SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 104205/2010
PHOENIX LIFE INSURANCE
vs.
THE ANTONIO ADAM ILIT
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS RECEIVED
JUN 27 2011
ORDER SECTION - RM 119A

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

and Status Conf set
for Oct 13, 2011 at 9:30am

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

Dated: AUG 09 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

Supreme Court of the State of New York
County of New York: Part 10

Phoenix Life Insurance Company,

Plaintiff,

-against-

The Antonio Adam ILIT,

Defendant.

Decision/Order
Index # 104205/10
Mot. Seq. # 002

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion	1
MEF affirm., exhibit	2
SG affd. in opp., exhibits	3
SMR affirm. in opp., exhibits	4
MF affirm. in further support, exhibits	

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, the Antoio Adam ILIT ("Adam Trust") seeks partial summary judgment. Plaintiff, Phoenix Life Insurance Company ("Phoenix") opposes. Issue has been joined and no note of issue has been or is past due to be filed. The motion is, therefore, properly before the court and will be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004); Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 (1st Dept. 2001).

None of the material facts are in dispute. The issue before the court is the remedy available to an insurance party seeking to rescind a life insurance policy ("policy") it previously issued.

In or about March 2008, the Adam Trust purchased a life insurance policy ("policy") from Phoenix on the life of Antonio Adam ("Adam") in the amount of seven million dollars ($7,000,000). There is no dispute that the Adam Trust paid the required premiums. On March 31, 2010, however, Phoenix filed this action claiming that the Adam Trust and Antonio Adam had made material representations relating to Adam's net worth and income in the application to procure insurance.

Phoenix has asserted two causes of action in the complaint for misrepresentation. The first cause of action seeks rescission of the policy and the second cause of action is for a declaratory judgment that the policy is void and unenforceable. The premiums previously paid by the Adam Trust to Phoenix were deposited with the court.

In its complaint Phoenix alleges the following damages in connection with its claim for recision:

> "Phoenix has been damaged as a result of the foregoing material representations, in that incurred expenses and costs in connection with, among other things, its underwriting and issuance of the Policy, payments of commissions and fees in connection with the issuance of the Policy, administration and servicing of the Policy, investigation of the misrepresentations and concealments detailed above and the commencement of this action to enforce its rights." (Complaint ¶ 24).

Adam Trust is willing to agree to the rescission of the policy, but it does not agree that it is legally responsible to pay any of the damages demanded by Phoenix. Indeed Adam Trust believes that if it agrees to rescission, it is entitled to have the paid previously paid premiums refunded. Because Phoenix has refused the tender without the payment of its damages, Adam Trust has moved for partial summary judgment

dismissing, as a matter of law, the damages Phoenix seeks on its cause of action for rescission of the policy. Phoenix claims that this case is not ripe for summary adjudication, but that even if it is, Phoenix argues that where a policy is rescinded based upon the insureds' fraud, the insurer is entitled to offset its costs and/or retain some or all of the commissions.

DISCUSSION

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). When only an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Preliminarily, the court rejects Phoenix's argument that this motion is premature because discovery is not complete. This motion addresses only an issue of law. Phoenix has not shown that the discovery it still seeks would be material and necessary to the issues raised on this motion. Kronish Leib Weiner & Hellman LLP v. Tahari, Ltd., 35 AD3d 317 (1st dept. 2006).

An insurance policy is a contract. Gram v. Mutual Life Ins. Co. Of NY, 300 NY

375 (1950). Rescission of a contract is an equitable remedy that is appropriate when there is no remedy at law. It seeks to put the parties back into the position that they were in prior to the time they entered into the contract. Consequently, it is only available when the pre-contract *status quo* can be substantially restored. Singh v. Carrington, 18 AD3d 855 (2nd dept. 2005). Rescission may be an appropriate remedy where a party was fraudulently induced into entering into a particular contract. Sorbaro Co. v. Captial Video Corp., 245 AD2d 364 (2nd dept. 1997). In such circumstances, the fact that claimed wrongdoer can not be restored to a pre-contract position will not necessarily bar the remedy. Sokolow, Danaud, Mercadier & Carreras v. Lacher, 299 AD2d 64 (1st dept. 2002).

Where a party's claims are based upon a theory of fraudulent inducement, both a claim for rescission and a claim for fraud my be plead in the complaint. By the time of trial, however, the party must choose the theory s/he is proceeding under. Libassi v. Chelli, 206 AD2d 508 (2nd dept. 1994). This is because the remedies are inconsistent, rescission vitiates a contract while a claim of fraud affirms the existence of such contract. Thus, at some point, a party to a lawsuit must elect the remedy it wants to proceed under. Vitale v. Coyne Realty, 66 AD2d 562 (4th dept. 1979).

Where a party elects rescission as opposed to claiming fraud, however, the court is not necessarily restricted against granting other appropriate relief. If complete restoration is impossible, the terms upon which rescission may be granted rest within the sound discretion of the court. Wiebusch v. Hayes, 263 AD2d 389 (1st dept. 1999); Ungewitter v. Toch, 31 AD2d 583 (3rd dept. 1968); Vitale v. Coyne Realty, *supra*; Copland v. Nathaniel 164 Misc2d 507 (Sup Ct. West. Co, 1995); see also Shomron v.

Griffen, 70 AD3d 406 (1st dept. 2010). Rescission, as an equitable remedy, is not so rigid that its rules should be applied in such a way as to become a shield for wrongdoing. Sokolow, Danaud, Mercadier & Carreras v. Lacher, *supra*. The court has the discretion to award damages in lieu of an equitable remedy where equity impracticable or impossible. Wiebusch v. Hayes, *supra*.

There are specific New York cases that deal with the issue of rescission in the context of insurance policies that have been obtained fraudulently. The remedy of rescission is generally available for fraudulently obtained insurance policies. Such a remedy, however, requires that the insured get credit for the premiums previously paid. Micho v. Bankers' Life Ins. Co, 124 AD 578 (1st dept. 1908); La Rocca v. John Hancock Mutual Life Ins., 174 Misc 89 (Sup. Ct. AT 1st dept); Bordon v. Paul Revere Life Ins. Co., 935 F2d 370 (1st Cir., 1991).

The parties' dispute centers around whether, in addition to rescission, Phoenix can also be awarded monetary damages that would put it back into the position that it was in before it issued the policy.

In Mincho v. Bankers Life Ins Co., *supra,* the Appellate Division of this department considered the rights of the parties where an insurance company claimed that the policy it issued had been procured by fraud. It held that if a party seeking to rescind a policy of insurance "has incurred expense, or otherwise incurred damage, by reasons of the fraud, equity will not compel him to pay back all he has received but only such part as remains after deducting his loss." Notwithstanding that Mincho is a very old case, the rule of law is still valid. It is consistent with the general propositions of law related to rescission, as stated above, that the terms of rescission may include

alternative or additional relief to restore the parties to a pre-policy *status quo*. Wiebusch v. Hayes, *supra*; Ungewitter v. Toch, *supra*. It was also recently relied upon in the May 17, 2010 Report and Recommendation of Magistrate Pollack in the case of John Hancock Life Insurance v. Meer (09 CV 2561) in denying an insured's motion to strike a claim to retain premiums as an offset against damages.

Contrary to the arguments of Adam Trust, the decision in LaRocca, *supra*, does not overrule Mincho, *supra*. In Larocca the court only considered the question about whether premiums should be returned if an insurance policy is rescinded. In this regard, it decided the question, consistently with Mincho, that the premiums should be returned. Larocca did not consider the further issue addressed in Mincho, about whether the insurance company could recover its costs in issuing the policy, while still seeking the remedy of rescission. Mincho not only answered that question in the affirmative, but indicated that the costs could be taken as an offset against the premiums that otherwise should be returned to the insured. The two decisions, in this court's judgment, are harmonious. Even were they not, Mincho, decided by the Appellate Division cannot be overruled, implicitly or otherwise, by Larocca, which was decided by the Appellate Term, a court of lower jurisdiction.

Further the October 27, 2010 decision in PHL Variable Insurance Company v. Gelb (10 C 957) relied upon by the Adam Trust is unpersuasive. That decision was made in a case pending in the United States District Court, Northern District of Illinois. It analyzed the application of Illinois state law.

Applying the rules of law stated above to the instant case, the court holds that the motion for partial summary judgment must be denied. Phoenix, by seeking the

remedy of rescission, has not foreclosed an award of money damages, flowing from Adam's Trusts' claimed fraud, and which may be necessary to restore Phoenix to its pre-contract position. In this regard, the court is not holding that Phoenix necessarily is entitled to these damages. The court is only holding that Phoenix is not foreclosed, as a matter of law, from proving entitlement to these damages at trial.[1]

Conclusion

In accordance with the foregoing,

It is hereby:

ORDERED that the defendant's motion for partial summary judgment is denied in its entirety and it is further

ORDERED that the case is set for a status conference on **October 13, 2011 at 9:30 a.m.**, no further notices will be sent to the parties and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
August 9, 2011

SO ORDERED:

J.G. J.S.C.

[1]Not argued and, therefore, not considered, is whether Phoenix' claim for attorneys fees in this action is otherwise barred by application of the American Rule Chapel v. Mitchell, 84 NY2d 345 (1994).