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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES RIVER INSURANCE)	
COMPANY, an Ohio)	
Corporation,)	No. C10-0446 BZ
)	
Plaintiff(s),)	
)	ORDER DENYING
v.)	DEFENSE MOTIONS
)	
DIANA'S CARE HOME, a)	
business entity form)	
unknown, et al.,)	
)	
Defendant(s).)	
)	
_____)	

19 The Castaneda defendants have filed six motions. The
20 Court has ruled separately on their motion to disqualify
21 plaintiff's counsel and on their motion to appoint new
22 independent counsel. Remaining are their motions to decline
23 jurisdiction, to quash service of process under Rule 12(b)(5),
24 to stay this action in light of the pending state court action
25 and to dismiss the complaint for failure to state a claim
26 under Rule 12(b)(6).

27 The motion to decline jurisdiction is **DENIED**. As the
28 defendants correctly recognize the Court has no discretion to

1 refuse to hear a rescission case. See First State Insurance
2 Co. v. Callen Associates, Inc., 113 F.3d 161, 163 (9th Cir.
3 1997). Defendants' reliance on Maui Land and Pineapple Co. v.
4 Occidental Chemical Corp., 24 F.Supp.2d 1079 (D.Hawaii 1998)
5 is misplaced. In Maui, the action remanded to state court was
6 not for rescission and the basis for remand was that the
7 coverage issues raised in the federal court action had already
8 been raised in a parallel state court proceeding, which has
9 not occurred here.

10 The motion for a stay is **DENIED**. Defendants mistakenly
11 invoke the rule of Montrose Chemical Corp. of Cal. v. Superior
12 Court, 6 Cal.4th 287, 301 (1993) which held that in
13 California, a party simultaneously defending a declaratory
14 relief coverage action and one or more actions for which
15 insurance coverage is sought may obtain a stay of the
16 declaratory relief action upon a showing of prejudice. The
17 Ninth Circuit however has subsequently clarified that this
18 doctrine is limited to declaratory relief actions, where
19 jurisdiction may be discretionary, and does not apply where
20 the insurer seeks rescission and has a "statutory right under
21 the diversity statute to pursue its claim in federal court."
22 First State Insurance Co. v. Callan Associates, Inc., 113 F.3d
23 161, 163 (9th Cir. 1997).

24 Nor have defendants established the sort of prejudice
25 Montrose requires. The only issue in this case is whether the
26 defendants made a material misrepresentation or concealment in
27 their insurance application. Defendants assert that their
28 state of mind in completing the application is at issue and

1 that adjudicating that state of mind in this case might
2 prejudice their position in Reyna, where their state of mind
3 towards the decedent is likely to be at issue. This argument
4 fails for a number of reasons. First, a misrepresentation or
5 a concealment may be grounds for rescission whether
6 intentional or unintentional. Cal. Insurance Code § 331.¹
7 See also West Coast Life Ins. Co. v. Ward, 132 Cal.App.4th
8 181, 186-7 (2005). Second, it does not appear that defendants
9 are contesting the fact that they did not fully disclose
10 certain facts surrounding Mr. Reyna in their insurance
11 application. Doc. No. 47, p. 3:14-16. Furthermore, to the
12 extent that their state of mind in completing the application
13 could be at issue, that state of mind would focus on April of
14 2009, long after the time the Castanedas are alleged to have
15 harmed Mr. Reyna.

16 The motion to quash service is **DENIED** for two reasons.
17 First, as presently constituted, the motion was not timely
18 raised within the meaning of Rule 12(h)(1). Failure to timely
19 raise a specific objection to service is a waiver of the
20 objection. A defendant may object to service by filing a
21 motion to dismiss pursuant to Rule 12(b)(4) (challenging
22 sufficiency of process) or Rule 12(b)(5) (challenging
23 sufficiency of service). An objection to service of process
24 "must be specific and must point out in what manner the

25
26 ¹ Defendants' reliance on Clarendon v. Nat'l. Insurance
27 Co. of the West, 442 F.Supp.2d 914, 928 (E.D.Cal. 2006) is
28 misplaced. Defendants have not produced any policy provisions
that show that, as in Clarendon, the insurance policy limited
the insurer's right to rescind to cases of fraud and
intentional concealment.

1 plaintiff has failed to satisfy the requirements of the
2 service provision utilized." Photolab Corp. v. Simplex
3 Specialty Co., 806 F.2d 807, 810 (8th Cir. 1986); Binns v.
4 City of Marietta Hous. Auth., 2007 WL 2746695, at *2 (N.D. Ga.
5 2007). In their motion, the Castanedas objected to service on
6 the sole grounds that they were served at their place of
7 business and not at their home, as they contended was required
8 by federal law. When the plaintiff pointed out in its
9 opposition that it had served the defendants pursuant to state
10 law, which permits service at their place of business,
11 defendants, in their reply, for the first time objected to
12 service on the grounds that it was inadequate under state law
13 because the person served was not in charge of their
14 business.²

15 Defendants' position is not well taken. Having failed to
16 raise this objection in their motion, they have waived this
17 specific objection. The law is clear that objections to
18 service that were not raised at the outset are waived and
19 cannot be raised in later motion practice. See Photolab Corp.
20 v. Simplex Specialty Co., 806 F.2d 807, 811 (8th. Cir. 1986)
21 approving Zisman v. Sieger, 106 F.R.D. 194, 197-98 (N.D.Ill.
22 1985). See also Grimaldo v. Reno, 189 F.R.D. 617, 619, (D.Co.
23 1999).

24 Second, the burden on the defendants was not only to
25 raise the objection but to provide support for it. Here,

27 ² This motion may be moot, since it appears that
28 defendants were personally served with the First Amended
Complaint.

1 nothing that the defendants filed in connection with the
2 original motion or belatedly and improperly in their reply³
3 supports the proposition that Menallie Baluyut, the person
4 served by the process server, was not the person apparently in
5 charge of defendants' business. While defendant Rothstein may
6 have been actually in charge of the business, she left Baluyut
7 in charge during her absence.⁴

8 Finally, the motion to dismiss the rescission claim
9 against Estrella Rothstein, the Castaneda's employee, on the
10 grounds that she is an "innocent insured" is **DENIED**. Under
11 California Insurance Code § 650, if a policy has been
12 rescinded, the rescission is effective as to all insured
13 unless the policy provides otherwise. Typically, policies
14 which provide otherwise have a severability provision. TIG
15 Insurance Co. v. Homestore, Inc., 137 Cal.App.4th 749, 759
16 (2006); American Economy Insurance Co. v. Herrera, 2007 WL
17 2696716 (S.D. Cal.); see generally, Recurring Issues in
18 Rescission Cases, 42 Tort Trial and Insurance Practice Law
19 Journal 51, 71-73 (2006). Defendants have not pointed to any
20 severability provision in this policy. To the extent they
21 rely on the provision titled "Representations," it is not a
22 severability provision. Compare for example, section IV(7) of

23
24 ³ In their reply, defendants raised a new argument for
25 the first time, a disfavored tactic. Zamani v. Carnes, 491
F.3d 990, 997 (9th Cir. 2007) (A "court need not consider
arguments raised for the first time in a reply brief").

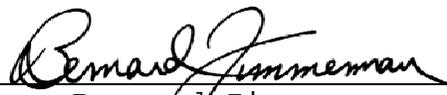
26 ⁴ The California substitute service statute shall be
27 "liberally construed to effectuate service and uphold
28 Bein v. Bechtel-Jochim Group, Inc., 6 Cal.App.4th 1387, 1392
(1992). (internal citation omitted).

1 this policy with section 17 of the policy in In Re
2 HealthSouth, Corp., 308 F.Supp.2d 1253, 1261 (N.D.Ala. 2004).⁵

3 The Court finds no need for argument and **VACATES** the
4 hearing scheduled for **June 30, 2010**. **IT IS ORDERED** that
5 defendant's remaining motions (Doc. 64) are **DENIED**.

6 Defendants shall answer by **July 15, 2001**.

7 Dated: June 24, 2010

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9 _____
Bernard Zimmerman
United States Magistrate Judge

10 G:\BZALL\BZCASES\JAMES RIVER V. DIANA'S CARE HOME\ORDER RE RULING ON DEFS
11 SIX MOTIONS.wpd

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26 _____
27 ⁵ Defendant's reliance on Watts v. Farmers Ins. Exch.,
28 98 Cal.App.4th 1246 (2002) is misplaced since that was not a
rescission action but held that a false claim by one insured
did not bar the legitimate claim of another insured.