

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

PHL VARIABLE INSURANCE
COMPANY,

Plaintiff,

vs.

Case No. 3:09-cv-1222-J-34JRK

THE EDWIN FULD LIFE INSURANCE
TRUST NOVEMBER 2007, by and through
its trustee of record, Robert D. Wilcox, Esq.,

Defendant.

ORDER

This cause is before the Court on the Motion to Strike Portions of the First Amended Complaint and Memorandum of Law in Support Thereof (Doc. No. 17; "Motion"), filed February 22, 2010. In the Motion, Defendant The Edwin Fuld Life Insurance Trust November 2007 ("Defendant") seeks to strike certain portions of Plaintiff PHL Variable Insurance Company's First Amended Complaint (Doc. No. 6; "First Amended Complaint"). Motion at 1, 9. Plaintiff PHL Variable Insurance Company ("Plaintiff") opposes the relief requested in the Motion. See Plaintiff, PHL Variable Insurance Company's Opposition to Defendant's Motion to Strike Portions of the First Amended Complaint and Memorandum of Law in Support (Doc. No. 19; "Response"), filed March 11, 2010. After obtaining leave of Court, see Order (Doc. No. 22), Defendant filed a reply to the Response. See Defendant's Reply Memorandum in Support of Motion to Strike Portions of the First Amended Complaint (Doc. No. 26; "Reply"), filed March 29, 2010. On April 12, 2010, Plaintiff, PHL Variable Insurance

Company's Sur-Reply in Opposition to Defendant's Motion to Strike Portions of the First Amended Complaint (Doc. No. 29; "Sur-Reply") was filed. In light of the Reply and Sur-Reply, this matter is ripe for decision, and there is no need for oral argument as requested in Plaintiff PHL Variable Insurance Company's Request for Oral Argument on Motion to Strike (Doc. No. 20; "Request for Oral Argument"). Therefore, the Request for Oral Argument is denied. Upon consideration of the Motion, Response, Reply, Sur-Reply, and being otherwise fully advised in the premises, the Motion is due to be denied for the reasons explained herein.

This case was commenced on December 11, 2009 with the filing of Plaintiff PHL Variable Insurance Company's Original Complaint (Doc. No. 1; "Complaint"). The Complaint was amended on January 5, 2010. See First Amended Complaint. In the First Amended Complaint, Plaintiff alleges that on or about November 16, 2007, Defendant applied for an insurance policy to insure the life of Edwin Fuld ("Fuld"). Id. at 3. Plaintiff asserts that the application contained false representations; specifically, that Fuld had a net worth of \$68,800,000 with annual income of \$6,900,000, and the life insurance was being purchased for estate planning purposes. Id. at 4. Based on these allegedly false representations, Plaintiff issued a life insurance policy ("Policy") to Defendant with a death benefit of \$15,000,000. Id. at 5. According to Plaintiff, it would not have issued the life insurance policy if accurate information had been provided. Id. Plaintiff alleges that it has suffered damages as a result of the Policy's issuance, "including but not limited to, commissions [Plaintiff] paid to its sales representatives that it would not have paid, but for the sale [of the Policy]." Id. Plaintiff seeks "a declaratory judgment that the Policy is null, void and rescinded *ab initio* due to the fraudulent, willfully false and/or material misrepresentations and omissions that Fuld

and [Defendant] made” in the insurance application. Id. Plaintiff proposes to deposit with the Clerk of the Court all premiums paid on the Policy, and Plaintiff seeks, “following rescission of the Policy, an equitable distribution of the premiums paid on the Policy.” Id. “More specifically, [Plaintiff] seeks a distribution of the premiums making [Plaintiff] whole for the damages it has suffered as a result of the Policy’s issuance” Id.

In the instant Motion, Defendant “requests that the Court strike all statements in the [First Amended Complaint] that refer to or request that, if the Policy is rescinded, the full refund of premiums plus interest paid under the Policy by the Defendant be offset by commissions paid to [Plaintiff]’s sales representatives or by other damages allegedly incurred by [Plaintiff] that are not benefits conferred on the Defendant, including [Plaintiff]’s request for its own payment of attorneys’ fees.” Motion at 9. According to Defendant, these portions of the First Amended Complaint “squarely contradict Florida law.” Id. at 1. Defendant seeks this relief pursuant to Rule 12(f), Federal Rules of Civil Procedure (“Rule(s)”). Id.

Rule 12(f) grants the Court the authority to strike from a pleading any “insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). However, striking pleadings is disfavored:

Partly because of the practical difficulty of deciding cases without a factual record, it is well established that the action of striking a pleading should be used sparingly by the courts. . . . It is a drastic remedy to be resorted to only when required for the purposes of justice. . . . The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy. . . . It is true, also, that when there is no showing of prejudicial harm to the moving party[,] the courts generally are not willing to determine disputed and substantial questions of law on a motion to strike.

Augustus v. Bd. of Pub. Instruction of Escambia County, 306 F.2d 862, 868 (5th Cir. 1962)¹ (internal quotation and citation omitted) (emphasis added).

Applying Rule 12(f), the Court concludes that the Motion is due to be denied. In support of the Motion, Defendant relies primarily on Perlman v. Prudential Ins. Co. of Am., 686 So.2d 1378 (Fla. 3d DCA 1997). In Perlman, the purchaser of a life insurance policy relied on the representations of an insurer's agent that a \$1,000,000 life insurance policy would cost no more than four annual premiums of approximately \$150,000. Perlman, 686 So.2d at 1379. After the purchaser of the life insurance policy made three of the four payments (approximately \$450,000), he was informed that an additional \$80,000 would be required to keep the policy in effect. Id. The purchaser refused to pay the additional money; the policy was terminated; and the insurer refunded the "cash value" of the policy, approximately \$265,000. Id. The purchaser sued for rescission and compensatory damages in the amount of the unreturned premiums, or \$185,000. Id. The Florida Third District Court of Appeal concluded that the purchaser was entitled to a return of a portion of the premiums; the insurer had to be credited with the value of the insurance it provided. Id. at 1380. Rejecting the contention that the insurer "must return all of the premiums," id. at 1380, the court adopted the rule that the insurer "is entitled to retain only that portion of the premiums which represent the 'value' of the policy . . . , that is, the money equivalent of the chance, as determined by the mortality tables, that persons of the [insured]s' ages would have died

¹ In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former United States Court of Appeals for the Fifth Circuit that were rendered prior to the close of business on September 30, 1981.

[during the term of the policy] and thus have entitled the [purchaser] to the million dollars.”

Id. at 1381.

Perlman is factually distinguishable from this case. In Perlman, the purchaser of an insurance policy sued the insurance company to rescind the insurance policy based on the fraud of the insurance company’s agent. See id. at 1379. Here, in contrast, it is the insurance company that is suing the purchaser of the policy for rescission based on alleged fraud on the part of the purchaser. See generally First Amended Complaint. Defendant essentially takes the position that never—under any circumstances—may an insurer obtain an equitable offset against premiums paid by a fraudster. Although Perlman may arguably provide some support for Defendant’s position, neither Perlman nor any of the other cases cited by Defendant establish as a matter of law that an insurer suing for rescission based on the purchaser’s fraud can never, regardless of the egregiousness of the fraud, seek an equitable distribution of premiums for expenses or damages incurred as a result of the fraud.

As Plaintiff points out, Response at 7, the secondary sources cited by Defendant indicate there is authority contrary to Defendant’s position. Defendant cites 2 Lee R. Russ, Couch on Insurance § 32:63 (3d ed. 2010) for the proposition that “it has been held that where a life insurance is rescinded for misrepresentations in the application, the insurer is obligated not only to refund the premium, but to pay the interest earned on the premium from the date of receipt.” Motion at 7 (citing 2 Lee R. Russ, Couch on Insurance § 32:63 (3d ed. 2010)). “There is authority, however, that where the policy transaction is a fraud upon the insurer, there is no obligation on the insurer to return the unearned premiums upon cancelling the policy.” 2 Lee R. Russ, Couch on Insurance § 32:63 (3d ed. 2010). In addition,

Defendant cites 44 Am. Jur. Ins. § 926 (2d ed. 2010) for the proposition that “[a]n insurance company is generally required to tender a refund of premiums paid, when it rescinds an insurance policy for misrepresentation” Motion at 7 (citing 44 Am. Jur. Ins. § 926 (2d ed. 2010)). However, the same section states that, “[w]hile there are causes holding that the putative insured cannot recover premium payments if the policy is invalidated by the applicant’s fraud[,] the distinction now followed depends on whether the insurance company paid a claim and subsequently discovered that the insured knowingly made a false representation.” 44 Am. Jur. Ins. § 926 (2d ed. 2010) (emphasis added). The secondary sources cited by Defendant caution against granting the instant Motion.

Plaintiff further argues that rescission is an equitable remedy requiring examination of the “specific facts and equities, as developed through discovery” Response at 9. Specifically, Plaintiff asserts the Policy was obtained as part of an illegal “Speculator Initiated Life Insurance” or “Stranger Originated Life Insurance” (“STOLI”) scheme. Id. at 2. Plaintiff explains that a STOLI scheme is one in the which a life insurance policy is “procured not to protect the policy’s beneficiary from the economic consequences of the insured’s death, but with the intent that a third party investor will profit when the insured dies.” Id.² Plaintiff points to recent cases from other jurisdictions that it asserts show a willingness on the part of courts to permit insurers to retain premiums in lawsuits seeking rescission of STOLI policies. Id. at

² Defendant contends Plaintiff’s arguments in relation to the allegations of a STOLI scheme should be disregarded by the Court because Plaintiff did not plead these allegations in the First Amended Complaint. Reply at 1-2. However, Plaintiff did plead that Defendant falsely represented Fuld’s income, and that “Fuld and the Trust represented that the life insurance was being sought for ‘estate planning purposes,” and “[t]his statement was false” First Amended Complaint at 4. For purposes of resolving the instant Motion, this allegation is sufficient under the notice pleading standard of the Rules to allow consideration of Plaintiff’s argument related to STOLI schemes.

10-12 (citations omitted). Although none of these cases are directly on point, and none apply Florida law, they do indicate there may be circumstances in which it could be appropriate to equitably offset against premiums in cases involving fraud. See, e.g., Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787, 797-98 (6th Cir. 2009). As the Wuliger court suggests, allowing a full refund of all premiums whenever a STOLI scheme is discovered would allow such schemes to be executed risk free; such a rule would be inconsistent with the public policy underlying the prohibition against STOLI schemes in the first place. See id. The rationale in Wuliger further cautions against striking the relief requested by Plaintiff.³

Finally, Defendant argues the language of the Policy requires a refund of all premiums. Motion at 8-9. However, the language quoted by Defendant applies “[i]f we contest the validity of all or a portion of the face amount provided under the policy” Id. at 8 (quoting the Policy) (emphasis added). In the Amended Complaint, Plaintiff alleges the Policy is void ab initio as a result of false representations on the part of Defendant; Plaintiff is not merely contesting the validity of the “face amount.” Amended Complaint at 4-6. In addition, Plaintiff argues this language is inapplicable because it is seeking equitable rescission of the contract rather than cancellation under the terms of the Policy. Response at 7-8 (citing State ex rel. Pac. Mut. Life Ins. Co. v. Larson, 12 So.2d 896, 897 (1943) (stating that cancellation, or the right to rescind, “may be authorized by: (a) statute; (b) terms of the contract of insurance; (c) breach of the contract; and (d) consent of the parties,” and “[i]f the policy has been obtained by fraud, misrepresentation, or mistake, courts of equity, on proper showing, may decree

³ Defendant repeatedly argues that no benefit was conferred on Defendant because Plaintiff alleges that the Policy was void ab initio. Motion at 7-8; Reply at 5-6. However, this argument does not address Plaintiff’s assertion that a balancing of the equities requires offset against the premiums.

cancellation”)). Furthermore, the Policy is not attached to the Complaint, and the Court “cannot consider matters beyond the pleadings” when evaluating a motion to strike. Stapleton v. State Farm Fire and Cas. Co., 11 F. Supp. 2d 1344, 1345 (M.D. Fla. 1998). Under the circumstances, the language of the Policy does not provide grounds for granting the Motion.

Defendant has not shown that Plaintiff cannot under any circumstances seek an equitable offset against the premiums for Defendant’s alleged fraud. Moreover, Defendant has not shown that prejudice would result from denial of the Motion. See Augustus, 306 F.2d at 868 (stating that “when there is no showing of prejudicial harm to the moving party[,] the courts generally are not willing to determine disputed and substantial questions of law on a motion to strike”). For the foregoing reasons, the Motion is due to be denied. Defendant’s concerns relating to Plaintiff’s requested relief are appropriately addressed at a later stage of the proceedings, after discovery has taken place. Accordingly, it is

ORDERED:

The Motion to Strike Portions of the First Amended Complaint and Memorandum of Law in Support Thereof (Doc. No. 17) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida on August10, 2010.



JAMES R. KLINDT
United States Magistrate Judge

jdf
Copies to:
Counsel of Record