

This case concerns a stranger-oriented life insurance policy[2] paid for by Sontag that insures the life of non-party Esther Waxman. *See* Dkt. 17 at 29 (the Policy). The Policy was issued by American General on February 24, 2006. The Policy's beneficiary is the Esther Waxman Trust (the Trust), which, presumably, will pay a significant potion of the policy proceeds to Sontag (the trustee) upon Ms. Waxman's death. Ms. Waxman, who was 78 years old at the time the Policy was issued, is still alive. The Policy clearly provides that "THIS IS A NEW JERSEY POLICY." *See id.* at 31 (capitalization in original).

Sontag commenced this action on June 16, 2015, more than nine years after the Policy was issued. On November 11, 2015, he filed an amended complaint with four causes of action: (1) rescission of the Policy on the ground of fraud; (2) fraud; (3) a declaratory judgment regarding the validity of the Policy; and (4) injunctive relief, requiring disclosure of how American General is calculating the premium payments. These claims are based on two alternative legal theories. The first is that the broker, Lebovits, allegedly acting as agent for the AIG Defendants, defrauded the Trust by tricking it (and Sontag) into thinking the Policy was really a New York policy. New York has more insured-favorable rules regarding incontestability than New Jersey. New Jersey also permits higher broker commissions. Sontag's second theory is that the AIG Defendants should have to take a position in this action about whether the Policy was fraudulently procured. Sontag, as explained below, wants to adjudicate this issue so he can stop making premium payments if the AIG Defendants take the position that they will not pay out on the Policy upon Ms. Waxman's death.

On January 22, 2016, the AIG Defendants moved to dismiss the AC because, according to them, the fraud claim is time barred, the declaratory judgment claim fails for lack of a ripe

[2] *See generally United States v Binday*, 804 F3d 558, 565-67 (2d Cir 2015).

controversy, and the injunctive relief claim fails for lack of irreparable harm. On April 11, 2016, Sontag moved for a default judgment against Lebovits, who was served, but defaulted by never appearing in this action. The court reserved on the motions after oral argument. *See* Dkt. 44 (8/16/16 Tr.).[3]

II. The AIG Defendants' Motion to Dismiss (Seq. 002)

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v*

[3] The extreme delay in issuing a decision is due to the parties' failure to provide the court with the transcript until March 8, 2017.

Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

The court will not evaluate the merits of Sontag's fraud claim (such as whether he can plead reasonable reliance when the Policy, on its face, clearly indicates that it is a New Jersey Policy)[4] because the claim is time-barred. Sontag commenced this action more than nine years after the Policy was issued. Pursuant to CPLR 213(8), "a fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or 'could with reasonable diligence have discovered.'" *Sargiss v Magarelli*, 12 NY3d 527, 532 (2009). Sontag does not meaningfully dispute the AIG Defendants' contention that the claim accrued at the time the Policy was issued in 2006, nor does Sontag argue that the two-year-from-discovery rule applies. In fact, Sontag barely addresses the statute of limitations. The entirety of Sontag's argument is as follows:

> Although the policies were sold in 2006, the defendants' fraudulent scheme is continuing and renewing constantly. The fraud is continuous because defendants continue to claim that the Waxman policies are New Jersey policies, when they are actually delivered and sold to a New York resident in New York. Each time a premium is paid by plaintiff, the defendants reap an illegal benefit from this bargain. The ongoing nature of the defendants' fraud renders meaningless any claim of Untimeliness.

Dkt. 40 at 16 (paragraph breaks omitted). Sontag did not support this argument with citation to any legal authority (Sontag is not *pro se*; he is represented by counsel).

Sontag's fraud claim accrued in 2006 because that is when the injury (the claim of being sold a New Jersey, not a New York policy) was suffered. *Carbon Capital Mgmt., LLC v Am. Exp. Co.*, 88 AD3d 933, 939 (1st Dept 2011) (fraud claim accrues when all elements of claim, including injury, can be alleged); *see Ackerman v Price Waterhouse*, 84 NY2d 535, 541 (1994)

[4] *See MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291 (1st Dept 2016) (failure to plead reasonable reliance warrants dismissal of fraud claim).

("As a general proposition, it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run."). Sontag's reference to the continuing wrong doctrine is of no avail. *See Henry v Bank of Am.*, 147 AD3d 599 (1st Dept 2017) ("the doctrine may only be predicated on continuing unlawful acts **and not on the continuing effects of earlier unlawful conduct**.") (emphasis added; citations and quotation marks omitted); *see also Harvey v Metro. Life Ins. Co.*, 34 AD3d 364 (1st Dept 2006) ("a continuing wrong ... is deemed to have accrued on the date of the last wrongful act."). Sontag conflates the AIG Defendants' alleged bad acts against other members of the Orthodox Jewish community (which, to be sure, are not the subject of any actual claim pleaded in this action) with the wrong allegedly committed against the Trust, which is limited to the alleged fraud committed when the Policy was issued in 2006. Sontag does not allege any fraudulent act on the part of any of the defendants after the Policy was issued. The harm Sontag complains of – having a New Jersey Policy instead of a New York policy – resulted exclusively from the parties' conduct in 2006 and was discernable by reading the Policy. Nothing that occurred after the Policy was issued impacted the type of policy in effect. Ergo, the last (really, the only) alleged wrongful act occurred in 2006.

For these reasons, Sontag's second cause of action for fraud is dismissed as time-barred. Moreover, the first cause of action for rescission, which is based on this time-barred fraud claim, also is dismissed as time-barred. *See Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 180 (1st Dept 1998); *see also Colyer v Colyer*, 26 AD3d 303, 304 (1st Dept 2006).

Sontag's declaratory judgment claim fares no better.[5] "Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The

[5] To the extent the declaratory judgment cause of action overlaps with the dismissed claim for rescission, the court treats such claim as duplicative. The court's analysis of this claim is limited to the portion seeking a declaration that the Policy is valid.

general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 (1st Dept 2009) (citations and quotation marks omitted). The court does not issue advisory opinions; if a claim is not ripe, there is no "justiciable controversy upon which a declaratory judgment can be rendered." *Ovitz v Bloomberg L.P.*, 18 NY3d 753, 760 (2012). Sontag cites no case, and the court knows of no authority, that supports the proposition than an insured has the right to a declaratory judgment on the validity of a life insurance policy while the person whose life is insured is still alive. The AIG Defendants have confirmed that the Policy is currently in effect [*see* Dkt. 24 at 6], and have taken no action to indicate that they presently believe the Policy was procured by fraud. On the contrary, it is only Sontag that suggests that there was fraud committed in procuring the Policy.

Sontag, misguidedly, makes much of the fact that the AIG Defendants have litigated coverage disputes with other insureds. But he cites no precedent holding there to be a justiciable coverage controversy based on coverage disputes with other insureds. Indeed, all large insurance carriers, such as AIG, will end up in coverage litigation with some percentage of their insureds. Noting AIG's justiciable controversies with its other insureds is no substitute for Sontag proffering an actual ripe controversy between him and the AIG Defendants.

For these reasons, the court finds that Sontag has not proffered a legal basis to compel the AIG Defendants to make a coverage determination prior to when such determination would normally be made. This is not how insurance companies operate in the ordinary course of business. AIG explains, and Sontag does not dispute, that life insurance coverage determinations are usually made after the covered person dies and a claim is made on the carrier. Sontag cites no case where a court has compelled a life insurance company to deviate from this practice.

Nonetheless, Sontag claims that this case is unique. He speculates that the AIG Defendants might not provide coverage upon Ms. Waxman's death because, under New Jersey law (which governs the Policy), the AIG Defendants might be able to argue that the Policy was fraudulently procured. Sontag does not want to have to continue making premium payments if the AIG Defendants have no intention of paying out on the Policy.

This appears to be Sontag's primary motivation for commencing this action. His plight is of no legal consequence, nor does it move the court. If the AIG Defendants really do have a meritorious claim that the Policy was procured by fraud, then Sontag, who would have participated in the fraud, does not deserve to get the benefits of the Policy because he and the Trust would be *in pari delicto*. *See Kirschner v KPMG LLP*, 15 NY3d 446, 464 (2010). On the other hand, if the AIG Defendants have no basis to withhold coverage because there was no actionable fraud, then Sontag will not suffer a loss. What Sontag really seeks in this action is the right to know if he will be precluded from recovering for his (possibly committed) fraud so he can save money by ceasing to make premium payments. The court sees no reason to deviate from the usual rules regarding ripeness and the issuance of advisory opinions.

Finally, Sontag has no right to mandatory injunctive relief regarding the calculation of the Trust's premium payments because his potential loss – paying too much in premiums – is pecuniary in nature. *See Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 (1st Dept 2011). Notably, Sontag does not actually allege that the Trust is being charged too much under the Policy. If he states a claim to that effect, he could seek reimbursement for overpayment of premiums. He has not done so.

III. Sontag's Motion for a Default Judgment (Seq. 003)

A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability." *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003) ("defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them."). That being said, a defendant's default does not "give rise to a 'mandatory ministerial duty' to enter a default judgment against it. Rather, [the plaintiff is] required to demonstrate that [it has] a viable cause of action." *Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (citation omitted); *see Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006), quoting *Joosten v Gale*, 129 AD2d 531, 535 (1st Dept 1987) ("CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action").

Leaving aside the fact that the fraud claim asserted against Lebovits is time-barred (because the statute of limitations is a waiveable affirmative defense), and that Sontag's reasonable reliance allegations are not plausible, Sontag has not made out a claim for fraud against Lebovits because Sontag has not pleaded any non-speculative damages. *See Dweck v Oppenheimer & Co.*, 30 AD3d 163 (1st Dept 2006) (fraud claim dismissed where "no damages were sustained"), citing *Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 437 (1st Dept 1988) (fraud claim dismissed where "no facts are alleged from which can be inferred the essential element of injury."). The Policy is currently in effect, and Sontag's claim that the AIG Defendants will not provide coverage is speculative. *See Gordon*, 141 AD2d at 437 ("The conclusory allegations of the complaint do not contain any factual detail showing specific

damages resulting from the purported misrepresentations and therefore are insufficient to establish a claim in fraud."). Moreover, as noted earlier, if coverage is (eventually) properly denied, that will mean that the Trust and Lebovits are *in pari delicto*. *See Kirschner*, 15 NY3d at 464.

Simply put, there is no legal theory (speculative or otherwise) under which Lebovits might have caused the Trust to fail to receive coverage under the Policy where the Trust would otherwise have the legal right to coverage. Sontag, therefore, is not entitled to a default judgment against Lebovits, notwithstanding Lebovits' failure to appear. *See Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994), citing *Joosten*, 129 AD2d at 535. The court will not rubber stamp a default judgment on a patently meritless claim. Accordingly, it is

ORDERED that the AIG Defendants' motion to dismiss the Amended Complaint is granted; and it is further

ORDERED that Sontag's motion for a default judgment against Lebovits is denied; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the Amended Complaint with prejudice.

Dated: May 1, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.