Ruiz v First Inv. Life Ins. Co.
2020 NY Slip Op 31967(U)
June 15, 2020
Supreme Court, Suffolk County
Docket Number: 15-6474
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 15-6474
CAL. No. 18-02180-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 5/16/19
ADJ. DATE 10/31/19
Mot. Seq. #001 - MotD

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DONNA RUIZ, Individually and as the Administrator of the Estate of ANTHONY RUIZ, Deceased,

Plaintiff,

- against -

FIRST INVESTORS LIFE INSURANCE COMPANY,

Defendant.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-21 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22-31 ; Replying Affidavits and supporting papers ____; Other defendant's memorandum of law; plaintiff's memorandum of law; defendant's reply memorandum of law; it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and declaring that the defendant properly rescinded a life insurance policy issued to Anthony Ruiz, the plaintiff's deceased husband, is granted to the extent indicated below, and is otherwise denied .

By way of this action, the plaintiff seeks to recover the proceeds of an insurance policy issued on the life of Anthony Ruiz. It appears that the policy was issued by the defendant on or about November 18, 2013, that the plaintiff was the owner of and named beneficiary under the policy, that premiums were duly paid, and that Anthony Ruiz died on July 9, 2014, within the policy's two-year contestability period. According to the death certificate, the decedent's cause of death was "Hypertensive Heart Disease Complicating Obesity."

Following the death, the plaintiff submitted a claim under the policy. By letter dated August 29, 2014, excerpted below, the defendant advised the plaintiff of its finding, based on an examination of

records from the decedent's treating cardiologist, that the decedent had failed to disclose in his application recent and significant medical history relating to a heart condition, and of its resulting determination to deny the claim on the basis of a material misrepresentation and to rescind the policy.

Specifically, Part I of the application contained this question 15c:

> Has the proposed insured consulted a physician or medical practitioner for heart trouble, high blood pressure, cancer, diabetes, lung, kidney or stomach disorder within the last ten (10) years?
>
> The question was answered "yes" with an explanatory remark: "Controlled borderline hypertension, routine visit Dr. Coudrey."

In addition, Part II of the application contained this question 8:

> Has the proposed insured had an electrocardiogram, x-ray or other diagnostic examination within the past 10 years?
>
> The question was answered "yes" with an explanatory remark: "6/12, Dr. Coudrey, Routine visit – x-ray, ecco (*sic*) cardiogram, everything O.K."

In the course of our claim investigation, the medical records obtained from Dr. Laura Coudrey provided the following information:

1. On 5/29/13, Mr. Ruiz was evaluated for a loud heart murmur, Grade 3, with radiation to the neck. Additional testing was ordered.
2. On 6/17/13, an echocardiogram review reported concentric left ventricular hypertrophy (LVH) and an enlarged left atrium with a question of patent foramen ovale.
3. On 6/19/13, normal stress electrocardiogram and echocardiogram reported LVH and septum thicker than posterior wall.
4. On 6/24/13, impression noted idiopathic hypertrophic subaortic stenosis.
5. On 8/12/13, impression noted was LVH with basal septal hypertrophy.

The declaration of the application of "Controlled borderline hypertension, routine visit Dr. Coudrey" does not provide adequate disclosure of the recent history as described above. Had the Company been aware of this material information, in accordance with our normal underwriting standards, the policy would not have been issued as applied for.

This action followed, with the plaintiff seeking to recover, *inter alia*, proceeds due in the principal amount of $250,000.00.

The plaintiff pleads three causes of action in her complaint. The first is for breach of contract, based on the defendant's refusal to pay the proceeds due under the policy and alleging that the reasons given by the defendant for its refusal were "false." The second is based on the claim that the decedent's medical condition was fully and timely disclosed to the defendant, that any deficiencies in the application

were the result of the defendant's own failures and, therefore, that the defendant should be estopped from asserting any defense of fraud or misrepresentation by the plaintiff or the decedent in the insurance application process. The third, which is pleaded in the alternative, alleges the defendant's fraud and deceit in procuring the decedent's signature on the application. In its answer, the defendant denies the material allegations set forth in the complaint, and asserts a counterclaim for judgment declaring that its decision to rescind the policy was appropriate and that the plaintiff is not entitled to recover any proceeds under the policy.

Now, discovery having been completed, the defendant timely moves for summary judgment. The defendant contends that it was entitled to deny the plaintiff's claim and rescind the policy based on the decedent's failure to disclose his heart condition, together with his sworn statement that the disclosures in his application were full, true, and complete, and because, pursuant to relevant underwriting guidelines, it would not have issued the standard rate policy it did if the decedent had disclosed the material health information he withheld; had it issued a policy at all, it would have been at substandard rates resulting in substantially higher premiums.

In support of its motion, the defendant submits, *inter alia*, a copy of the policy, annexed to which is a copy of the decedent's application for life insurance (the plaintiff does not challenge its authenticity); copies of the decedent's records from his treating cardiologist, Dr. Coudrey, referencing various aspects of the treatment of the decedent's heart condition, including the loud murmur, concentric left ventricular hypertrophy, and enlarged left atrium; the file maintained by the defendant relative to the policy and the plaintiff's claim for the proceeds of the policy; and the relevant underwriting guidelines. The defendant also submits a copy of the transcript of the deposition of Glen Mueller, the defendant's chief underwriter.[1] Referring to the medical records and to the guidelines, he testified that a standard policy would not be issued if testing demonstrated an actual murmur—according to Dr. Coudrey's records, the decedent's June 17, 2013 echocardiogram demonstrated a murmur with a related diagnosis of mild aortic stenosis—and that a diagnosis of left ventricular hypertrophy, as here, would likewise warrant a substandard rating and an increased premium for the same level of coverage. He also testified that, had the decedent indicated in the application that he had a heart condition, the defendant would have requested medical reports from his treating physicians. According to his testimony, the decedent was not insurable at the standard rate, and his policy would have been issued at a substandard rate had he properly disclosed the relevant information on his application.

"To establish its right to rescind an insurance policy, an insurer must show that the insured made a material misrepresentation when he or she secured the policy" (***Novick v Middlesex Mut. Assur. Co.***, 84 AD3d 1330, 1330, 924 NYS2d 296, 296 [2011]). "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (***Zilkha v Mutual Life Ins. Co. of N.Y.***, 287 AD2d 713, 714, 732 NYS2d 51, 52 [2001]). "To establish materiality as a

[1] In addition to the redacted copies of the papers filed in the public record, the court has also reviewed and considered the unredacted, unfiled copies furnished separately to chambers pursuant to the agreement of the parties, which copies shall be returned to the attorneys after the court reopens.

matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (***Schirmer v Penkert***, 41 AD3d 688, 690-691, 840 NYS2d 796, 799 [2007]).

Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating, through its evidentiary submissions (unredacted and otherwise), that it would not have issued the subject policy to the decedent had the relevant information pertaining to his heart condition been disclosed in the application (*see* ***Varshavskaya v Metropolitan Life Ins. Co.***, 68 AD3d 855, 890 NYS2d 643 [2009], *lv denied* 14 NY3d 710, 903 NYS2d 769 [2010]).

The plaintiff, in opposition, failed to raise a triable issue of fact. The plaintiff acknowledged in her deposition testimony that by June 2013, she and her husband were aware that he had been diagnosed with a heart murmur, the diagnosis having been confirmed by Dr. Coudrey. Although she now claims in her opposing affidavit that she believed, by time of their first interview with the defendant's agents in September 2013, that the condition had been resolved following a course of treatment and medication, this would not have excused the decedent, as required, from disclosing on the application that it had existed and that he had received treatment for it. Instead, he stated in his answer to question 8 of Part II of the application that he had undergone a echocardiogram (on "6/12," which, according to the plaintiff, means on or about June 12, 2013) but indicated that "everything [was] o.k.," thereby failing to disclose that the echocardiogram revealed or confirmed the existence of the murmur. She also claims that she specifically advised the defendant's agents at the first interview about the decedent's "enlarged ventricles" but that this information was not ultimately reported on the application. Assuming the truth of her claim, it still does not appear that the defendant was ever advised of the heart murmur, a condition which, according to Glen Mueller's unchallenged deposition testimony, would have independently precluded the issuance of a standard policy. And even if, as the plaintiff further claims, the application did not specifically ask whether the decedent had any abnormal heart conditions, it did ask whether he had undergone any diagnostic testing within the past 10 years, to which he responded "yes," referring to the echocardiogram—but he did not accurately disclose the result of that testing. As to the plaintiff's claim that the language in the application providing that the decedent's answers are full, complete and true "to the best of [his] knowledge" somehow constitutes a waiver of the defendant's statutory right to rescind the policy based on a material misrepresentation (*see* Insurance Law § 3105), it again suffices to note the plaintiff's deposition testimony that she and the decedent were aware of the heart murmur by June 2013, so that this information was within their knowledge at the time the application was prepared. The court has reviewed the plaintiff's remaining arguments and finds them insufficient to defeat summary judgment.

Accordingly, the defendant is entitled to summary judgment, although not to the extent requested in the notice of motion. The plaintiff's first cause of action stands in direct conflict with the counterclaim—as to which summary judgment is clearly warranted—and the plaintiff's second cause of action is nothing more than a subset of the first. Nowhere in the defendant's papers, however, does it address the plaintiff's third cause of action, which pleads, in effect, that the plaintiff was

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fraudulently induced to enter into an insurance contract. In theory, were the plaintiff to obtain a finding of the defendant's liability on the third cause of action, this would not entitle her to the proceeds of the policy but only the return of premiums paid, and the court presumes this was already done; however, the plaintiff also seeks an award of punitive damages. The court finds, therefore, that the plaintiff's third cause of action survives summary judgment, and the defendant's motion is granted only to the extent of granting summary judgment in its favor on its counterclaim for judgment declaring that its decision to rescind the policy was appropriate and that the plaintiff is not entitled to recover any proceeds under the policy, and dismissing the first and second causes of action.

The court directs that the claims as to which summary judgment is granted are hereby severed and that all remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: May 15, 2020

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**