UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARY MURTHA,	:	
Substitute Plaintiff,	:	
	:	Civil Action No.
v.	:	3:98-CV-975 (JCH)
	:	
GOLDEN RULE INSURANCE	:	MARCH 5, 2001
COMPANY,	:	
Defendant.	:	

RULING ON MOTION FOR SUMMARY JUDGMENT [DKT. NO. 30]

The substitute plaintiff, Mary Murtha ("plaintiff"), brings this civil action on behalf of the deceased, Jeffrey Moreau ("Moreau"), against the defendant Golden Rule Insurance Company ("Golden") for breach of contract and a violation of the Connecticut Unfair Trade Practices Act ("CUTPA") based on a violation of the Connecticut Unfair Insurance Practices Act ("CUIPA"), for failure to cover Moreau's medical bills under a medical insurance policy issued to Moreau by Golden. Amended Complaint (Dkt. No. 11).[1] Golden has raised eight special defenses to each of the plaintiff's claims and four counterclaims. Second Amended Answer, Special Defenses & Counterclaim (Dkt. No. 24).

Now before the court is Golden's Motion for Summary Judgment [Dkt. No.

[1] On July 21, 2000, the court granted the plaintiff's Motion for Substitution of Mary Murtha, Executrix of the Estate of Jeffrey Moreau a/k/a Jeffrey Alan Moreau (Dkt. No. 34), following Moreau's death in the summer of 2000.

30] on the plaintiff's two claims. For the reasons that follow, the motion is granted.

I. FACTS

The following facts are undisputed. In March 1977, Moreau was admitted to Saint Francis Hospital where he underwent surgery for the removal of a brain tumor. Plaintiff's Brief in Opposition (Dkt. No. 39) at 2. Almost twenty years later, on July 16, 1996, Moreau visited Dr. Stephen Leach of the Windham Medical Group, P.C. for purposes of a general physical examination. Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 1; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶ 1. On February 12, 1997, Moreau sought medical advice relating to headaches he had been experiencing, and he underwent a neurological examination and CAT scan at Saint Francis Hospital. Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 2; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶¶ 1-2.

Also on February 12, 1997, Moreau, with the plaintiff's assistance, completed and submitted an application for a medical insurance policy with Golden ("application"). Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 3; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶ 1. Moreau indicated that he had not received any medical advice or treatment in the past six months, in response to Question 19 on the application, failing to disclose the treatment he received earlier that same day. Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 4; Plaintiff's 9(c)2 Statement (Dkt.

No. 38) at ¶¶ 1, 4; see also Defendant's Memo. of Law (Dkt. No. 32), Ex. 1.

In response to Question 21(c) on the application, Moreau indicated that he had not experienced any indications, signs, symptoms, diagnoses or treatment of headaches in the last ten years, failing to disclose the headaches he was experiencing. Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 6; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶¶ 1, 4; see also Defendant's Memo. of Law (Dkt. No. 32), Ex. 1. Moreau failed to list any doctors or other health care professionals that Moreau has consulted with or been treated by in the last five years, failing to disclose the treatment he received that same day. Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 8; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶¶ 1, 4; see also Defendant's Memo. of Law (Dkt. No. 32), Ex. 1.

Based on this application, Golden issued a medical insurance policy to Moreau with effective dates of coverage for injuries of February 13, 1997, and for illnesses of February 27, 1997. Defendant's 9(c)1 Statement (Dkt. No. 31) at ¶ 9; see also Defendant's Memo. of Law (Dkt. No. 32), Ex. 1. Section 16 of the policy states, in part:

> Material Misstatements or Omissions: This policy may be voided by us, or claims may be denied, by reason of misstatements by you in any application for this policy or in any additional information which you provide in support of the application. This action may be taken by us in the first two years of a person's coverage. Beyond two years after the

> effective date of coverage, this policy may be voided only by reason of fraudulent misstatement as determined by a court of competent jurisdiction.

Defendant's Memo. of Law (Dkt. No. 32), Ex. 1. The application also contained a "Statement of Understanding" above Moreau's signature line, which states:

> I have personally completed this application. I represent that the answers and statements on this application are true, complete, and correctly recorded to the best of my knowledge. I UNDERSTAND AND AGREE that this application and the payment of the initial premium do not give me immediate coverage. Coverage for illness begins on the 15th day after a person becomes insured for injury. Incorrect or incomplete information on this application may result in lose of coverage or claim denial. The information provided in this application, and any supplements or amendments to it, will be made a part of any policy/certificate which may be issued. The producer is only authorized to submit the application and initial premium, and mu not change or waive any right or requirement. I have received a conditional receipt.

Id. Moreau signed and dated the application beneath this statement on February 12, 1997. Id.

The CT scan taken on February 12 showed no evidence of a recurrent tumor, but Moreau continued to seek medical treatment for his headaches in March and April 1997. Plaintiff's Brief in Opposition (Dkt. No. 39) at 4. Moreau was diagnosed with a brain tumor in May 1997 and underwent surgery to remove the tumor on July 15, 1997. Id.

Moreau submitted claims for this treatment, which Golden denied on the

basis of the policy's Pre-Existing Condition clause. Id. at 5; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶ 6; see also Defendant's Memo. of Law (Dkt. No. 32), Ex. 1; Plaintiff's Brief in Opposition (Dkt. No. 39), Ex. 10. Golden accepted premiums in the aggregate amount of $1,824.28 from Moreau for the policy. Plaintiff's Brief in Opposition (Dkt. No. 39), Ex. 10; Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶ 8.

On October 1, 1997, Golden asked Dr. Norman W. Oestrike, a neurologist, to review Moreau's medical records to determine whether Moreau had a pre-existing condition according to the terms of the policy. Defendant's Memo. in Support (Dkt. No. 32), Ex. 9 at ¶ 3. By letter of December 10, 1998, Golden informed Moreau that it was voiding his policy for material misstatements in response to Questions 19, 21(c), and 25-27 on the application. Plaintiff's Brief in Opposition (Dkt. No. 39), Ex. 10.

II. STANDARD OF REVIEW

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); White v. ABCO Engineering Corp., 221 F.3d 293, 300 (2d Cir. 2000). A court must grant summary judgment

"'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 . . . .'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Fed. R. Civ. P. 56(c)). "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 97 (2d Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "An issue of fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law.'" Id. (quoting Liberty Lobby, 477 U.S. at 248).

"[I]f after discovery, the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," summary judgment is appropriate. Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (internal quotation marks omitted) (quoting Berger v. United States, 87 F.3d 60, 65 (2d Cir. 1996)). "The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. Instead, 'the non-movant must produce specific facts indicating' that a genuine factual issue exists. 'If the evidence [presented by the non-moving party] is merely colorable, or is not significantly probative, summary judgment may be granted.' To defeat a motion, 'there must be evidence on which the jury could

reasonably find for the [non-movant].'" Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998) (citations omitted).

"In deciding the motion, the trial court must first resolve all ambiguities and draw all inferences in favor of the non-moving party, and then determine whether a rational jury could find for that party." Graham v. Long Island R.R., 230 F.3d 34, 38 (2d Cir. 2000). "If reasonable minds could differ as to the import of the evidence, . . . and [i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1997) (internal quotation marks omitted) (quoting Brady v. Town of Colchester, 863 F.2d 205, 211 (2d Cir. 1988)).

"At the same time, the non-moving party must offer such proof as would allow a reasonable juror to return a verdict in his favor . . .." Graham, 230 F.3d at 38. A plaintiff may not create a genuine issue of material fact by presenting unsupported statements or "sweeping allegations." Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 65 (2d Cir. 1997). The non-moving party "cannot defeat the motion by relying on the allegations in his pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible. The motion 'will not be defeated merely . . . on the basis of conjecture or surmise.'"

Gottlieb v. County of Orange, 84 F.3d 511, 518 (2d Cir. 1996) (citations omitted); see also Fed. R. Civ. P. 56(e) (a non-moving party "may not rest upon the mere allegations or denials of the [non-moving] party's pleading").

III. DISCUSSION

The defendant primarily raises the arguments in support of its motion for summary judgment that (1) the policy on which the plaintiff is suing is void because of material misrepresentations made by Moreau in the application for the medical insurance policy with Golden and (2) Golden properly denied coverage of Moreau's claims relating to what was ultimately diagnosed as a brain tumor because it was a pre-existing condition as that term is defined under the policy. The plaintiff responds that genuine issues of material fact exist as to whether, inter alia, "[w]hether the tumor discovered in Mr. Moreau is to be considered a Pre-Existing Condition," "[w]hether any misrepresentation was made," "[w]hether any misrepresentation, if made was material," and "[w]hether Golden Rule had knowledge of certain conditions yet failed to act."

The law on material misrepresentations in insurance contracts is well established. "As a matter of common law, a party to a contract other than an automobile insurance contract may rescind that contract and avoid liability thereunder if that party's consent to the contract was procured either by the other

party's fraudulent misrepresentations, or by the other party's nonfraudulent material misrepresentations." Munroe v. Great Am. Ins. Co., 234 Conn. 182, 188 n.4 (1995).[2] "Accordingly, the party seeking to rescind need not demonstrate that the other party's misrepresentations were made intentionally, provided that they are material to the contract." Id.

Thus, "[u]nder Connecticut law, an insurance policy may be voided by the insurer if the applicant made '[m]aterial representations . . ., relied on by the company, which were untrue and known by the assured to be untrue when made.'" Pinette v. Assurance Co. of Am., 52 F.3d 407, 409 (2d Cir. 1995) (quoting State Bank & Trust Co. v. Conn. Gen. Life Ins. Co., 109 Conn. 67, 72 (1929)). To prevail on this defense to a contract action, a defendant "must therefore prove three elements: (1) a misrepresentation (or untrue statement) by the plaintiff which was (2) knowingly made and (3) material to defendant's decision whether to insure." Id.

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[2] Plaintiff, a citizen of Connecticut, brings this action in diversity pursuant to 28 U.S.C. § 1332(a)(1) against Golden Rule, an Illinois corporation with its principal place of business in Illinois. "'[A] federal court sitting in diversity must follow the law directed by the Supreme Court of the state whose law is found to be applicable.'" Belmac Hygiene, Inc. v. Belmac Corp., 121 F.3d 835, 840 (2d Cir. 1997) (quoting Plummer v. Lederle Labs., 819 F.2d 349, 355 (2d Cir. 1987)). The parties' briefs assume that Connecticut law controls, "and such 'implied consent . . . is sufficient to establish choice of law.'" Krumme v. Westpoint Stevens Inc., 238 F.3d 133, 138 (2d Cir. 2000) (quoting Tehran-Berkeley Civil & Envtl. Eng'rs v. Tippetts-Abbett-McCarthy-Stratton, 888 F.2d 239, 242 (2d Cir. 1989)). Accordingly, the court applies Connecticut state law.

"For a material misrepresentation to render a contract voidable under Connecticut law, the misrepresenting party must know that he is making a false statement. 'Innocent' misrepresentations—those made because of ignorance, mistake, or negligence—are not sufficient grounds for rescission." Id. at 409-10. "When Connecticut courts speak of 'innocent' misrepresentations, they generally have in mind the situation in which the applicant does not know that the information he is providing is false." Id. at 410. However, under Connecticut law,

> a person may not claim that a misrepresentation is "innocent" solely because the person failed to read the application before signing it. "The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written." Thus, at least in Connecticut, an applicant for insurance has the affirmative duty "to inform himself of the content of the application signed by him, under penalty of being bound by the representations as recorded therein."

Id. (citation omitted). Connecticut courts have also held that "'[a]n insured makes a knowing misrepresentation only when he submits an answer to a question in the application other than that which he has reason to believe is true.' . . . A misrepresentation will not be found if the insured was 'justifiably unaware of [the answer's] falsity, had no actual or implied knowledge of its existence, and was not guilty of bad faith, fraud or collusion.'" Mt. Airy Ins. Co. v. Millstein, 928 F. Supp. 171, 175 (D. Conn. 1996) (quoting Lewis v. John Hancock Mut. Life Ins.

Co., 443 F. Supp. 217, 218 (D. Conn. 1977)).

As to the issue of materiality, "[u]nder Connecticut law, a misrepresentation is material 'when, in the judgment of reasonably careful and intelligent persons, it would so increase the degree or character of the risk of the insurance as to substantially influence its issuance, or substantially affect the rate of premium.'" Pinette, 52 F.3d at 411 (quoting Davis Scofield Co. v. Agric. Ins. Co., 109 Conn. 673, 678 (1929)). The Second Circuit has held that "[c]ommon sense tells us that an applicant's prior loss history is material to a reasonable insurance company's decision whether to insure that applicant or determination of the premium" and has further observed that "Connecticut courts have evaluated similar misrepresentations and found them material as a matter of Connecticut law." Id. "Furthermore, Connecticut caselaw strongly suggests that an answer to a question on an insurance application is presumptively material." Id.; see also Mt. Airy, 928 F. Supp. at 176 ("Information in an insurance application that becomes a part of the policy is material."). "Thus, in addition to the character of the information misrepresented, the fact that the application in this case specifically requested the information supports the district court's finding of materiality." Pinette, 52 F.3d at 411.

The court concludes that the plaintiff has raised no genuine issues of material fact as to whether Moreau made misrepresentation on the application for his policy

with Golden and as to whether these misrepresentations were material. There is no dispute whatsoever that Moreau falsely answered Questions 19, 21(c), and 26-27 of the application. See Plaintiff's 9(c)2 Statement (Dkt. No. 38) at ¶ 1. Moreau had sought medical advice and treatment for headaches earlier on the very day he completed the application. Moreau signed the application after filling in his negative answers to Questions 19 and 21(c) and after listing no doctors or other health care professionals under Question 27 in response to Question 26. Because it is undisputed that Moreau knew he had been experiencing headaches and had sought treatment from a doctor that same day, the court concludes as a matter of law that Moreau made knowing misrepresentations when he submitted answers to questions in the application other than that which he had reason to believe is true.

As to materiality, the application specifically sought the information which Moreau failed to disclose, and the application indicated that the information provided "will be made a part of any policy/certificate which may be issued." Defendant's Memo. of Law (Dkt. No. 32), Ex 1; see also Mt. Airy, 928 F. Supp. at 176 (holding that misrepresentations are material where "the application provided that 'this application shall become the basis of any coverage and a part of any policy that may be issued by the Company"); Paul Revere Life Ins. Co. v. Pastena, 52 Conn. App. 318, 322 (1999) (holding that "[t]here is no dispute that the statements

and answers contained in an insurance application become part of that application and any contract of insurance issued on it, and that these statements and answers are material" (footnote omitted)). The questions at issue on the application did not ask if Moreau was sick or had been diagnosed with any illness, so it is no answer that "Moreau had no reason to believe that he was ill, having been diagnosed by two qualified physicians." Plaintiff's Brief in Opposition (Dkt. No. 39) at 13; see also Ranger Ins. Co. v. Kovach, 63 F. Supp. 2d 174, 185-86 (D. Conn. 1999) (holding it is no defense to a claim of material misrepresentation that the plaintiff believed responsive information to questions on an insurance application were of "minor significance"); Corn v. Protective Life Ins. Co., No. 3:95-cv-556, 1998 WL 51783, at *5 (D. Conn. Feb. 4, 1998) (same). The court concludes that, under well-settled Connecticut law, Moreau's misrepresentations were material as a matter of law.

The plaintiff responds, relying on cases from the Northern District of Mississippi and the Court of Appeals for the Fifth Circuit, that, by failing to rescind or void the policy prior to December 1998 and continuing to collect premiums from Moreau, Golden waived its right to rescind the insurance contract. Generally, under Connecticut law, "[w]aiver is the intentional relinquishment of a known right. To constitute waiver there must be both knowledge of the existence of the right and intention to relinquish it. Waiver involves the idea of assent, and assent is an act of

understanding. This presupposes that the person to be affected has knowledge of his rights, but does not wish to assert them. Intention to relinquish must appear." Novella v. Hartford Accident & Indem. Co., 163 Conn. 552, 561-62 (1972) (citations and internal quotation marks omitted). "Waiver does not have to be express, but 'may consist of acts or conduct from which waiver may be implied.' In other words, waiver may be inferred from the circumstances if it is reasonable so to do." Id. at 562 (citation omitted).

The plaintiff relies heavily on the fact that Golden knew of Moreau's misrepresentations prior to December 1998, but failed to void or rescind the policy before that time. The plaintiff also argues that the language of Section 16 of the policy is ambiguous in that it can be read to provide Golden with an irrevocable choice either to deny claims or to void the policy: "This policy may be voided by us, or claims may be denied, by reason of misstatements by you in any application for this policy or in any additional information which you provide in support of the application." Defendant's Memo. in Support (Dkt. No. 32), Ex. 1.

"Generally, the interpretation of an insurance contract is a matter of law to be decided by the Court. As the Second Circuit has recently discussed in Andy Warhol Foundation, 189 F.3d 208, 213, an insurance policy, like any contract, must be construed to effectuate the intent of the parties as derived from the plain and

ordinary meaning of the policy's terms. If the language of the policy, when viewed in its entirety, is unambiguous, the Court will apply its terms." Am. Home Assurance Co. v. Abrams, 69 F. Supp. 2d 339, 348 (D. Conn. 1999) (citations omitted). The court concludes that the language of the policy is not ambiguous, when read in its entirety, and clearly allows Golden to rescind a policy for a material misstatement "in the first two years of a person's coverage" while also denying claims in the intervening period. Defendant's Memo. in Support (Dkt. No. 32), Ex. 1. Golden complied with these terms: the application was submitted on February 12, 1997, and Golden informed Moreau that it was voiding the contract on December 10, 1998.

The fact that Golden denied claims in the intervening period and accepted Moreau's premium payments does not alter or result in a waiver of Golden's right to rescind under the terms of the policy. Furthermore, the fact that Golden was aware of Moreau's misrepresentations prior to its voiding of the policy does not constitute circumstances from which it is reasonable to infer an intentional waiver of Golden's rights under the contract under Connecticut law.

The court is also not persuaded by the plaintiff's citation to two decisions of courts outside of this jurisdiction. Mattox v. Western Fidelity Insurance Company, 694 F. Supp. 210, 215 (N.D. Miss. 1988), which relied on Mississippi state

insurance and contract law, involved a situation in which the insured provided information to the insurer's agent who failed to record the information on the insured's application. Here, the plaintiff does not even claim that any information was divulged to an agent of Golden nor does the plaintiff deny that Moreau, with the plaintiff's assistance, completed the application himself. Moreover, the situation that the district court in Mattox sought to avoid—"an insurance company . . . be[ing] free to issue insurance policies with full knowledge of innocent misstatements by the applicant and collect premiums while reserving the right to avoid the policy any time a claim was submitted which was for an amount greater than the accumulated premiums"—does not apply in the instant case where the plaintiff has failed to raise any issue of material fact to suggest that Moreau's misrepresentations were innocent or unknowing.

The Fifth Circuit's decision in Carroll v. Metropolitan Insurance & Annuity Company, 166 F.3d 802, 803-06 (5th Cir. 1999), also relies on an application of Mississippi state insurance and contract law and involves an insured who was examined by a doctor retained by the insurer prior to the insurer deciding on the application and issuing the policy. Moreover, the statement in Carroll from which the plaintiff seeks support for its waiver argument—"Even if a misrepresentation exists, however, an insurance company cannot rely on it to rescind the policy if facts

were known that would cause a prudent insurer 'to start an inquiry, which, if carried out with reasonable thoroughness, would reveal the truth.'"—quotes a Southern District of Mississippi case for this principle of Mississippi law. 166 F.3d at 806 (quoting Mass. Mut. Life Ins. Co. v. Nicholson, 775 F. Supp. 954, 959 n.13 (N.D. Miss. 1991). Examination of the Nicholson decision indicates that the facts referred to in this statement are "facts in the application [that] would cause a prudent insurer 'to start an inquiry which, if carried out with reasonable thoroughness, would reveal the truth,'" to which facts "the insurance company 'cannot blind [itself] . . . and choose to 'rely' on the misrepresentation.'" 775 F. Supp. at 959 n.13 (quoting N.Y. Life Ins. Co. v. Strudel, 243 F.2d 90, 93 (5th Cir. 1957) (applying Florida state insurance law)). Here, the application did not provide any facts, due to Moreau's knowing nondisclosure, to indicate to Golden that Moreau had a history of brain cancer or, more importantly, had very recently sought treatment for headaches.

The court concludes that Moreau's material misrepresentations render the policy issued to him by Golden void as a matter of law because, in compliance with the terms of the policy, Golden rescinded the insurance contract in December 1998, within two years of Moreau's application. "Rescission, simply stated, is the unmaking of a contract. It is a renouncement of the contract and any property obtained pursuant to the contract, and places the parties, as nearly as possible, in the

same situation as existed just prior to the execution of the contract.'" Paul Revere, 52 Conn. App. at 325 (quoting Kavarco v. T.J.E., Inc., 2 Conn. App. 294, 299 (1984)). The insurance contract between Moreau and Golden is, because of Moreau's material misrepresentations in the application, of no force and effect. Because the plaintiff's breach of contract and CUTPA claims rely on the viability of this policy, summary judgment must enter for Golden on the plaintiff's claims.

IV. CONCLUSION

For the reasons stated above, the defendants' Motion for Summary Judgment [Dkt. No. 15] is GRANTED. The Clerk is directed to enter judgment for the defendant on the plaintiff's claims.

SO ORDERED.

Dated at Bridgeport, Connecticut, this 5th day of March, 2001.

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Janet C. Hall
United States District Judge