

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

PAUL M. PRUSKY, <u>et al.</u>	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
RELIASTAR LIFE INSURANCE COMPANY	:	No. 03-6196

**MEMORANDUM AND ORDER**

HUTTON, S.J. January 26, 2005

Presently before this Court are Plaintiffs' Motion to Reconsider and Alter Judgment (Docket No. 52), Defendant's Opposition thereto (Docket No. 53), and Plaintiffs' Request for Oral Argument (Docket No. 54).

**I. BACKGROUND**<sup>1</sup>

In a Memorandum and Order dated December 7, 2004 ("M&O"), this Court denied Plaintiffs' Motion for Partial Summary Judgment and, sua sponte, granted summary judgment in favor of Defendant on Plaintiffs' sole remaining claim for breach of contract. See Docket No. 48. The basis for the Court's decision was that the bilateral insurance contracts between the parties, which included the provisions set forth in the Sierk Memos, contained both legal and illegal provisions. This Court found that it could not apportion Plaintiffs' performance under the contracts between the legal

---

<sup>1</sup> This Court incorporates by reference all relevant background facts set forth in its previous Memorandum and Order issued in this case. See Prusky, et al. v. Reliastar Life Ins. Co., 2004 U.S. Dist. LEXIS 24802 (E.D. Pa. December 7, 2004).

(securing a life insurance policy and maintaining the ability to submit transfer requests by fax) and the illegal (the ability to "late trade") provisions of the agreements. As such, under Pennsylvania law, the illegal provision could not be severed from the contract as a whole. The Court held that it could not order specific performance of solely the legal portions of the contracts, as Plaintiffs sought in their suit, and the Court granted summary judgment in favor of Defendant.

In this Motion to Reconsider and Alter Judgment, Plaintiffs argue that the Court's M&O contained errors of fact and law and would impose manifest injustice if not reconsidered and altered. The motion also asserts the existence of new evidence supporting reconsideration and alteration of the judgment. The Court will address each of Plaintiffs' arguments in turn below.

## **II. LEGAL STANDARD**

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Max's Seafood Café by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). A motion for reconsideration will only be granted if: (1) there has been an intervening change in controlling law; (2) new evidence, which was not previously available, has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest

injustice. Marjam Supply Co. v. BCT Walls & Ceilings, Inc., 2003 WL 22006801, at \*1 (E.D. Pa. Aug. 20, 2003); Wiggins v. Boston Scientific Corp., 1999 WL 200672, at \*2 (E.D. Pa. Apr. 8, 1999). "Motions for reconsideration are not to be used to reargue or relitigate matters already decided." Haymond v. Lundy, 205 F. Supp. 2d 390, 395 (E.D. Pa. 2002). Nor are they intended as an opportunity for the losing party to raise arguments they neglected to include in previous briefs. See id. at 396 ("Rule 59(e) motions are aimed at reconsideration, not initial consideration.") (internal quotations omitted).

### **III. DISCUSSION**

#### **A. The Effect of Parties' Removal of the Late Trading Provisions from the Contracts**

Plaintiffs assert that the portion of the contracts the Court held to be illegal, the "late trading" provisions, were removed from the contracts in November 2002 and therefore should not have influenced the Court's decision in this case. In November 2002 Defendant notified Plaintiffs by letter that it would no longer allow Plaintiffs to late trade. See Pl.'s Mot. for Recons. or Alteration of J. at 2. Both parties continued to perform their respective obligations under the Contracts until November 2003 when Defendant stopped allowing Plaintiffs to submit transfer requests by fax. Plaintiffs contend that these facts establish that after November 2002 the parties were operating pursuant to contracts that

no longer contained the illegal late trading provisions. Therefore, Plaintiffs argue that the Court's decision voiding the contracts on grounds of illegality was a mistake of law and fact and merits reconsideration and an alteration of judgment.

Plaintiffs' argument does not convince the Court to reconsider or alter its judgment. Although the M&O did not specifically state that in November 2002 Defendant stopped allowing Plaintiffs to late trade, Defendant's motion before the Court stated this fact and the Court was aware of it. See Def.'s Mot. in Opp'n to Pl.'s Mot. for Summ. J. at 6. The fact that the parties performed their other respective obligations under the contracts for one year following Defendant's removal of the late trading provision, however, does not lead to the legal conclusion Plaintiffs suggest. Striking an illegal provision from contracts that contain both legal and illegal provisions does not automatically confer complete legality status upon, and enable a court sitting in equity to enforce, the contracts.

As the Court explained in detail in its M&O, the undisputed facts in this case indicate that the Court cannot apportion Plaintiffs' contractual obligation to pay life insurance premiums among the legal and illegal provisions in the contracts. When Plaintiffs paid premiums for their life insurance contracts, they received three separate services from Defendant - (1) life insurance coverage, (2) the ability to submit transfer requests by

fax, and (3) the ability to late trade. Because Plaintiffs' premiums cannot be apportioned among these three services, the contracts as a whole are void. See M&O at 8-9, 12-13; see also Restatement (Second) of Contracts § 183 & cmt. (b).<sup>2</sup> The fact that both parties performed their obligations under the contracts after the illegal portions of the contracts were removed does not lead this Court to conclude that it made a mistake of law or fact in its M&O.

---

<sup>2</sup> Relevant portions of Restatement (Second) of Contracts § 183 & cmt. b are as follows:

If the parties' performances can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents and one pair is not offensive to public policy, that portion of the agreement is enforceable by a party who did not engage in serious misconduct.

\* \* \*

*b. Requirements.* The rule stated in this Section applies when four requirements are met. The first is that it must be possible to apportion the parties' performances into corresponding pairs of part performances. This process of apportionment is essentially one of calculation and the rule cannot be applied unless calculation is feasible . . . . The second requirement is that the corresponding pairs of part performances must be properly regarded as agreed equivalents. This means that the parts of the pair must be of roughly equivalent value to the injured party in terms of his expectation with respect to the total agreed exchange . . . . The third requirement is that one of the pairs of performances must not be offensive to public policy. If the entire agreement is part of an integrated scheme to contravene public policy, none of it will be enforced. The fourth requirement is that the party seeking enforcement must not have engaged in serious misconduct. This will depend on the gravity of the public policy involved and the extent of the party's involvement in its contravention. A court will not use the mitigating technique of this Section in favor of a party whose misconduct is so serious that a refusal to enforce the entire agreement is a proper sanction to discourage such conduct. In such a case enforcement of any part of the agreement would amount to a misuse of official authority.

## B. Late Trading Was Essential to the Contracts

In arguing that the late trading provisions should not void the contracts in their entirety because the provisions were not essential to the insurance contracts, Plaintiffs' reliance on Pennsylvania and Third Circuit case law is unconvincing. Pennsylvania courts have held that if an essential term of a contract is deemed illegal, it renders the entire contract unenforceable by either party. Diebler v. Chas. H. Elliot Co., 81 A.2d 557, 560-61 (Pa. 1951). On the other hand, under Pennsylvania law a court may partially enforce a contract pursuant to the following rule:

- (1) If less than all of an agreement is unenforceable under the rule stated in § 178 ["When a Term is Unenforceable on Grounds of Public Policy"], a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.
- (2) A court may treat only part of a term as unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.

Restatement (Second) of Contracts § 184 (emphasis added); see also Forbes v. Forbes, 48 A.2d 153, 156 (Pa. Super. 1946) (holding that an illegal provision in a family settlement contract did not defeat primary purpose of the agreement to provide support and maintenance for spouse); Huber v. Huber, 470 A.2d 1385, 1389-90 (Pa. Super.

1984) (illegal portion of post-marital contract did not defeat the remaining provisions containing the essential purpose of providing support for the couple's children) (citing Restatement (Second) of Contracts § 184).

Attached to Plaintiffs' Motion to Reconsider is an affidavit from Plaintiff Paul Prusky stating that he purchased the life insurance contracts for estate planning purposes and that he would have purchased the life insurance contracts even if Defendant had not allowed Plaintiffs to engage in late trading. See Paul Prusky Decl. at 1. Prusky's statements are offered in support of Plaintiffs' argument that the late trading provisions were not an essential part of the contracts and could therefore be stricken by the Court when it ordered specific performance of the legal portions of the contracts. See Pl.'s Mot. to Recon. at 10-18.

The essence of these contracts was not solely insurance coverage but was also the ability to engage in late trading; because Plaintiffs' premiums paid for both insurance coverage and the ability to late trade, the court cannot partially enforce the contracts. Despite Plaintiffs' arguments to the contrary, Plaintiffs' arguments and affidavits are contradicted by Plaintiffs' performance under the contracts from 1998 until Defendant stopped allowing late trading in 2002, as well as by Plaintiffs' deposition testimony and statements contained in Plaintiffs' filings. This evidence indicates that the late trading

provisions were an essential component of the life insurance contracts. For example, Plaintiffs submitted transfer requests to Defendant as often as once per day, up until 4:00 p.m. Central Time, for four years, indicating that Plaintiffs made active use of the contracts' late trading provisions. Furthermore, Plaintiff Prusky's deposition testimony is replete with statements outlining negotiations between the parties. These statements indicate that Plaintiffs actively sought to secure the right to late trade before entering into the life insurance agreement with Defendant, evidencing that the ability to late trade was essential to the contracts. In addition, in their motion currently before the Court, Plaintiffs state that the ability to late trade was "important to the utilization of the variable features of the Contracts." See Pl.'s Mot. for Recon. and Alter J. at 4. Plaintiffs also stated in their Motion for Partial Summary Judgment that the Sierk Memos, containing the late trading provisions and explicitly incorporated into each of the contracts, were "an integral part" of the contracts. Pl.'s Mot. for Partial Summ. J. at 5.<sup>3</sup> Further contradicting Plaintiffs' argument that the contracts' primary purpose was insurance is a footnote in Plaintiffs' Motion for Partial Summary Judgment stating that the variable life insurance

---

<sup>3</sup> Indeed, the incorporation of the Sierk Memos into the contracts was an essential fact relied upon by Plaintiffs in support of their case. The specific performance Plaintiffs sought in this suit, the ability to submit transfer requests by fax, was also set forth in the Sierk Memos and therefore Plaintiffs asserted the argument (uncontested by Defendant) that the Sierk Memos were explicitly incorporated into the contracts at issue in this case.

contracts at issue are "generally regarded as an expensive insurance vehicle," and that a policyholder decides to buy this type of insurance contract "[b]ecause a policyholder may achieve a better return under the investment feature of such a policy than elsewhere." Id. at n.5.

Based on the conduct and statements outlined above, the late trading provisions were an essential and non-severable part of the contracts. Although both parties performed their respective obligations from November 2002 until November 2003 without implicating the illegal late trading provisions, at no time were Plaintiffs' premiums apportioned between the legal and illegal obligations created when the parties initially signed the contracts in 1998. In other words, Plaintiffs' obligation to pay for the ability to late trade in monthly premiums, and Defendant's obligation to allow late trading, were not "entirely separable elements of the contract between the parties" such that the Court must partially enforce the legal portions of the Contracts while at the same time ignoring the illegal portion. Watkins v. Hudson Coal Co., 151 F.2d 311, 320 (3d Cir. 1945). Therefore, the Court did not commit a mistake of law in its M&O and will not reconsider its decision refusing to enforce the legal portions of the contracts.

**C. Notice Requirement for Court's Entry of Summary Judgment**

Plaintiffs argue that the Court did not provide them with the required notice that the Court was considering entering summary

judgment against Plaintiffs on the ground that the contracts were void. As was explained in detail in this Court's M&O, district courts have the power to enter summary judgment sua sponte so long as the losing party was on notice that they had to come forward with all of their evidence. See Helmrigh Transp. Systems, Inc. v. City of Philadelphia, 2004 WL 2278534 (E.D. Pa. Oct. 8, 2004). A court also possesses the power to grant summary judgment in favor of the non-moving party in cases where the moving party has had adequate notice of the grounds for the judgment and where there is clear support for the judgment. See DeFelice v. Philadelphia Bd. of Ed., 306 F. Supp. 1345, 1348 (E.D. Pa. 1969). In this case, after reviewing the opposing motions, the Court held that based on the illegal late trading provisions contained in each of the contracts, the Court could not grant summary judgment in favor of Plaintiffs. Furthermore, based on the applicable law regarding the unenforceability of illegal contracts, the Court granted summary judgment in favor of Defendant.

Contrary to Plaintiffs' assertions, Plaintiffs did have adequate notice of the grounds for this Court's decision. The illegality of late trading was addressed by Defendant in its Motion in Opposition to Plaintiff's Motion for Partial Summary Judgment, see Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 14 (first argument section titled "Plaintiff's Motion Should be Denied Because the Sierk Memos are Illegal and Therefore Void"), and

Plaintiffs explicitly addressed the legality issue in their Reply brief, see Pl.'s Reply Mem. in Support of Pl.'s Mot. for Partial Summ. J. at 8. While it is true, as Plaintiffs argue, that the language used by both parties in their filings referred to the legality of "the Sierk Memos" as opposed to the legality of the contracts in their entirety, this fact does not alter the Court's analysis, as both parties agreed that the Sierk Memos were incorporated into the contracts. See Pl.'s Compl. at ¶¶ 52-53; Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 15. Logically, if the Sierk Memos contained an illegal provision, the contracts at issue contained an illegal provision. Plaintiffs' explicitly adopted this logic in their Reply Memorandum when they argued that the Sierk Memos were "an integral part" of the contracts and that the late trading provisions contained in the Sierk Memos did not render the contracts unenforceable because the late trading provisions "[we]re not at issue in this case." See Pl.'s Reply Mem. at 5. Pursuant to this reasoning, Plaintiffs had adequate notice of the grounds of this Court's decision and therefore the Court will not reconsider its decision in light of Plaintiffs' second argument based on lack of notice.

#### **D. New Evidence**

Plaintiffs' third argument suggests that new evidence "adduced since the parties submitted their papers on Plaintiffs' motion for partial summary judgment" supports this Court's reconsidering its

M&O. The supposed new evidence, the November 17, 2004, deposition testimony of Plaintiff Steven Prusky, simply reiterates a fact that was before the Court when it reviewed the parties' motions and issued its M&O: Defendant stopped allowing Plaintiffs to late trade in November 2002. Because this evidence is not new, it does not support the argument that this Court must reconsider its earlier decision granting summary judgment in favor of Defendants.

**E. Legality of Late Trading**

Last, Plaintiffs argue that the Court should reconsider and alter its decision because the late trading provision was not illegal. As explained above, Plaintiffs had adequate notice that the legality of the provisions contained in the Sierk Memos was at issue. As such, an argument suggesting the late trading provision was legal could have been raised earlier. Furthermore, the argument does not convince the Court that its conclusion that the late trading provisions contained in the contracts were illegal was a mistake of law. Therefore, the Court does not find this argument to be a valid basis for reconsideration or alteration of its decision.

An appropriate Order follows.

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

PAUL M. PRUSKY, et al. : CIVIL ACTION  
 :  
v. :  
 :  
RELIASTAR LIFE INSURANCE COMPANY : No. 03-6196

O R D E R

AND NOW, this 26<sup>th</sup> of January, 2005, upon consideration of Plaintiffs' Motion to Reconsider and Alter Judgment (Docket No. 52), Defendant's Response thereto (Docket No. 53), and Plaintiffs' Request for Oral Argument (Docket No. 54) IT IS HEREBY ORDERED that Plaintiffs' motion is **DENIED** without oral argument.

BY THE COURT:

S/ \_\_\_\_\_  
HERBERT J. HUTTON, S.J.