SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

LAUREN BELLER, as Successor Trustee under The D. Gruber Trust, on behalf of herself and all persons similarly situated,

Plaintiff,

INDEX NO.: 004845/2002
MOTION DATE: 03/30/2007
MOTION SEQUENCE: 004

-against-

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Memorandum of Law in Support of Motion for Summary Judgment of Defendant William Penn Life Insurance Company of New York	2
Affidavit of David J. Orr dated 2/28/07 & Exhibits Annexed	3
Affidavit of David L. White, Jr. dated 2/28/07 & Exhibits Annexed	4
Affirmation of James G. Flynn in Opposition to Defendant's Motion for Summary Judgment & Exhibits Annexed	5
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment	6
Affidavit of William R. Britton, Jr. dated 3/20/07 & Exhibits Annexed	7
Reply Memorandum of Law in Support of Motion for Summary Judgment of Defendant William Penn Life Insurance Company of New York	8
Reply Affidavit of David L. White, Jr. dated 3/28/07 & Exhibit Annexed	9
Affidavit of Bruce W. Winterhof dated 2/27/07	10

Motion by the defendant William Penn Life Insurance Company pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied.

In 2002, the plaintiff Lauren Beller commenced the within, now certified class action alleging, *inter alia*, that the defendant William Penn Life Insurance Company of New York, breached provisions of certain "flexible premium adjustable life insurance" policies (*Beller v. William Penn Life Ins. Co. of New York*, 37 AD3d 747 *see also*, *Beller v. William Penn Life Ins. Co. of New York*, 8 AD3d 310).

Among other things, the plaintiff currently alleges that the defendant failed to conduct – or inadequately conducted – contractually mandated, periodic review of so-called "cost of insurance" factors, or "non guaranteed elements," which would potentially impact upon premium amounts and/or the "Policy Account Value" (Cmplt., ¶ 1).

Significantly, the policy provides in this respect that "cost-of-insurance rates" ["COI's"], "are determined by the Company based on its expectation" of four, non-guaranteed factors: "future mortality; interest; expenses; and persistency." The policy further states that, "[t]he rate for this plan will be reviewed at least once every five years to determine if a change should be made" (Flynn Aff., Exh., "2," Sample Policy, 9-10).

Lastly, the policy advises in part that, "[a] change in rate will be due to a change in the Company's expectation in one or more" of the COI factors referenced above (Sample Policy, 10). Notably, the policy does not contain guidelines identifying how the relevant COI factors are to be reviewed, *i.e.*, it neither quantifies the sort of COI changes which would trigger a rate adjustment nor indicates precisely how specific COI expectations would correlate to potential rate increases or decreases.

There is, however, a "Table of Guarantee Maximum Insurance Rates" included in the policy – although it is undisputed that the COI rates charged have never exceeded the permitted, maximum amounts set forth therein (Sample Policy at 13; Def's Brief at 7; Pltff's Brief at 8).

The defendant now moves for summary judgment dismissing the complaint, asserting, *inter alia*, that the involved rates were never raised, and that in any event it conducted the required review process in a timely and complete fashion, and therefore

discharged its contractual obligations as a matter of law.

In support of its application, and as evidence that the periodic review was conducted, the defendant primarily relies upon: (1) certain belatedly produced "Actuarial Opinions"; and (2) so-called "European Embedded Value" and/or Achieved Profit Reports, which concededly were not prepared for the purpose of dedicated, COI review, but which allegedly include estimates of future experience "implicitly" encompassing or subsuming the pertinent COI factors identified in the policy (Orr Dep., 31-32, 38; Orr [Feb 28] Aff., ¶ 15 *see also*, White Report at 8).

The defendant further argues that undocumented, oral discussions at annual meetings between two of its two actuarial employees (Nancy C. January and Chief Actuary, David J. Orr), should be viewed, as a matter of law, as constituting the policy-mandated, COI review (Def's Brief at 11, 22-23).

In opposing the motion, the plaintiff has submitted an opposing actuarial report which concludes, *inter alia*, that the required periodic policy reviews were never conducted and/or not conducted in accord with applicable actuarial standards and principles, and that a proper review and recalculation of relevant COI assumptions and factors, would yield a class-wide, preliminary damage award of approximately $108,000,000.00 (Britton Report, at 10-14; Britton [March 20] Aff., ¶ 9). The defendant's motion for summary judgment should be denied.

Initially, the Court rejects the defendant's claim that the plaintiff has materially or prejudicially altered its theory of recovery by relying on the assertion that the required periodic reviews were not conducted – as opposed to the allegation that the rates themselves had been affirmatively increased (Def's Brief at 21-22; Cmplt., ¶ 1).

It bears noting that the plaintiff's complaint expressly refers to the defendant's obligation to conduct periodic reviews (Cmplt.,¶ 11), and then incorporates reference to this assertion, into a subsequently pleaded breach of contract cause of action which broadly avers, *inter alia*, that the defendant "breached the terms" of the relevant insurance policies (Cmplt., ¶ 16-17).

Moreover, during a transcribed telephone conference conducted in early of March of 2007, this Court addressed the foregoing claim and expressed its view that it

did not constitute a newly framed theory of recovery (Flynn Aff., Exh., "18" at 13-14)(*cf.,Cannon v. Amarante,* 19 AD3d 1144).

Turning then, to the governing contract language, it is settled that "[t]he tests to be applied in construing an insurance policy are common speech * * * and the reasonable expectation and purpose of the ordinary businessman" (*Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983] *accord, General Motors Acceptance Corp. v. Nationwide Ins. Co.,* 4 NY3d 451, 457 [2005]*; Belt Painting Corp. v. TIG Ins. Co.*, 100 NY2d 377, 383 [2003]; *City of New York v. Evanston Ins. Co.*,___AD3d___ 830 NYS2d 299 [2nd Dept. 2007]; *MDW Enterprises, Inc. v. CNA Ins. Co.*, 4 AD3d 338, 340).

It is settled that unambiguous terms in an insurance policy must be construed in accord with their plain, ordinary meaning and so that no provision is left without "force and effect" (*Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 5 NY3d 157, 162 [2005]*; Lavanant v. General Acc. Ins. Co. of America,* 79 NY2d 623, 629 [1992] *see*, *Mostow v. State Farm Ins. Companies,* 88 NY2d 321, 325-326 [1996]).

On the other hand, "ambiguities in an insurance policy should be construed in favor of the insured and against the insurer, the drafter of the policy language" (*Mostow v. State Farm Ins. Companies*, *supra*, at 326 *see, Belt Painting Corp. v. TIG Ins. Co.*, *supra,* at 383; *Travelers Indem. Co. v. Commerce & Industry Ins. Co. of Canada*, 36 AD3d 1121).

It has been held that where a contract "contemplates the exercise of discretion," it also incorporates a promise to refrain from acting "arbitrarily or irrationally in exercising that discretion," to the extent that "even an explicitly discretionary contract right may not be exercised in bad faith * * *"(*Dalton v. Educational Testing Service*, 87 NY2d 384, 389 [1995]; *Richbell Information Services, Inc. v. Jupiter,* 309 AD2d 288, 302).

Here, the relevant policy language provides – albeit with virtually no explanatory gloss – that the defendant must periodically review the "[t]he rate for this plan" "to determine if a change should be made" based on future expectations pertaining to certain enumerated factors, *i.e.*, future "mortality; interest; expenses; and persistency"

(Sample Policy, 10).

While the policy is cryptic with respect to the precise manner and scope of the "review" to be undertaken by the defendant (*cf., Primavera v. Rose & Kiernan, Inc.*, 248 AD2d 842, 844), the reasonable inference to be drawn from those provisions of the policy which are clear, is that an affirmative COI "review" of the "*rate for this plan*" must be conducted by the defendant to determine "if a change should be made" [emphasis added].

Accordingly, and construing the policy in accord with the "reasonable expectations and purposes of ordinary businesspeople" (*Belt Painting Corp. v. TIG Ins. Co., supra,* at 383; *City of New York v. Evanston Ins. Co., supra*) – the Court finds that the COI review provisions contemplates at the very least: (1) an affirmative obligation to periodically review the factors within the context of the specific policy in question; and (2) subsequent, evaluative conduct with respect to "rates for this plan" based on a good faith review of the enumerated factors contained in the policy.

With these conclusions in mind, and viewing "the evidence in the light most favorable to * * * [the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]), the Court agrees that issues of fact exist as to whether, *inter alia,* the required review of "the rates for this plan" has been actually or properly conducted.

More particularly, while the defendant theorizes, *inter alia*, that the disputed COI review was implicitly conducted as part of its unrelated, "embedded" value reporting process (Orr Aff., ¶ 16), the plaintiff's expert has submitted an opposing actuarial opinion concluding, among other things, that the defendant's "embedded value" reports: (1) are not the contractually prescribed, review of the "rates for this plan;" and (2) in any event, do not contain or properly document the data necessary to perform a meaningful actuarial analysis of the COI factors applicable to the policies at issue (Britton Aff., ¶ 7 *see also*, Pltff's Brief at 15-16).

To be sure, the defendant has challenged the additional conclusions reached, and actuarial methodologies utilized by, the plaintiff's expert, William R. Britton, Jr. However, this Court cannot conclude that Mr. Britton's conclusions are fatally

conclusory, unsupported by any evidentiary foundation or otherwise defectively constituted as a matter of law (*cf., Diaz v. New York Downtown Hosp.* 99 NY2d 542, 544 [2002]). Although the defendant has submitted the opposing opinions of its own actuarial expert, it is settled that conflicting expert opinions are, in general, not amenable to resolution as a matter of law upon a motion for summary judgment (*e.g., Cooper v. City of Rochester*, 16 AD3d 1117; *Pittman v. Rickard*, 295 AD2d 1003, 1004).

The Court similarly disagrees that the defendant has demonstrated its entitlement to judgment as a matter of law based upon: (1) undocumented, apparently *ad hoc,* type, "face-to-face" oral discussions between its actuarial employees (Def's Brief at 11, 22-23; Pltff's Brief at 1-2; 13-14); and (2) the "annual report" materials currently annexed as exhibit "J" to the affidavit of David J. Orr (*see,* Pltff's Brief at 17-18).

It is well settled that summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v. Robbins*, 191 AD2d 488, 489)

Lastly, the Court is unpersuaded by the defendant's assertion that the policy essentially confers unfettered discretion with respect to its review and/or potential adjustment of COI policy rates, *i.e.*, its theory that despite the inclusion of the rate review procedure, "nothing in the Policy language requires COI rates to be reduced under any circumstances whatsoever" (Def's Reply Brief, at 2).

Although the defendant construes the absence of express guidelines or particularized standards as supporting its position, an equally viable inference is that the policy is simply vague and unclear with respect to the precise scope and nature of the CIO review to be undertaken. It is settled that "'[i]f an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the [insured] against the [insurer]'" (*Auerbach v. Otsego Mut. Fire Ins. Co.*, 36 AD3d 840, 841, *quoting from, Hartol Prods. Corp. v. Prudential Ins. Co.*, 290 NY 44, 49 [1943]; *New York v. Evanston Ins. Co., supra see also, Westview*

Associates v. Guaranty Nat. Ins. Co., 95 NY2d 334, 340 [2000]).

Moreover, to adopt the defendant's construction – or to alternatively conclude that rate review is immune from challenge so long as the maximum rates have not been exceeded (Def's Reply Brief at 4) – would render the policy review procedure essentially meaningless, since the defendant could presumably decline to act upon policy rates irrespective of what conclusions it may have drawn from its required review of the enumerated, COI factors. Interpretive analysis which negates contract provisions or otherwise deprives them of "force and effect" is disfavored, especially where, as here, the carrier itself has drafted a rate review procedure whose manner of application is unclear.

The Court has considered the defendant's remaining contentions, and concludes that none has established its entitlement to judgment as a matter of law upon the record presented.

Accordingly, it is,

ORDERED, that the motion by the defendant William Penn Life Insurance Company pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied.

The foregoing constitutes the decision and order of the Court.

Dated: May 22, 2007

J.S.C.