Krausz v First Central Natl. Life Ins. Co. of N.Y.
2014 NY Slip Op 33013(U)
November 19, 2014
Sup Ct, Kings County
Docket Number: 503318/13
Judge: Karen B. Rothenberg

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of November, 2014.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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MANUEL KRAUSZ, AS TRUSTEE OF THE CHAIM KOMPEL 100 FAMILY TRUST,

Plaintiff,

- against -

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FIRST CENTRAL NATIONAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memoranda of Law	4, 5, 6

Upon the foregoing papers, plaintiff Manuel Krausz, as trustee of the Chaim Kompel 100 Family Trust (plaintiff or plaintiff Trust) moves for an order pursuant to CPLR 3211 (a)(7), 3211 (b), and 3212, dismissing the defenses and counterclaim of defendant Pavonia Life Insurance Company of New York f/k/a First Central National Life Insurance Company

of New York and operating under the trade name HSBC (Pavonia or defendant) and awarding plaintiff summary judgment.

On May 6, 2009, a life insurance application was electronically submitted to Pavonia seeking to insure the life of Chaim Kompel in the amount of $500,000 for a 15-year term. The application listed Mr. Kompel's address as 4403 15th Avenue, Brooklyn, N.Y. and also provided his social security number. On that same date, after an initial premium payment was made electronically with a credit card, Pavonia issued a 15-year term life insurance policy in the amount of $500,000 which listed Mr. Kompel as the named insured and owner of the policy (the policy). The policy further listed the Chaim Kompel 100 Family Trust (the plaintiff Trust or the Trust) as the primary beneficiary of the policy. Mr. Kompel, who was 60 years old at the time the policy was issued, did not submit to a physical examination prior to the issuance of the policy. Among other things, the policy contained the statutorily-required incontestability clause stating that: "[e]xcept for non-payment of premiums, this Policy will be incontestable after it has been in force for two years during the lifetime of the Insured after its Policy Date."

On August 25, 2011, more than two years after the May 6, 2009 policy date, Mr. Kompel died in Los Angeles, California. On July 10, 2012, the Trust submitted a completed claim form to Pavonia seeking payment under the policy. Thereafter, there were numerous exchanges between the Trust and Pavonia regarding payment of the claim but Pavonia repeatedly advised the Trust that the claim was still being evaluated.

On or about June 17, 2013, plaintiff commenced the instant action against Pavonia by filing a complaint alleging that Pavonia is contractually obligated to pay the Trust $500,000 under the terms of the policy and that Pavonia is in breach of this contractual obligation. On January 28, 2014, Pavonia joined issue and interposed an answer generally denying the allegations in the complaint. In addition, the answer contained several affirmative defenses including claims that the action was barred as a result of fraud, that the policy was void as an illegal wagering contract, and that the policy was void due to a lack of an insurable interest at inception. Finally, the answer contained a counterclaim seeking a judgment declaring that the underlying policy lacked an insurable interest at inception and is therefore void *ab initio*. In particular, the counterclaim alleges that the policy is a so-called stranger originated life insurance or "STOLI" policy. In this regard, the counterclaim avers that plaintiff Manuel Krausz approached Mr. Kompel at some point prior to the policy date and the two entered into a scheme whereby Mr. Kompel would apply for the Pavonia policy and conceal his intent to sell the policy to an investor in the secondary market. The counterclaim also alleges that the Trust was not created for financial planning or any other legitimate purpose, but rather, was fraudulently created to transfer the policy to an investor in the secondary market. Finally, the counterclaim alleges that, although the policy application was purportedly reviewed and signed in New York, Mr. Kompel did not read the policy application and did not participate in the procurement of the policy as he was not in New York at the time the application was submitted.

Plaintiff now moves, pursuant to CPLR 3211 (a) (7), 3211 (b), and 3212 dismissing the defenses and counterclaim of Pavonia and awarding it summary judgment. In so moving, plaintiff argues that, even accepting all of Pavonia's allegations in the answer as being true, the Trust is entitled to judgment because the policy is incontestable. In this regard, plaintiff points to the incontestability clause in the policy which is required pursuant to Insurance Law § 3203 (a) (3). According to plaintiff, the passage of the two year contestability period in the clause renders the policy immune to Pavonia's attacks. In particular, plaintiff argues that under relevant case law, after the incontestability period closes, the policy may not be attacked by the insurer on any grounds, including fraud or lack of an insurable interest.

Alternatively, plaintiff contends that even if the policy is contestable, there is an insurable interest in this case as a matter of law. In support of this argument, plaintiff relies upon the Court of Appeals' ruling in *Kramer v Phoenix Life Ins. Co.*, (15 NY3d 539 [2010]). In particular, in *Kramer*, the Court ruled that Insurance Law §§ 3205 (b) (1) and (b) (2) did not prohibit an insured from procuring a policy on his own life and immediately transferring the policy to a person without an insurable interest even though the policy was obtained for just such a purpose. According to plaintiff, this is precisely what the counterclaim alleges that Mr. Kompel did when he procured the policy. Under the circumstances, plaintiff contends that the counterclaim must be dismissed.

In opposition to plaintiff's motion, Pavonia maintains that an incontestability clause in a life insurance policy does not bar the insurer from challenging the policy where, as here,

an imposter submitted the underlying application for the policy inasmuch as the named insured is a stranger to the contract and cannot benefit from the incontestability clause. In support of this claim, defendant notes that it specifically alleged in its answer that Mr. Kompel did not read the application, did not participate in the procurement of the policy, and was not in New York at the time the application was submitted. Pavonia also points out that both the policy application and first premium payment were submitted electronically and that the Social Security number listed for Mr. Kompel on the application differed from the Social Security listed on his death certificate. Pavonia also argues that New York courts have specifically contemplated that public policy concerns may preclude enforcement of an uncontestability clause under certain circumstances. In particular, Pavonia points to the Court of Appeals' ruling in *New England Mut. Life Ins. Co. v Caruso*, (73 NY2d 74 [1989]). In that decision, the Court noted that "a decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties" (*id.*, at 81). The Court further stated that in the case of an incontestability clause, the public policy concern "is the general public interest in preventing gambling and, in . . . compromising public safety by furnishing a temptation to bring about the event upon which payment is conditioned" (*id.*). Here, Pavonia maintains that, inasmuch as the policy was fraudulently procured by an imposter, public policy requires an exception to the application of the

incontestability clause inasmuch as the insured Mr. Kompel "unknowingly served as a pawn in an illegal transaction intended to gamble on his life."

As a preliminary matter, the court must determine whether or not the plaintiff Trust may avail itself of the incontestability clause in the underlying life insurance policy. In making this determination, the court initially notes that it must liberally construe the pleadings in favor of Pavonia and give it the benefit of every reasonable inference (*Mazzei v Kyriacou*, 98 AD3d 1088, 1088-1089 [2012]; *Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1255 [2012]). In particular, the court must take at face value Pavonia's claim that the policy was procured without Mr. Kompel's participation or knowledge. In this regard, the court notes that, to some extent, this claim is contradicted by the allegations in Pavonia's own pleadings. Specifically, paragraph 15 and 16 of Pavonia's counterclaim allege that Mr. Kompel was an active participant in a plan to obtain the policy and thereafter sell the policy to outside investors. However, in paragraphs 29 and 30 of the counterclaim, Pavonia alleges that Mr. Kompel did not read or sign the policy application, or participate in the procurement of the policy. Thus, inasmuch as the court must construe Pavonia's pleadings liberally, the answer and counterclaim sufficiently allege that the policy was procured with Mr. Kompel's consent, participation, or knowledge.

Turning to the incontestability clause itself, Insurance Law § 3203 (a) (3) specifically requires that all life insurance policies contain such a clause, which fixes the insurer's promise to pay benefits upon maturity if the policy is in force for a period of two years during

the life of the insured and the premiums have been paid (*New England Mut. Life Ins. Co*, 73 NY2d at 78). Here, it is undisputed that the policy was in force for more than two years prior to Mr. Kompel's death and that the premiums on the policy were paid in full. Thus, the issue is whether or not the Trust is entitled to enforce the incontestability clause in the policy or whether some exception to enforcement of the clause exists. In this regard, the general rule is that the expiration of the contestability period precludes an insurer from denying a claim. As the Court of Appeals stated, after the two-year period of time, "the insurer's conditional promise to pay benefits shall become absolute. The requirement rests on the legislative conviction that a policyholder should not indefinitely pay premiums to an insurer, under the belief that benefits are available, only to have it judicially determined after death of the insured that the policy is void because of some defect existing at the time the policy was issued" (*id.*). Thus, in *New England Mut. Life Ins. Co.* (73 NY2d at 82-83), the Court determined that an incontestability clause in a life insurance policy operated to bar an insurer's claim that the policy was unenforceable because the owner and beneficiary of the policy lacked an insurable interest in the life insured under the policy (*id.*). Other courts have held that, once the two-year contestability period has run, an insurer may not avoid paying a claim based upon alleged fraudulent misrepresentations in the policy application (*Johnson v Metropolitan Life Ins. Co.*, 79 AD3d 450 [2010]; *Ilyaich v Bankers Life Ins. Co. of N.Y.*, 47 AD3d 614 [2008]; *see also New England Mut. Life Ins. Co. v Doe*, 93 NY2d 122 [1999]). In such cases, the onus is on the insurer to investigate the veracity of the representations in

the application during the two-year contestability period or otherwise protect itself by including a fraudulent misstatement exception within the incontestability clause.

Notwithstanding the general rule that the expiration of the contestability period precludes an insurer from denying a claim, a narrow exception to this rule exists when the policy is taken out by an imposter posing as the named insured since the incontestability clause may not be raised by a party that is a stranger to the policy or by a party that is assigned ownership by a stranger to the policy (*American Mayflower Life Ins. Co. of New York v Moskowitz*, 17 AD3d 289, 292 [2005]; *Halberstam v United Stated Life Ins. Co. in the City of New York*, 36 Misc 3d 497, 500 [2012]; *see also Berkshire Settlements, Inc. v Ashkenazi*, 09-CV-0006 FB JO, 2011 WL 5974633 [EDNY 2011]). In this regard, "the provisions for incontestability inure to the benefit of the insured and his beneficiary, or to the benefit of a bona fide assignee, but not a stranger" (*American Mayflower Life Ins. Co. of New York*, 17 AD3d at 292).

Here, even if the application for the policy was submitted by an imposter posing as Mr. Kompel as Pavonia alleges, it cannot be said that the plaintiff Trust was a stranger to the policy. In this regard, it is undisputed that the Trust has been listed as the primary beneficiary since the inception of the policy. Consequently, the Trust has the benefit of, and may otherwise rely upon the incontestability clause in the policy.

Having determined that the Trust is entitled to the benefit of the incontestability clause, the court further finds that Pavonia's counterclaim seeking to void the policy based

upon a lack of an insurable interest fails to state a cause of action. In particular, as previously noted, the Court of Appeals has determined that once the contestability period expires, an insurer may not deny a claim on a life insurance policy based upon the lack of an insurable interest on the part of the policy owner or beneficiary (*New England Mut. Life Ins. Co*, 73 NY2d at 78). Accordingly, that branch of plaintiff's motion which seeks to dismiss Pavonia's counterclaim pursuant to CPLR 3211 (a) (7) and CPLR 3211 (b) is granted.

As a final matter, it is clear that Pavonia's remaining affirmative defenses are precluded by the incontestability clause. In particular, Pavonia's affirmative defenses are based upon allegations that the Trust committed fraud and/or that it lacked an insurable interest. However, as previously noted, once the two-year contestability period closed, allegations of fraud and/or lack of an insurable interest may not serve as a basis for an insurer to deny a claim under a life insurance policy (*New England Mut. Life Ins. Co*, 73 NY2d at 78; *Johnson*, 79 AD3d at 450 [2010]; *Ilyaich*, 47 AD3d at 614; *Security Mut. Ins. Co. of N.Y. v Herpaul*, 36 AD3d 449, 451 [2007]).

Accordingly, plaintiff Trust is entitled to summary judgment against Pavonia in the amount of $500,000 plus interest at the statutory rate of 9% from the date of Mr. Kompel's death.

This constitutes the decision and order of the court.

E N T E R,

J.S.C. Karen B. Rothenberg
Justice, Supreme Court

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