

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEW YORK LIFE INSURANCE CO.	:	CIVIL ACTION
	:	
v.	:	
	:	
ARTHUR TERRY DALY	:	95-6702

MEMORANDUM AND ORDER

HUTTON, J.

October 10, 2001

Presently before the Court are Plaintiff New York Life Insurance Company's Motion for Summary Judgment and accompanying Memorandum of Law (Docket No. 21) and Defendant Arthur Terry Daly's Answer to Plaintiff's Motion for Summary Judgment and accompanying Memorandum of Law (Docket No. 23). After full consideration of the arguments, Plaintiff's motion is **DENIED**.

**I. BACKGROUND**

Plaintiff New York Life Insurance Company ("New York Life") is a mutual life insurance company that issued two insurance policies to the Defendant, Arthur Terry Daly ("Daly"), an attorney who practiced personal injury law in Philadelphia. Daly submitted his first application to New York Life for a Premier Disability Income Policy on May 8, 1989, followed by a second application for professional overhead expenses ("POE") in November of 1992. New York Life issued Daly the policies with coverage effective May 9, 1989 and April 1, 1993 respectively.

Prior to Daly's application for POE insurance, an investigating Grand Jury in Philadelphia County returned its first

of three Presentments against Daly, concluding that Daly should be charged with a number of criminal offenses<sup>1</sup> in connection with his handling of six personal injury cases from 1986 through 1992. The Grand Jury returned a second Presentment on November 30, 1992 recommending additional charges be filed against Daly for his handling of two more cases between 1983 and 1993, and Daly was again arrested on December 4, 1992. Finally, on March 10, 1993, the Grand Jury returned a third and final Presentment resulting in Daly's arrest on March 12, 1993.

Daly executed a proof of claim for benefits under the disability insurance policy on October 20, 1993 in which he claimed he had become totally disabled on May 3, 1993 due to depression and paranoia. New York Life paid this claim from July 9, 1993 to April 30, 1995 for a total of \$167,633.33. Daly checked himself into a psychiatric hospital on June 9, 1993 and remained there until June 1, 1994. On October 22, 1993, the Pennsylvania Supreme Court indefinitely suspended Daly's license to practice law.

In October of 1995, New York Life brought the instant action seeking declaratory relief on the issue of whether Daly is entitled to benefits under the policies. In December of 1996, the Court granted Daly's motion to stay the proceedings pending the conclusion of the criminal case. This action was placed in Civil

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<sup>1</sup> The charges included criminal conspiracy, solicitation to commit perjury, theft by deception, tampering with public records, perjury, criminal attempt to commit theft, and false swearing.

Suspense in June of 1997. On March 13, 2000, Daly pled guilty to one count of conspiracy, four counts of criminal solicitation, three counts of tampering with public records, four counts of theft by deception, and one count of theft by failure to properly dispose of funds. New York Life filed this Motion for Summary Judgment on April 5, 2001.

## II. LEGAL STANDARD

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Ultimately, the moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. See id. at 325. Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A

fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. See id.

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nevertheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The court's inquiry at the summary judgment stage is the threshold inquiry of determining whether there is a need for a trial, that is, whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See Anderson, 477 U.S. at 250-52. If there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of the plaintiff, that is enough to thwart imposition of summary judgment. See id. at 248-51.

### **III. DISCUSSION**

Where federal jurisdiction is based on diversity of citizenship, as it is here, the district court must apply the

choice of law rules of the state in which it sits. St. Paul Fire & Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 n.3 (3d. Cir. 1991)(citation omitted). Under Pennsylvania law, an insurance contract is governed by the law of the state in which the contract was made. Crawford v. Manhattan Life Ins. Co. of N.Y., 208 Pa. Super. 150, 154, 221 A.2d 877, 880 (1996). An insurance contract is made at the place of delivery. Centennial Ins. Co. v. Meritor Savings Bank, Inc., 1992 WL 164906, at \*2 (E.D. Pa. June 2, 1992). Here, Daly was a Pennsylvania resident when New York Life issued him the insurance policies for his law practice, also located in Pennsylvania. Neither party disputes the fact that Pennsylvania law applies to the policies at issue.

**A. Insurable Interest**

New York Life first contends that it is entitled to summary judgment because the policies are void ad initio for lack of an insurable interest. See Pl.'s Mot. Summ. J. at 7. According to New York Life, Daly lacked an insurable interest because he obtained the policies to protect an "illegal income stream." Id. Daly counters that from 1985 to 1993, he received legitimate income from his occupation as a personal injury lawyer, and thus had an insurable interest in his legal practice. See Def.'s Answer to Pl.'s Mot. Summ. J. at 5-6.

Under Pennsylvania law, in order for a person to recover on an insurance policy, a valid contract of insurance must exist.

Shockley v. Harleysville Mut. Ins. Co., 381 Pa. Super. 287, 291, 553 A.2d 973, 974 (1988). An insurance contract is valid if, among other things, the policy owner possesses an insurable interest. Commonwealth v. Rodebaugh, 102 Pa. Cmwlth. 592, 607, 519 A.2d 555, 563 (1986). One who "derives pecuniary benefit or advantage from the preservation or continued existence of [] property or who will suffer pecuniary loss from its destruction" has an insurable interest. Luchansky v. Farmers Fire Ins. Co., 357 Pa. Super. 136, 138, 515 A.2d 598, 599 (1986). Since "the requirement of an insurable interest arose to prevent the use of insurance for illegitimate purposes," New York Life contends the policies should be void ab initio. Pl.'s Mot. Summ. J. at 7 (citing Luchansky, 515 A.2d at 599).

Here, Daly raises a genuine issue of material fact as to whether he had an insurable interest in legitimate income made from his legal practice. Daly has averred that his legal practice generated substantial income, not from illegal activity, but from his handling of personal injury cases and referring cases to other lawyers. See Aff. of Arthur Terry Daly at ¶ 7. It is uncontested that Daly plead guilty to crimes committed through his legal practice. However, New York Life has produced no evidence to contradict Daly's statement that he also received legitimate income during the relevant time period. Under Pennsylvania law, "whether a person has an insurable interest is [generally] an issue to be

decided by the finder of fact." Alberici v. Safeguard Mut. Ins. Co., 444 Pa. Super. 351, 357, 664 A.2d 110, 112 (1995); Campbell v. Royal Indem. Co. of N.Y., 256 Pa. Super. 312, 315, 389 A.2d 1139, 1141 (1978). Drawing all reasonable inferences in the light most favorable to Daly, the Court concludes that a genuine issue of material fact exists as to whether Daly had an insurable interest. Accordingly, summary judgment on Count V is denied.

**B. Public Policy**

New York Life next contends that public policy precludes coverage under the instant insurance contracts. As this Court noted, considerations of public policy may preclude coverage under an insurance contract even if the policy is not void for illegality. See New York Life Ins. Co. v. Daly, No. Civ. A. 95-6702, 1996 WL 153665, at \*1 (E.D. Pa. Apr. 2, 1996). Nevertheless, in order to determine whether public policy precludes coverage under an insurance contract, courts must evaluate four factors: (1) whether the insurance contract was procured in contemplation of the wrongful activity; (2) whether the insurance contract might be said to promote the wrongful activity; (3) whether denying coverage would serve as a deterrent; and (4) whether the insurance contract saves the insured from the consequences of wrongful acts. See Eisenman v. Hornberger, 438 Pa. 46, 50, 264 A.2d 673, 675 (1975); Aetna Life & Cas. Co. v. McCabe, 556 F.Supp. 1342, 1352-53 (E.D. Pa. 1983).

Applying these four factors, New York Life contends that Daly procured the insurance policies in contemplation of, and in the midst of, illegal activity. See Pl.'s Mot. at 9. In addition, New York Life argues that permitting Daly to insure illegal income would promote such wrongful activity, whereas denying coverage would deter the insurance of illegal income. Id. Finally, according to New York Life, permitting Daly to obtain insurance benefits would save him from the consequences of his wrongful act.

The Court recognizes that some courts have voided insurance claims based on public policy where the insured has committed criminal acts. See Mass. Mut. Life Ins. Co. v. Ouellette, 617 A.2d 132, 135 (Vt. 1992) ("Imposing liability on disability insurance companies in cases like this would be contrary to the public interest in discouraging coverage for an insured's own intentional criminal conduct.") (citation omitted). Other courts, most notably in this Circuit, have declined to do so, finding that the insured is not seeking coverage for liability arising from criminal conduct, but because of a condition the insured alleges rendered him disabled to practice his profession. See Grayboyes v. Gen. Am. Life Ins. Co., Civ. A. No. 92-2515, 1995 WL 156040, at \*7 (E.D. Pa. Apr. 4, 1995) ("The court rejects defendant's argument that to allow plaintiff to recover benefits 'would violate the strong public policy against allowing insurance coverage for conduct that is criminal.'"). Moreover, Pennsylvania cases have expressly



rejected the public policy in denying recovery where the insured was involved in culpable conduct. See Eisenman, 264 A.2d at 675; Wetzel v. Westinghouse Elec. Corp., 258 Pa. Super. 500, 504, 393 A.2d 470, 472 (1978). Here, the evidence demonstrates that there is a genuine issue of material fact as to whether Daly procured insurance policies in contemplation of his illegal activity, or, as Daly contends, to protect his legitimate income in the event of a disability. While it is undisputed that Daly pled guilty to charges that he engaged in illegal practices during the time he purchased insurance, it is not conclusive, as New York Life contends, that he obtained the policies solely to protect his illegal income. The question of Daly's motive and intent in purchasing insurance policies is more properly determined by a trier of fact who, unlike the Court upon this current motion, may properly weight the credibility and weight of the evidence. Moreover, it cannot be said that denying coverage in this case would deter the criminal conduct that took place. Nor can it be said that providing Daly insurance benefits would save him from the consequences of his actions since "the consequences of Mr. Daly's illegal act is imprisonment." Def.'s Answer to Pl.'s Motion for Summ J. at 7. Accordingly, summary judgment on Counts III and IV is denied.

**C. Fraudulent Misrepresentation**

Next, New York Life contends that summary judgment should be

granted on Counts VIII and IX because Daly fraudulently misrepresented himself as an attorney on his insurance application.<sup>2</sup> Pl.'s Mot. at 11. Under Pennsylvania law, in order to rescind an insurance contract for fraud, an insurer must show that (1) there was a misrepresentation in the insurance application; (2) the misrepresentation was material to the risk insured; and (3) the applicant knew the statement was true when made or otherwise acted in bad faith in making an untrue statement. New York Life Ins. Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991); Royal Indem. Co. v. Deli by Foodarama, Inc., No. Civ. A. 97-1267, 2001 WL 33162, at \*5 (E.D. Pa. Jan. 11, 2001). The plaintiff must prove the misrepresentation by clear and convincing evidence. See Batka v. Liberty Mut. Fire Ins. Co., 704 F.2d 684, 687 (3d Cir. 1983); Rohm and Haas Co. v. Continental Cas. Co., 732 A.2d 1236, 1251-52 (Pa. Super. Ct. 1999). "If falsity and bad faith appear affirmatively from the documentary evidence and plaintiff's own witnesses, the court may enter a verdict in favor of the insurer." Barbaro v. Old Line Life Ins. Co. of Am., Civ. A. No. 91-4296, 1992 WL 97227, at \*1 (E.D. Pa. Apr. 27, 1992).

According to New York Life, Daly fraudulently misrepresented on his insurance application that "he was engaged in the legitimate occupation of an attorney" when he was in fact "engaged in the

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<sup>2</sup> While New York Life contends that Daly fraudulently misrepresented other facts on his insurance applications, New York Life specifically limits the considerations on this motion to Daly's representation of his occupation. See Pl.'s Mot. Summary J. at 3 n.1.

practice of defrauding insurance companies." Pl.s' Mot. Summ. J. at 11. Again, Daly counter that his statement to New York Life that he was a personal injury lawyer was in no way fraudulent. See Def.'s Answer to Pl.'s Mot. Summ. J. at 8. "When asked the name of my business, I responded Arthur Terry Daly - Personal Injury Lawyer. When asked the structure of my business, I responded, sole proprietorship." Aff. of Arthur Terry Daly at ¶ 5. Moreover, Daly maintained a license to practice law until his suspension from the bar in October of 1993. New York Life has failed to demonstrate that Daly misrepresented his occupation on his insurance application. Since New York Life fails to affirmatively document falsity and bad faith, the Court will not enter a verdict in favor of the New York Life on Counts VIII and IX.

**D. Legal Disability**

Finally, New York Life argues that it is entitled to summary judgment because Daly's disability is caused by the legal and professional consequences of his criminal conduct, and not by mental illness. See Pl.'s Mot. Summ. J. at 12. It is undisputed that Daly's current incarceration and suspension from the bar have rendered him unable to practice law. However, Daly avers that the cause of his disability is a mental illness that pre-dates the criminal matter that resulted in his incarceration and suspension from the bar. See Def.'s Answer to Pl.'s Mot. Summ. J. at 8-9.

Disability insurance policies generally provide coverage for

factual disabilities, such as injury or sickness, and not for legal disabilities. Goomar v. Centennial Life Ins. Co., 855 F.Supp. 319, 325 (S.D. Cal. 1994), aff'd, 76 F.3d 1059 (9th Cir. 1996); see also Couch on Insurance ¶ 146:9 (3d ed. 2000). An insured is deemed legally disabled under an insurance contract if the insured is not permitted by law to practice his profession. Provident Life & Accident Ins. Co. v. Fleischer, 26 F.Supp.2d 1220, 1223 (C.D. Cal. 1998); see also Grayboyes v. Gen. Am. Life Ins. Co., Civ. A. No. 92-2515, 1995 WL 156040, at \*7 (E.D. Pa. Apr. 4, 1995) ("There is a difference between one who is unable to engage in an occupation and one who is not allowed to do so.") (citations omitted). However, courts have declined to grant summary judgment "despite a criminal conviction or license suspension, where a genuine dispute exist[s] on whether the insured's factual disability preceded the legal disability." Paul Revere Life Ins. Co. v. Bavaro, 957 F.Supp. 444, 499 (S.D.N.Y. 1997).

If defendant demonstrates to the trier of fact that he is unable to work because of his mental and emotional problems then he is entitled to disability payments, despite the existence of his subsequent legal disability. If, however, the trier of fact believes that but for his legal disability he would be able to perform his occupation, then he is not entitled to disability payments.

Id.

Here, a reasonable fact finder could conclude from Daly's evidence, if credited, that Daly's mental illness preceded the suspension of his law license and incarceration. On September 30,

1993, Daly was diagnosed with paranoid schizophrenia, depressive disorder, and panic disorder. See Pl.'s Mot. Summ. J., Ex. N. In addition, Daly had suffered from paranoid schizophrenia in 1979. Id. Moreover, the Pennsylvania Supreme Court transferred Daly to inactive status based on Daly's contention that he suffers "from a disabling condition making it impossible to prepare an adequate defense . . ." When deciding a motion for summary judgment, "[t]he court's role is not to try issues of fact, but rather to determine whether issues exist to be tried." Paul Revere, 957 F.Supp. at 497. The Court concludes that there exists a triable issue of fact as to whether Daly's factual or legal disability prevents him from returning to his occupation. Therefore, summary judgment is denied on Count II.

An appropriate Order follows.

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NEW YORK LIFE INSURANCE CO.                   :                   CIVIL ACTION  
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  :  
ARTHUR TERRY DALY                               :                   95-6702

O R D E R

AND NOW, this 10<sup>th</sup> day of October, 2001, upon consideration of Plaintiff New York Life Insurance Company's Motion for Summary Judgment and accompanying Memorandum of Law (Docket No. 21) and Defendant Arthur Terry Daly's Answer to Plaintiff's Motion for Summary Judgment and accompanying Memorandum of Law (Docket No. 23), IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.