

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

WESTERN RESERVE LIFE ASSURANCE	:	
CO. OF OHIO	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JOSEPH CARAMADRE, RAYMOUR	:	
RADHAKRISHNAN, ESTATE PLANNING	:	C.A. No. 09-470-WS
RESOURCES, INC., HARRISON CONDIT,	:	
And FORTUNE FINANCIAL SERVICES	:	
INC.	:	
	:	
Defendants.	:	
	:	
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TRANSAMERICA LIFE INSURANCE	:	
COMPANY,	:	
	:	
Plaintiff,	:	
	:	
WESTERN RESERVE LIFE ASSURANCE	:	
CO. OF OHIO	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 09-473S
	:	
	:	
JOSEPH CARAMADRE, RAYMOUR	:	
RADHAKRISHNAN, ESTATE PLANNING	:	
RESOURCES, INC., DK LLC,	:	
EDWARD HANRAHAN, THE LEADERS	:	
GROUP, INC and JASON VEVEIROS	:	
	:	
Defendants.	:	

**REPLY MEMORANDUM IN SUPPORT OF
MOTION OF DK, LLC FOR DISMISSAL**

The Memorandum in Support of Consolidated Objections to Defendants’ for Reconsideration, Dismissal, and for a more definite Statement (April 25, 2011; Document # 102) (“WRL Memo”), appears to address the motion of DK, LLC for dismissal by incorporation of its previous memorandum, filed November 17, 2010 (Document # 79), in opposition to DK, LLC’s then-pending motion for judgment on the pleadings and for dismissal. *See* WRL Memo at 6, 7. The only issue common to DK, LLC’s erstwhile motion and the instant one is whether WRL’s

second (now third) amended complaint fails to state a claim for which relief can be granted on the legal theory of fraud in the factum. WRL addressed this issue at pp. 24 to 26 of Document # 79.

In its Memorandum of Defendant DK, LLC in Support of Motion for Dismissal of Third Amended Complaint (Document # 121)("DK Memo"), DK, LLC reviewed and explained the case law establishing that fraud in the factum is a doctrine which will relieve a party from its obligations under a contract when it is established that it was induced to sign the contract by misrepresentation regarding its contents or meaning. *See* DK Memo at 6 - 9. WRL's fraud in the factum claim arises from the form signed by the annuitant, Jason Viveiros. *See* Third Amended Complaint ("TAC") at ¶ 51 ("All defendants except Viveiros committed fraud in the factum by concealing the existence, nature and essential terms of the annuity from Viveiros in order to get him to sign the application under which he purportedly agreed to serve as an annuitant"). The TAC does not allege that Mr. Viveiros was induced into signing the form based on a misrepresentation regarding its contents or meaning, but that he signed the form without knowing its contents or meaning. This is a significant difference. It is black letter law that mere ignorance of the terms of an agreement will not relieve a party from being bound to it. *See Shappy v. Downcity Capital Partners, Ltd.* 973 A.2d 40 (2009). It is only when ignorance of the terms is coupled with a demonstration that the signature on the document was procured by misrepresentation regarding the document's meaning that the party can avoid the obligations of a contract that he executed.

WRL has failed to address this argument. Its response does nothing more than repeat the TAC's threadbare allegation that the defendants "conceal[ed] the existence, nature, and essential terms of the annuity from the Annuitants in order to get them to sign the application." Document

79 at 25. That allegation standing alone fails to state a claim for misrepresentation. *See* DK Memo at 8, 9.

The TAC's allegation in this regard also takes considerable liberty with the affidavit that Mr. Viveiros signed. The complaint implies coercion: information was concealed as a means of obtaining the annuitant's signature. The affidavit offers no support to the implication. Its pertinent paragraphs state only that at the time he signed the form Mr. Viveiros did not know that he was entering into an annuity contract (he is correct; he was not, in fact, entering into an annuity contract); and that "[n]either Joseph Caramadre nor anyone else even explained to me how this annuity contract worked or what my role in it was." Mr. Viveiros offers not even the suggestion that he was in any way coerced into signing the form, or that he sought information that was refused.

Moreover, WRL has failed completely to address the fundamental problem that fraud in the factum, if proved, operates only to relieve the party who was fraudulently induced to sign a contract from his own obligations under the contract. Mr. Viveiros, the putative victim of fraud in the factum, is not a party to the Annuity. The form he signed is not a contract. No party is attempting to enforce the terms of any contract on him.

DK, LLC unequivocally argued this point in DK Memo at 7-8. WRL has no response. WRL has offered no legal analysis at all to support its proposition that proof of fraud in the factum regarding Mr. Viveiros's signature on the application would operate to invalidate the contract that was subsequently entered into between it and DK, LLC (and to which Mr. Viveiros is not a party). The sole authority offered by WRL, *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984) (WRL Memo at 25), gives it no assistance. Rather, that decision states clearly and succinctly the principles which DK, LLC argued: "[A] party who

signs a written agreement generally is bound by its terms, even though he neither reads it nor considers the legal consequences before signing it. ... This proposition, however, is qualified by the principle that *he who signs a document* reasonably believing it is something quite different than it is *cannot be bound to the terms of the document.*” *Id.*, 737 F.2d at 1504, citing Restatement (Second) of Contracts, § 32 (1981), E. Farnsworth, *Contracts*, 116 (1982), J. Calamari & J. Perillo, *Contracts*, 332 (2d ed. 1977), and 1 *Williston on Contracts*, § 95A (3d ed. 1957) (emphasis supplied).

There is nothing in the *Operating Engineers* decision that supports WRL’s contention that it may be excused from its obligation under its contract with DK, LLC, based on an infirmity that it alleges to exist in the application form signed by Mr. Viveiros. The Annuity expressly excludes the application form from the contents of the contract.¹

WRL has provided no legal authority whatsoever for its attempt to apply the doctrine of fraud in the factum to the circumstances of this case. Its entreaty that it “ought to be afforded the opportunity to test [its] claim [of fraud in the factum] on the merits,” WRL Memo at 26, ignores the fact that it has failed to demonstrate that the claim has any merits. The instant motions of DK, LLC and the other defendants place the viability of WRL’s allegations as stating a cause of action for fraud in the factum squarely in issue. It was WRL’s burden to establish the legal basis for its claim. Having failed utterly to do so, it has no claim to test.

¹ Section 3 of the Annuity, “General Provisions,” contains the following definitional terms:

THE CONTRACT

This policy, which includes any attached endorsements and riders, constitutes the entire contract between You and Us.

MODIFICATION OF POLICY

No change in this policy is valid unless made in writing by Us and approved by one of Our authorized officers. No agent or registered representative has authority to change or waive any provision of Your policy.

Respectfully submitted,
DK, LLC

By its attorneys,

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CERTIFICATE OF SERVICE

I certify that the within document was electronically filed with the clerk of the court on April 28, 2011, and that it is available for viewing and downloading from the Court's ECF system. Service by electronic means has been effectuated on all counsel of record.

/s/ R. Daniel Prentiss