

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

PAUL M. PRUSKY, : CIVIL ACTION
Individually and as Trustee, :
Windsor Retirement Trust, :
Plaintiff, :
 :
v. :
 :
PHOENIX LIFE INSURANCE :
COMPANY, :
Defendant. : No. 02-6010

MEMORANDUM AND ORDER

J. M. KELLY, J. **NOVEMBER** , **2003**

Presently before the Court is a Motion for Reconsideration filed by Defendant Phoenix Life Insurance Company ("Phoenix" or "Defendant") seeking reconsideration of this Court's March 3, 2003 Order granting in part and denying in part Phoenix's Motion to Dismiss the Amended Complaint filed by Plaintiff Paul M. Prusky ("Prusky" or "Plaintiff"). Prusky filed a Memorandum in Opposition to Phoenix's Motion for Reconsideration, and Phoenix filed a Reply thereto.

Two-and-a-half months later, Phoenix also filed a Supplemental Memorandum in Support of Defendant's Motion for Reconsideration, requesting that this Court judicially estop Prusky from asserting a position in this litigation that is contrary to a position he asserted in a prior litigation, and attaching thereto a copy of the brief that Prusky filed in that prior litigation. Prusky filed a Motion to Strike the Supplemental Memorandum and Phoenix filed its Opposition thereto.

For the following reasons, Plaintiff's Motion to Strike Defendant's Supplemental Memorandum is **GRANTED**, and Phoenix's Motion for Reconsideration is **DENIED**.

I. BACKGROUND

The factual background of this case has been addressed in detail by this Court's Memorandum and Order dated March 3, 2003, which Order permitted Prusky's claims, including breach of contract and fraud, to proceed, while dismissing Prusky's equitable estoppel claim. We reiterate below only those facts relevant to disposing of the motions presently before the Court.

In February 1999, Prusky purchased a Phoenix Estate Edge Variable Universal Life Insurance Policy (the "Policy"), a "second-to-die" life insurance policy, which death benefit becomes payable upon the death of the later to die of the two insureds, Prusky and his wife. The Variable Universal Life Account is divided into subaccounts, each of which is available for allocation of policy value and invests in corresponding mutual funds with distinct investment objectives. The Policy value will depend on the performance of the underlying fund and permits its owner to transfer value among the subaccounts.

Approximately eight months prior to purchasing the Policy, Prusky received a memorandum dated June 10, 1998 from a Phoenix representative indicating that Prusky would be permitted

unlimited subaccount transfers (the "June 10 Memorandum"). For the next three years, Prusky made unlimited subaccount transfers, sometimes on a daily basis. However, on two separate occasions during that three-year period, almost two years apart, Phoenix notified Prusky that it would restrict his subaccount transfers. Prusky objected to Phoenix's restriction by presenting the June 10 Memorandum to Phoenix. Phoenix appeared to acquiesce, in response to the June 10 Memorandum, by abandoning its efforts to restrict Prusky's subaccount transfers.

In July 2002, Phoenix refused to process a transfer instruction from Prusky. Prusky then initiated suit in this Court alleging that Phoenix failed to fulfill its obligations to him as expressed in the June 10 Memorandum from Phoenix, and as implied in the parties' course of performance following his purchase of the Policy. Prusky asserted various claims for relief including breach of contract, equitable estoppel, unfair trade practices, bad faith, fraud and negligent misrepresentation. Phoenix filed a Motion to Dismiss all counts of Prusky's Amended Complaint, and for the reasons set forth in this Court's March 3, 2003 Memorandum and Order, Prusky's claim for equitable estoppel was dismissed, while the rest of his claims remained before the Court.

Phoenix now seeks reconsideration of the Court's March 3, 2003 Order granting in part and denying in part its Motion to

Dismiss, contending that this Court misconstrued the allegations contained in Prusky's Amended Complaint. Two-and-a-half months later, Phoenix submitted a Supplemental Memorandum in Support of its Motion for Reconsideration, asserting a new basis, judicial estoppel, for dismissal of Prusky's claims. Prusky opposes the Motion for Reconsideration, and requests that the Supplemental Memorandum be stricken. We address, in turn, each of the motions before the Court.

II. DISCUSSION

A. **Phoenix's Motion for Reconsideration**

Federal Rule of Civil Procedure 59 and Local Rule of Civil Procedure 7.1 permit a party to move the court for reconsideration within 10 days of entry of judgment. Fed. R. Civ. P. 59(e); E.D. Pa. R. 7.1(g). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Federal courts have a strong interest in the finality of judgments, so motions for reconsideration should be sparingly granted. Continental Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995). Courts will reconsider an issue "when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear

error or prevent manifest injustice." NL Indus., Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n.8 (3d Cir. 1995). Mere dissatisfaction with the Court's ruling is not a proper basis for reconsideration. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

Phoenix contends that this Court's March 3, 2003 Memorandum and Order was predicated upon a misunderstanding of the claims alleged by Prusky, and that, on reconsideration, this Court should dismiss the remainder of Prusky's claims. Specifically, Phoenix argues that the breach of contract claim should be dismissed since the allegations in Prusky's Amended Complaint set forth a claim for fraud in the inducement rather than one for fraud in the execution of the Policy. Phoenix also argues that Prusky's reliance allegations do not support his claims for fraud, negligent misrepresentation and violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 72 Pa. Stat. § 201-1 et seq.

As discussed in our March 3, 2003 Memorandum and Order, this Court liberally construed Prusky's Amended Complaint, accepting as true all factual allegations and giving the pleader the benefit of all reasonable inferences that can be drawn therefrom. See Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). It is a well-established principle that "a complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). It appearing that, on reconsideration, Phoenix merely requests that this Court narrowly re-review Prusky's Amended Complaint by recasting the allegations in a single, categorical manner, rather than permitting this Court to engage in the liberal review that is required to do on a motion to dismiss, we find that reconsideration is improper here and do not rehash the analysis of our prior decision.

Specifically, Phoenix claims that Prusky's Amended Complaint alleges only a fraudulent inducement claim, and not a fraud in the execution claim, for which parol evidence is admissible to demonstrate that certain provisions were supposed to be in the agreement but were omitted because of fraud, accident or mistake.¹ We disagree with Phoenix's characterization of the

¹ The United States Court of Appeals for the Third Circuit has explained the distinction between fraudulent inducement and fraud in the execution:

Fraud in the execution applies to situations where parties agree to include certain terms in an agreement, but such terms are not included. Thus, the defrauded party is mistaken as to the contents of the physical document that it is signing. Parol evidence is admissible in such a case only to show that certain provisions were supposed to be in the agreement but were omitted because of fraud, accident, or mistake. Fraud in the inducement, on the other hand, does not involve terms omitted from an agreement, but rather allegations of oral representations on which the other

allegations contained in Prusky's Amended Complaint, in light of, for example, Prusky's allegations that Phoenix acquiesced to the June 10 Memorandum on each occasion that it attempted to restrict Prusky's subaccount transfers. Unless it is beyond doubt that Prusky can prove no set of facts entitling him to relief, that the terms of the June 10 Memorandum were not omitted from the Policy as a result of fraud, accident or mistake,² Prusky's claim for fraud in the execution remains.

Phoenix also argues that Prusky's fraud and misrepresentation claims should have been dismissed since it is unreasonable as a matter of law for Prusky, whom Phoenix claims is a sophisticated investor, to rely on pre-contractual promises that contradict the written Policy. At this procedural juncture, and without more, we do not credit Phoenix's characterization of Prusky's investment acumen.

Since, on a motion for reconsideration, we look for manifest errors of law or fact, or for newly discovered evidence, and find

party relied in entering into the agreement but which are contrary to the express terms of the agreement.

Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996).

² Under Pennsylvania law, the burden of proving mutual mistake rests with the moving party and requires evidence that is clear, precise and convincing. Bugen v. New York Life Insur. Co., 184 A.2d 499, 500-01 (Pa. 1962).

that this standard of review has not been met, Phoenix's motion is **DENIED**.

B. Prusky's Motion to Strike Supplemental Memorandum

Phoenix filed a Supplemental Memorandum in support of its Motion for Reconsideration seeking judicial estoppel of Prusky's breach of contract actions, and attaching thereto a copy of a brief filed by Prusky in a prior litigation, Prusky v. Prudential Insurance Company, Civ. A. No. 00-2783 (E.D. Pa. filed June 1, 2000), in which, Phoenix claims, Prusky takes a diametrically opposed position to that which he has taken in this case.

Prusky moves to strike Phoenix's Supplemental Memorandum, contending that it raises a new argument that has not been timely asserted in connection with either the Motion to Dismiss or Motion for Reconsideration, and that Phoenix has failed to seek leave of this Court to file the Supplemental Memorandum out of time. Prusky further contends that the Supplemental Memorandum violates the provisions of Federal Rule of Civil Procedure 12(g),³ Local Civil Rule 7.1(g)⁴ and Paragraph 4 of this Court's

³ Federal Rule of Civil Procedure 12(g) provides for consolidation of defenses in a motion:

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not

Pretrial and Trial Procedures.⁵

We agree that Phoenix's judicial estoppel argument is improperly presented to the Court as supporting its motion for reconsideration, and that, further, Phoenix has failed to seek leave of this Court to file its Supplemental Memorandum as an additional brief to its Motion for Reconsideration. However, even were this Court to grant Phoenix leave to file an additional brief, as Phoenix now requests, we would nevertheless deny

thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Fed. R. Civ. P. 12(g). Rule 12(h)(2) provides that:

A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Fed. R. Civ. P. 12(h).

⁴ Local Rule of Civil Procedure 7.1(g) requires that "[m]otions for reconsideration or reargument shall be served and filed within ten (10) days after the entry of judgment, order, or decree concerned." E.D. Pa. R. Civ. P. 7.1(g).

⁵ Paragraph 4 of this Court's Pretrial and Trial Procedures provides, in relevant part:

A reply memorandum addressing arguments first raised in the memorandum in opposition to the motion may be filed by the moving party within ten (10) calendar days after service of the memorandum in opposition to the motion. No further briefing by either party be filed without express leave from the court.

Phoenix's request that this Court judicially estop Prusky from asserting his position in this case.

Judicial estoppel, sometimes called the doctrine against the assertion of inconsistent positions, is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that he has previously asserted in the same or in a previous proceeding. Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996) (quotations omitted). It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from "playing 'fast and loose with the courts.'" Id. (quoting Scarano v. Central R. Co. of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953)). Phoenix is correct in its assertion that a party seeking judicial estoppel need not enjoy privity to the parties in the prior litigation. See id. at 360-61.

However, as judicial estoppel is intended to prevent parties from playing fast and loose with the courts by asserting inconsistent positions, any application of the doctrine depends upon a two-part inquiry of the party against whom judicial estoppel is sought, specifically: (1) whether that party is asserting a present position that is inconsistent with a position asserted in an earlier proceeding and, (2) if so, whether that party asserted either or both of the inconsistent positions in bad faith. Id. at 361. "Only if both prongs are satisfied is

judicial estoppel an appropriate remedy." Id.

The Third Circuit in Ryan, a case involving whether plaintiff-debtor's nondisclosure of potential claims against defendants as a contingent asset in its Chapter 11 Bankruptcy proceedings judicially estopped the plaintiff-debtor from seeking to recover against the defendants on those claims, rejected the defendants' argument that intent may be inferred solely from nondisclosure notwithstanding the affirmative disclosure requirement of the Bankruptcy Code. See id. In so doing, the Court stated that a showing of intent was required, finding no reason for why discerning intent during the discovery process would be an unworkable proposition. Id. Similarly, in this case, we require that Phoenix make a showing of Prusky's bad faith intent in asserting allegedly inconsistent positions, before we will invoke the doctrine of judicial estoppel to preclude Prusky from asserting his present position.

III. CONCLUSION

On the motion to dismiss, we were obligated to view the allegations contained in Prusky's Amended Complaint in the light most favorable to him and to draw all reasonable inferences therefrom, and, in doing so, we determined that Prusky pleaded facts sufficient to support his remaining claims for relief. Because Phoenix has not come forward with any newly discovered

evidence, does not cite an intervening change in controlling law and fails to point to any clear error of law or manifest injustice, as is required on reconsideration, this Court will not alter the outcome of our earlier decision, and Phoenix's Motion for Reconsideration is **DENIED**.

Furthermore, Prusky's Motion to Strike Phoenix's Supplemental Memorandum in Support of its Motion for Reconsideration is **GRANTED**.

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O R D E R

AND NOW, this day of November, 2003, in consideration of the Motion for Reconsideration filed by Defendant Phoenix Life Insurance Company ("Phoenix") (Doc. No. 12), the Memorandum in Opposition filed by Plaintiff Paul M. Prusky ("Plaintiff") (Doc. No. 13), and Phoenix's Reply thereto (Doc. No. 16), it is **ORDERED** that Phoenix's Motion for Reconsideration is **DENIED**.

In consideration of the Supplemental Memorandum in Support of Defendant's Motion for Reconsideration (Doc. No. 22), Plaintiff's Motion to Strike the Supplemental Memorandum (Doc. No. 23) and Defendant's Opposition thereto (Doc. No. 26), it is **ORDERED** that Plaintiff's Motion to Strike Defendant's Supplemental Memorandum is **GRANTED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.