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

JEFFREY JUSTOFIN, ET AL.	)	
	)	Civil Action
v.	)	
	)	No. 01-6266
METROPOLITAN LIFE INS. CO.	)	

MEMORANDUM

Padova, J. _____**, 2002**

The instant matter arises on Defendant's renewed motion for summary judgment. For the reasons that follow, the Court grants the Motion. Judgment is entered in favor of Defendant on the breach of contract and bad faith claims and on Defendant's second counterclaim.

I. Background

Plaintiffs are the beneficiaries of the life insurance policy of their mother, Loretta K. Justofin ("Decedent"), who died on December 7, 1999. Plaintiffs claim that the insurer, Defendant Metropolitan Life Insurance Company, failed to pay the full value of the policy of $300,000, and instead only made a payment of $100,000. Decedent originally held a life insurance policy with a maximum benefit of $100,000. On April 26, 1999, Decedent submitted a conversion application ("Change Application") to increase the face amount of the policy to $300,000. Defendant approved the change application, which became effective on May 28, 1999. Following an investigation which was triggered by Decedent's death

within two years of the policy conversion, Defendant paid the original $100,000 policy limit, but informed Plaintiffs that it was voiding the policy conversion because Decedent had failed to disclose that she had Lupus, and, therefore, had made a material misrepresentation in the Change Application. Defendant offered a refund of all the premiums paid on the policy conversion. Plaintiffs disputed that Decedent had made a material misrepresentation and filed the instant action seeking payment on the conversion policy.

Plaintiffs originally brought three claims: (1) breach of insurance contract; (2) negligence; and (3) bad faith. Defendant brought a single counterclaim seeking a declaration that the policy is void ab initio on the basis of the alleged material misrepresentation relating to Decedent's Lupus condition. Defendant brought a Motion for Summary Judgment on June 3, 2002. By Order dated July 29, 2002, the Court granted the Motion with respect to the negligence claim, but denied the Motion in all other respects.

Defendant filed a timely motion for reconsideration based on evidence contained in the existing summary judgment record that related to references to the drug Prednisone, which is a drug used to treat Lupus. In response to the motion for reconsideration, Plaintiffs disclosed that Dr. Christopher Justofin, one of the Plaintiffs and Decedent's son, is a physician who treated Decedent

weekly from 1994 until at least 1997 and prescribed the drug prednisone for her arthritis.[1] Defendant then moved for a continuance of the trial in this action and leave to file a supplemental counterclaim seeking a declaration that the Change application was void ab initio on the basis of Decedent's failure to disclose in the Change Application her treatment by Dr. Justofin during the period from 1994 to 1997. The Court granted this motion. Defendant now seeks summary judgment on its new counterclaim and on Plaintiffs' breach of contract and bad faith claims based on Decedent's misrepresentations concerning her treatment by Dr. Justofin for arthritis.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

[1] Dr. Justofin in his deposition indicated that he was unsure whether he stopped treating Decedent in 1997 or 1998. (Def's Ex. I, "Justofin Depo.", at 13-14).

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of

its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

In order to establish that an insurance policy is void under Pennsylvania law, the insurer has the burden to demonstrate that: (1) a representation made by the insured was false; (2) the insured knew the representation she made was false when made or the insured made the representation in bad faith; and (3) the representation was material to the risk being insured. Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993) (citing Shafer v. John Hancock Mut. Life Ins. Co., 189 A.2d 234, 236 (Pa. 1963)). Such a misrepresentation in an application must be proven 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 there are no genuine issues of material fact and the policy is void, Defendant is entitled to summary judgment on both the breach of contract and bad faith claims and on the counterclaim.

Defendant now claims that the contract is void because Decedent made a material misrepresentation with respect to her weekly treatments by Dr. Christopher Justofin with Prednisone for

arthritis during the period from 1994 to 1997. Specifically, the Change Application asked the following question:

> 11. Has any person EVER received treatment, attention, or advice from any physician, practitioner or health facility for, or been told by any physician, practitioner or health facility that such person had: . . .
>
> (j) Arthritis, paralysis, or disease or deformity of the bones, muscles or joints?

(Def.'s Ex. F, "Change Application" (emphasis added)). Decedent answered "yes" to this question. (Id.) Question 15 asked, "In past 5 years, has any physician, practitioner or health facility examined, advised or treated any person? If Yes, give name of person and details below for each instance." (Id.) Decedent also answered "yes" to this question. (Id.) Finally, Question 16 instructed "For any Yes answer to Items 11 through 15 give the following details," including the name and address of each treating physician and the "Nature and Severity of Condition, Frequency of Attacks, Specific Diagnosis and Treatment." (Id.) Decedent listed several doctors and treatments, but failed to list Dr. Justofin and failed to list his prescriptions for Prednisone. See (id.)

In this instance, there is no dispute that the Decedent failed to disclose her treatments and consultation with Dr. Justofin. Plaintiffs first contend, however, that the misstatements were not made knowingly or in bad faith. Innocent mistakes, even when involving material misrepresentations, are insufficient to void the contract. The American Franklin Life Ins. Co. v. Galati, 776 F.

Supp. 1054, 1060 (E.D. Pa. 1991). Nevertheless, in determining that the insured made a misrepresentation intentionally or in bad faith, it is not necessary that the insured intended to deceive the insurance company for the purpose of obtaining insurance. Rather, it is sufficient that the insured knew that the statement or representation she made was false. See Evans v. Penn Mutual Life Ins. Co. of Phila., 186 A. 133, 138 (1936) ("It is sufficient to show that [the representations] were false in fact and that [the] insured knew they were false when [s]he made them since an answer known by [the] insured to be false when made is presumptively fraudulent.") (citations omitted).

Generally, it is for a jury to decide whether the representations made by the insured in the application were false and whether the insured knew that the representations were false, because such issues of knowledge and intent must often be resolved on the basis of inferences drawn from the conduct of the parties. Riehl v. Travelers Ins. Co., 772 F.2d 19, 24 (3d Cir. 1985). However, where "such falsity and the requisite bad faith affirmatively appear from (a) competent and uncontradicted documentary evidence, such as hospital records, admissions in the pleadings or proofs of death or (b) the uncontradicted testimony of plaintiff's own witnesses, a verdict may be directed for the insurer." Shafer v. John Hancock Mutual Life Ins. Co., 189 A.2d 234, 236 (1963). Bad faith may be inferred as a matter of law when

the uncontradicted documentary evidence is such "that the insured has consulted physicians so frequently, or undergone medical or surgical treatment so recently, or of such a serious nature, that a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance." Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81, 84 (1941); see also Flick v. Union Sec. Life Ins. Co., Civil Action No. 95-6848, 1996 U.S. Dist. LEXIS 6341, at *13-14 (E.D. Pa. May 7, 1996).

Dr. Justofin testified in his deposition that he consulted and advised Decedent on a weekly basis with respect to her arthritis condition. (Def's Ex. I, "Justofin Dep.") Dr. Justofin also testified that he prescribed the drug Prednisone, a prescription steroid drug, to treat her arthritis. Id. Decedent herself indicated in her application that she had self medicated with Prednisone in 1969, when she owned a pharmacy. (Def's Ex. G, "Change Application-Part II"). Given Dr. Justofin's testimony, bad faith may be inferred as a matter of law, because the uncontradicted evidence is such that Decedent consulted with Dr. Justofin so frequently, that "a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance." Freedman, 21 A.2d at 84. Moreover, in contrast to her total omission of her son's treatment, Decedent's other responses in the Change

Application are thorough and complete, and do not indicate that Decedent simply had trouble understanding the application or the nature of what was being asked of her.[2] Accordingly, there is no genuine issue of material fact with respect to Decedent's bad faith in making the misrepresentation regarding her weekly treatment by Dr. Justofin from 1994 to 1997.

Plaintiffs further contend that the misstatement was not material to the application. The Court disagrees. "A fact is material to the risk when, if known to the underwriter, it would have caused him to refuse the risk, or would have been a reason for his demanding a higher premium." McCaffrey v. Knights and Ladies of Columbia, 63 A. 189, 189 (citing Hartman v. Keystone Ins. Co., 21 Pa. 466, 477 (1853)); see also New York Life Ins. Co. v. Johnson, 923 F.2d 279, 282 (3d Cir. 1991). "Every fact is material which increases the risk, or which, if disclosed, would have been a fair reason for demanding a higher premium." Hartman, 21 Pa. at 477; see also A.G. Allebach, Inc. v. Hurley, 540 A.2d 289, 295 (Pa. Super. Ct. 1988).

Furthermore, "[i]t is well settled in Pennsylvania law that representations concerning an insured's current or prior health and

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[2]Indeed, Decedent indicated in her original 1994 application that she was at the time being seen by Dr. Justofin for occasional arthritis of her hands and feet. (Def's Ex. E, "1994 Application"). Thus, there is no question that Decedent understood that the application questions required the disclosure of Dr. Justofin's treatments.

past treatment by a physician are material to the risk assumed by the insurer as a matter of law." Berkshire Life Ins. Co. v. Aiello, Civil Action No. 88-7927, 1989 U.S. Dist. LEXIS 9952, at *10 (E.D. Pa. Aug. 21, 1989) (citing Van Riper v. The Equitable Life Assurance Society of the United States, 561 F. Supp. 26, 31 (E.D. Pa. 1982)); Shafer, 189 A.2d at 236 (1963)).

Notwithstanding the general rule that treatment by a physician is material as a matter of law, summary judgment may be inappropriate in cases where there are disputed issues of fact regarding whether knowledge of a decedent's true history would have resulted in increased premiums. In Burkert v. Equitable Life Assurance Society of America, 287 F.3d 293 (3d Cir. 2002), a case which concerned a misrepresentation concerning drug and alcohol abuse, the court first noted the general rule that answers relating to the insured's treatment for drug and alcohol abuse, like answers relating to treatment, are material as a matter of law. The court, however, entertained the plaintiff's argument that Defendant knew of decedent's past drug and alcohol problems and took them into account when determining the premiums charged, thus creating a question of fact which trumped the district court's conclusion that the decedent's answers were material as a matter of law. Id. at 298. The Court then rejected the plaintiff's argument based on the record before it, holding that undisputed evidence "clearly support[s} the District Court's conclusion that 'knowledge of the

true nature of decedent's drug and alcohol use would have caused Equitable to decline the risk or require higher premiums.'" Id. (citing Burkert v. Equitable Life Assurance Society of America, Civil Action No. 99-1, 2001 U.S. Dist. Lexis 2995, at *32 (E.D.Pa. March 20, 2001)). See also Underwood v. Prudential Life Ins. Co. of America, 359 A.2d 422 (Pa. Super Ct. 1976).

On the record before this court, there is no evidence which creates a genuine issue of fact on the issue of materiality. Defendant has produced the affidavit of Eileen Kosiner, a Senior Underwriting Consultant for Defendant, who testified that, had Defendant known that Decedent had been under the care of a physician and had been given Prednisone treatments for rheumatoid arthritis for an extended period of time, they would have refused the benefit increase or, in the alternative, would have demanded a higher premium in exchange for increasing the benefit. (Def's Ex. M, "Kosiner Aff." ¶¶ 11-12). Plaintiffs' own witness, Dr. Justofin, admits in his deposition that he treated Decedent with Prednisone for arthritis, that Decedent had symptoms of rheumatoid arthritis, and that Prednisone is appropriately used only in the treatment of rheumatoid arthritis, and not osteoarthritis.[3] (Def's Ex. I, "Justofin Dep", at 15, 18, 37). Thus, there is no genuine dispute that decedent was treated by Dr. Justofin for rheumatoid

[3]The parties do not dispute that there are two types of arthritis, rheumatoid arthritis and osteoarthritis.

arthritis. Ms. Kosiner further testified in her deposition that rheumatoid arthritis, but not osteoarthritis, is relevant in determining the level of risk posed by an applicant. (Pl's Exh. G, "Kosiner Deposition", at 50-51.). Finally, the Life Medical Underwriting Guide used by Defendant in underwriting applications specifically states that rheumatoid arthritis is a condition which increases the risk faced by the insurer. (Def's Ex. M, "Life Medical Underwriting Guide").

Plaintiffs present nothing to dispute this evidence. Plaintiffs do argue that Defendant was aware that decedent had arthritis of an unknown type and had self medicated with Prednisone in the distant past. However, these facts do not indicate that Defendant had any knowledge of Decedent's weekly treatments by her son or her son's Prednisone prescriptions during the period from 1994 to 1997, or that Defendant took these treatments into account at the time of the application in determining the premiums charged to Decedent. Furthermore, Plaintiffs present no evidence disputing Defendant's claim that rheumatoid arthritis is a condition that, under Defendant's own guidelines, increases the risk.[4] Finally,

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[4] Plaintiffs also argue that there is no proof that Decedent actually had rheumatoid arthritis, implying that her failure to disclose the Prednisone treatments was therefore immaterial. Whether Decedent actually had rheumatoid arthritis, however, is irrelevant to a materiality determination. The misrepresentation of treatment for rheumatoid arthritis is relevant because

according to the undisputed record evidence, not all instances of arthritis affect the risk to the insurer in the same manner (indeed, osteoarthritis does not affect the risk at all). Thus, Plaintiffs cannot argue that Decedent's disclosure that she had arthritis rendered her omission of her weekly treatment by Dr. Justofin immaterial.

An exception to the materiality rule applies in cases where the applicant does not disclose medical treatment relating to minor illnesses, such as the common cold or indigestion. See Piccinini v. Teachers Protective Mutual Life Ins. Co., 463 A.2d 1017 (Pa. Super Ct. 1983). This is because "an applicant for insurance is not required to report illnesses or conditions which one would not regard as being of real gravity or importance." Id. Such an exception is obviously not applicable here, as the insurance application specifically asks about treatment for arthritis. Thus no reasonable fact-finder could determine that Decedent assumed that Prednisone treatments for arthritis were unimportant.

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uncontroverted evidence indicates that it would have been a key factor considered by Defendant in determining whether to approve the application or in calculating the premium charged. Further, as this Court stated in its previous summary judgment opinion, "The materiality of the misrepresentation must be viewed at the time of the application, and not in hindsight." Justofin v. Metropolitan Life Ins. Co., Civil Action No. 01-6266, 2002 WL 1870469, at *5 (E.D. Pa. July 29, 2002).

Plaintiffs assert that Defendant had a duty to investigate decedent's insurance application, and therefore has waived its right to contest the answers provided by Decedent. An insurer, however, has no general obligation to investigate the accuracy of an insurance application. Bujak v. Old Line Life Ins. Co., Civil Action No. 97-3358, 1998 U.S. Dist Lexis 16831, at *5 (E.D.Pa. April 14, 1998)("[a]bsent ambiguity, an insurer is not obligated to investigate beyond the face of the insurance application when issuing the policy"); Provident Life v. Charles, Civil Action No. 90-7584, 1993 U.S. Dist Lexis 5030 (E.D.Pa. April 14, 1993); Shafer, 189 A2d at 237.

Insurers have a duty to investigate only in cases where inconsistencies on the face of the insurance application place the insurer on notice that the answers given in the application are incomplete or inaccurate. In such instances, an insurer may waive a defense of material misrepresentation if it fails to investigate. See Franklin Life Insurance Co. v. Bienek, 312 F.2d 365 (3d Cir. 1962) (holding that insured's false answers to two questions on an insurance application were so clearly erroneous that the insurer waived its claim of materiality with respect to those answers when it failed to properly investigate them.) However, the law is clear that, where an answer is ambiguous, an insurer waives only the right to contest the validity of that particular answer, and

retains the right to contest the validity of any other misrepresentations made by the insured. Id. at 375.

In this case, there was nothing on the face of the 1999 insurance application to put Defendant on notice that Decedent's answer to Question 16 of the Change Application was incomplete or erroneous. Indeed, nothing in the 1999 application indicates that Decedent was ever treated by Dr. Justofin in any capacity.

Plaintiffs argue at length that ambiguities in Decedent's 1999 application answers placed a duty upon Defendant to investigate the claim. Plaintiffs note that the questions relating to arthritis in the insurance application do not mention the type of arthritis diagnosed. Decedent did disclose in the 1999 application that she had been treated for arthritis in 1994 (albeit by a doctor other than Dr. Justofin, and not with Prednisone), and that she had "self medicated" with prednisone for arthritis in 1969. (Def's Ex. G, "Change Application-Part B"). Furthermore, Decedent apparently indicated during her paramedical exam that she suffered from an "unknown type arthritis" (Def's Ex. H, "Paramedical Evaluation"). Plaintiffs maintain that, at the very least, these responses created an ambiguity in the application that Defendant had a duty to resolve.

Plaintiffs' argument misses the mark, however, as none of these answers gives any indication that Decedent was being treated

by her son on a weekly basis and with prednisone during the five year period immediately preceding the application, which is the material misrepresentation at issue in this case. Thus, even if other answers in Decedent's application concerning her arthritis, taken together, could be considered ambiguous, Defendant would not be estopped from asserting that her omission of her son's treatment in the application was a material misrepresentation. See Franklin Life, supra.

IV. Conclusion

Viewing the evidence of record on the renewed motion for summary judgment in the light most favorable to Plaintiff, there is no genuine issue of material fact for trial in this case. Defendant is entitled to a declaration that the contract was void ab initio based on Decedent's material misrepresentation as to the treatment that she received from Dr. Justofin. Furthermore, as the contract was void ab initio, Plaintiffs cannot prevail on the breach of insurance contract claim or the bad faith claim. Judgment is entered in favor of Defendant and against Plaintiffs.

An appropriate Order follows.

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METROPOLITAN LIFE INS. CO.	)	

ORDER

AND NOW, this day of , 2002, upon consideration of Defendant's Renewed Motion for Summary Judgment (Doc. No. 67), and all supporting and opposing briefing thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. **JUDGMENT** is **ENTERED** in favor of Defendant and against Plaintiffs on Counts I and III and on the Counterclaim. This case shall be **CLOSED** for statistical purposes.

BY THE COURT:

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John R. Padova, J.