2018 IL App (1st) 173202-U

FIRST DIVISION
December 24, 2018

No. 1-17-3202

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PETER DI RITO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2016 M1-129893
	)	
METROPOLITAN LIFE INSURANCE CO.,	)	Honorable
	)	Margaret A. Brennan,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Griffin concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's dismissal with prejudice of plaintiff insured's complaint for fraudulent misrepresentation and fraudulent concealment is affirmed. Plaintiff failed to allege circumstances under which his insurer, who expressly disclosed that premiums on his policy could increase, had a duty to disclose any additional information about the likelihood or amount of future increases.

¶ 2 Plaintiff Peter Di Rito appeals from the circuit court's dismissal of his claims against defendant Metropolitan Life Insurance Co. (MetLife) for fraudulent misrepresentation and fraudulent concealment. Mr. Di Rito purchased from MetLife a long-term care (LTC) insurance policy, a type of insurance intended to pay for long-term healthcare services an insured may one

day need, such as the cost of nursing home care or in-home healthcare. Mr. Di Rito alleged that he, like other purchasers of LTC policies, expected his premiums to remain stable, *e.g.*, subject to change but not to sudden and drastic increases. Although MetLife made its standard disclosure that his premium rates could go up, Mr. Di Rito alleged that the company failed to disclose certain known difficulties insurers were having in setting stable premiums for LTC policies, problems that years later caused MetLife to increase Mr. Di Rito's premiums by over 100%.

¶ 3 The circuit court dismissed Mr. Di Rito's complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)), for failure to state a claim on which relief could be granted. It also concluded that Mr. Di Rito's complaint was subject to dismissal pursuant to section 2-619 (735 ILCS 5/2-619 (West 2016)), on the basis that his claims were barred by the filed rate doctrine.

¶ 4 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 On or about April 21, 2004, when he was 43 years old, Mr. Di Rito purchased a "guaranteed renewable" LTC insurance policy from MetLife. The policy, a copy of which was attached to Mr. Di Rito's complaint, mentioned the possibility of premium rate increases several times. The first page of the policy stated as follows:

> "RENEWABILITY: THIS POLICY IS GUARANTEED RENEWABLE FOR LIFE. PREMIUM RATES ARE SUBJECT TO CHANGE. This means You have the right, subject to the terms of the policy, to continue this policy as long as You pay Your premiums on time. We cannot change any of the terms of this policy without Your consent, except that We may change the premium rates, subject to applicable state Insurance Department approval. Any such change in premium rates will apply to all

policies in the same class as Yours in the state where this policy was issued."

¶ 7 In the "Premium Payment" section of the policy, MetLife likewise reserved the right to change premium rates, subject only to the limitations that increases could not be based on Mr. Di Rito's increasing age or health changes, and that MetLife could only increase premiums on a class basis.

¶ 8 And the policy included a one-time 30-day "free-look" provision, pursuant to which Mr. Di Rito could void the policy within 30 days of purchase for any reason and have any premiums that he had paid returned to him.

¶ 9 Finally, under a "Contingent Benefits Upon Lapse Rider," Mr. Di Rito was entitled to a partial benefit if he stopped paying his premiums after a "Substantial Premium Increase," a term defined differently depending on the insured's original age at issuance, from as little as a 10% cumulative increase for older purchasers to as much as a 200% cumulative increase for younger purchasers. For Mr. De Rito, who was 43 years old when he purchased his policy, a "Substantial Premium Increase" was defined as a cumulative increase of 150% or more over his initial annual premium. MetLife had an obligation, pursuant to the rider, to notify Mr. De Rito of such an increase 45 days in advance and give him the option of either paying the same premium and receiving reduced benefits or of capping his total lifetime benefit. This rider bears an effective date of April 21, 2010, and it is unclear from the record whether some version of it was attached to the policy when Mr. Di Rito purchased it in 2004.

¶ 10 Mr. Di Rito alleged that MetLife's disclosure that premium rates could increase in the future, although technically true, was an actionable half-truth because there were other facts, known to MetLife but not to him, that materially qualified that statement. As evidence of MetLife's superior knowledge, Mr. Di Rito attached to his complaint a March 2003 report on

LTC insurance prepared for the Henry J. Kaiser Family Foundation (the Kaiser Report) (Stephanie Lewis, J.D., of Georgetown University Institute for Health Care Research and Policy; John Wilkin, of Actuarial Research Corporation; and Mark Merlis, *Regulation of Private Long-Term Care Insurance: Implementation Experience and Key Issues*). The authors of the report discussed various stability factors an insurer must consider before it can determine a premium for LTC insurance, including persistency (the percentage of policyholders who will hold on to their policies each year) and utilization (how many of the policyholders will actually need long-term care services each year), two things they stated had "proved especially problematic" for insurers to estimate, given "the short history and rapid evolution" of the market for LTC insurance.

¶ 11 Mr. Di Rito alleged that, when he purchased his LTC policy in April 2004, "MetLife held itself out as an insurance company having superior knowledge and experience in providing financial security for—*i.e.*, shifting the risk of long-term medical care in its LTC policies." Mr. Di Rito further alleged that MetLife knew that it did not have the ability to set stable premiums, knew that its LTC policies were likely underpriced, and intended to impose the risk that its actuarial assumptions were incorrect on its insureds, by later raising premiums and, if necessary, closing blocks of policies. Mr. Di Rito asserted that, had he known all of this, he would not have purchased an LTC policy from MetLife, and had he learned of it sooner, he would not have continued to pay his premiums.

¶ 12 Mr. Di Rito also alleged that, in 2007, MetLife stopped selling the type of LTC policy it had sold him, effectively closing the block of policies. According to Mr. Di Rito, this made future premium increases all but certain, as premiums from new and younger insureds were no longer being added to the pool of funds used to pay claims.

¶ 13 MetLife did in fact raise the premiums for Mr. Di Rito's policy twice, by 18% in late

2008 (effective in 2009) and by 102% in late 2014 (effective in 2015). Mr. Di Rito cited MetLife's rate-approval communications with the Illinois Department of Insurance (IDOI) as evidence that MetLife knew more than it had disclosed to him. In its October 10, 2008, request for the initial 18% increase, for example, MetLife disclosed the following to the IDOI:

> "Although a larger premium rate increase is currently supportable under loss ratio regulation, and needed under rate stability regulation, to minimize the impact on policy owners to the extent the company can, an increase of only 18%, subject to the issue age and new business caps described in this paragraph, is being requested at this time."

¶ 14 In November 14, 2012, MetLife requested IDOI approval for a second rate increase, of 58% to take effect in 2013, but that increase was not approved by the IDOI. However, a rate increase of 102% was approved for 2015 and, on September 10, 2014, Mr. Di Rito received a letter informing him of this fact. Mr. Di Rito alleged that this "sudden and drastic" increase put him in an untenable situation: he could choose to pay the unforeseeably high rate to maintain his coverage, or he could let his coverage lapse and lose the thousands of dollars in premiums he had paid over the last ten years. He maintained that, given the passage of time, obtaining alternative LTC coverage with a different carrier was not realistic.

¶ 15 Mr. Di Rito asserted three claims against MetLife, a count of fraudulent misrepresentation based on a half-truth, and two counts of fraudulent concealment—one for MetLife's failure to disclose relevant facts at the time of purchase and one for its continued failure to do so over the years that Mr. Di Rito paid premiums on his LTC policy.

¶ 16 MetLife filed a combined motion to dismiss the complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). Pursuant to section 2-615 (735 ILCS 5/2-615 (West 2016)), it argued that Mr. Di Rito had failed to allege facts giving rise to a duty on MetLife's part

to disclose potential reasons for future premium increases. MetLife's position was that information like the Kaiser Report was equally available to Mr. Di Rito and to MetLife, Mr. Di Rito had ample opportunity to ascertain the truth of MetLife's representations and the nature of the policy he was purchasing before he decided to purchase it, and MetLife did nothing to actively conceal information from Mr. Di Rito. MetLife also sought dismissal under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)), on the basis that Mr. Di Rito's claims were barred by the filed rate doctrine—which generally provides that if a rate has been filed with and approved by a government agency charged with regulating such rates, individuals are barred from attacking the amount of the rates in an action for damages—and under section 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2016)), on the basis that Mr. Di Rito's claims were time-barred.

¶ 17 In response, Mr. Di Rito argued both that MetLife's disclosure that premium rates could increase was a fraudulent half-truth and that MetLife's position of authority and superior knowledge of the insurance marketplace gave rise to a duty to disclose additional facts regarding the likelihood of premium increases to its insureds. Mr. Di Rito insisted that he was not challenging the reasonableness of MetLife's rates, nor asking to pay a reduced rate. Instead, Mr. Di Rito characterized his requested relief as the "disgorgement of previously paid premiums."

¶ 18 The circuit court dismissed Mr. Di Rito's complaint with prejudice. It ruled that Mr. Di Rito could not state a claim for fraud where MetLife had expressly disclosed that premiums could be raised. The court also found that the filed rate doctrine was "fatal" to Mr. Di Rito's claims, which would necessarily require the court to consider "the reasonableness of approved rates (*i.e.*, whether or not the increases [were] 'sudden' or 'drastic')." The court determined that "the damages that [Mr. Di Rito sought] would also be violative of the filed rate doctrine"

because they "would have the effect of [Mr. Di Rito] paying less for the same coverage as other insureds."

¶ 19 The circuit court denied Mr. Di Rito's motion to reconsider and denied his motion for leave to file an amended complaint, concluding that the proposed amendments would not cure the defective pleading. Mr. Di Rito appealed.

¶ 20 II. JURISDICTION

¶ 21 The circuit court dismissed Mr. Di Rito's complaint with prejudice on August 11, 2017, and denied his motion to reconsider on December 15, 2017. Mr. Di Rito timely filed his notice of appeal from those orders on December 28, 2017. We have jurisdiction over this matter pursuant to Illinois Supreme Court Rules 301 and 303, governing appeals from final judgments in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 22 III. ANALYSIS

¶ 23 On appeal, Mr. Di Rito argues the circuit court erred by dismissing his complaint, under either section 2-615 or section 2-619 of the Code. He argues in the alternative that, if dismissal was proper, the circuit court abused its discretion by denying him leave to amend.

¶ 24 A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. "The essential question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11. Dismissal pursuant to section 2-615 is proper when "it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover." *Id.* A motion to dismiss under section 2-619 of the Code, by contrast, "admits the legal sufficiency of the complaint but asserts that some affirmative matter defeats the

plaintiff's claim." *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*, 2017 IL 117720, ¶ 4. When considering a motion to dismiss under either section, a court accepts as true all well-pleaded facts and reasonable inferences that may arise from those facts. *Kanerva*, 2014 IL 115811, ¶ 33; *Stone Street*, 2017 IL 117720, ¶ 4. And our review of an order granting or denying a motion to dismiss under either section is *de novo*. *Cochran*, 2017 IL 121200, ¶ 11; *Stone Street*, 2017 IL 117720, ¶ 4.

¶ 25 A. Fraud

¶ 26 To state a claim for fraudulent misrepresentation a plaintiff must allege: "(1) [a] false statement of material fact; (2) known or believed to be false by the party stating it; (3) [the] intent to induce the other party to act; (4) action in reliance by the other party; and (5) damage to the other party resulting from such reliance." *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill. App. 3d 258, 264-65 (1993). Mr. Di Rito did not allege that MetLife made any affirmative misstatement of fact to him regarding the LTC policy he purchased. He instead alleged that MetLife's general disclosure at most warned him that premiums could go up for forseeable reasons, but that MetLife failed to disclose that the premiums "would likely go up suddenly and drastically for a reason unforeseeable to [him]—that [MetLife], which held itself out as an expert in LTC underwriting, lacked the ability to set stable premiums."

¶ 27 To assert a claim of fraud based on a failure to disclose, a plaintiff must allege that the defendant had a duty to disclose withheld information to the plaintiff. The law is clear in Illinois that an insurer does not have a fiduciary duty to its insureds as a matter of law. *Fichtel v. Board of Directors of River Shore of Naperville Condo Association*, 389 Ill. App. 3d 951, 963 (2009). A duty to disclose may nevertheless arise when a defendant: (1) fails to materially qualify a half-truth (*Heider*, 245 Ill. App. 3d at 265), or (2) is in a position "of influence and superiority" over

the plaintiff" (*Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996)). Mr. Di Rito maintains that he adequately alleged a duty to disclose under either theory. We consider each in turn.

¶ 28 1. Duty to Disclose Based on a Half-Truth

¶ 29 Mr. Di Rito argues the circuit court erroneously relied on federal cases cited by MetLife (see, *e.g.*, *Crichton v. Golden Rule Insurance Co.*, 576 F.3d 392, 398 (7th Cir. 2009)) which he claims stand for the proposition that a plaintiff asserting fraudulent misrepresentation based on a half-truth must plead that the defendant presented the half-truth as the whole truth. Mr. Di Rito urges us instead to employ the reasoning in *Heider*, 245 Ill. App. 3d at 265, where we held that "[a] statement which is technically true as far as it goes may nonetheless be fraudulent if it is misleading because it does not state matters which materially qualify that statement." *Id.* at 265. In other words, a half-truth may " 'amount to a lie, if it is understood to be the whole.' " *Id.* (quoting W. Prosser, Law of Torts § 106, at 696 (4th ed. 1971)). We need not parse the distinctions between federal law and Illinois law on this point. We agree with Mr. Di Rito that, under *Heider*, actionable omissions are not limited to those situations in which a defendant has affirmatively stated that a half-truth represents the whole truth. But the facts present in *Heider* are different from those alleged here in several important respects.

¶ 30 The plaintiff in *Heider* learned, after purchasing a warehouse from the defendant, that certain columns in the warehouse contained asbestos. *Id.* at 263. Earlier in the negotiations leading to the sale, the plaintiff had specifically inquired about the nature of the materials used in the columns and was assured it was "not a problem." (Internal quotation marks omitted.) *Id.* at 262. The defendant had in its possession a report indicating that the material on the columns were comprised of less than 10% asbestos and that levels of airborne asbestos were low compared to government standards. *Id.* That same report, however, recommended enclosing the

columns and training warehouse employees to prevent them from accidentally dislodging the asbestos-containing material. *Id.* The defendant did not disclose the report to the plaintiff, even when the plaintiff asked at the closing whether there was anything else about the condition of the building that he should know before proceeding with the sale. *Id.* at 262-63.

¶ 31 We held that the plaintiff in *Heider* sufficiently alleged the element of a fraudulent statement because the defendant's statement that the condition of the columns was "not a problem," though technically true because there was no *immediate* problem of asbestos being released into the air, was nonetheless a "false statement" because it ignored what the defendant knew about the risk of potential future releases, a very real "problem" requiring present remedial action. *Id.* at 265. The undisclosed information was not only of interest to the plaintiff, but affected the truthfulness of the disclosed information. The same is simply not true here. We have no reason to doubt that it was important to Mr. Di Rito to know, not only that premiums *could* increase but that they likely would increase, perhaps drastically. Unlike in *Heider*, however, the existence of this additional information did not make MetLife's unqualified disclosure that premiums could be raised any less true.

¶ 32 *Heider* is distinguishable from this case for other reasons as well. The plaintiff in that case received an assurance from the defendant after making a very specific inquiry about the nature of the material covering the warehouse's columns. *Id.* at 261-62. Mr. Di Rito did not allege that he ever made a similarly specific inquiry about MetLife's ability to set stable premium rates for LTC insurance, or the likelihood of premium increases on his policy. Nor did he allege that he received a general assurance in response to such a specific inquiry. The asbestos report in *Heider* was also an "intracompany memo." *Id.* at 262. The information contained in that memo was "on a matter peculiarly within the realm of knowledge of [the] defendant, as owner of

the property" (*id.* at 266) and concerned a *hidden* defect (*id.* at 268-69). Here, the information Mr. Di Rito claims MetLife failed to disclose to him was contained, according to Mr. Di Rito's own allegations, in a publicly available report published the year before he purchased his LTC policy.

¶ 33 Under these circumstances, we are unconvinced that MetLife's repeated and unqualified disclosures that premiums for the LTC policy could go up—including at some point a rider alerting Mr. Di Rito to the fact that a "Substantial Rate Increase" of 200% or more was possible—represented a half-truth like the one we found actionable in *Heider*.

¶ 34 2. Duty to Disclose Based on a Position of Dominance, Influence, or Superiority

¶ 35 Mr. Di Rito alternatively argues that MetLife had a duty to disclose material facts to him under *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482 (1996). In *Connick*, our supreme court recognized that such a duty "may arise *** where [a] plaintiff places trust and confidence in [the] defendant, thereby placing [the] defendant in a position of influence and superiority over [the] plaintiff," and further that a "position of superiority may arise by reason of friendship, agency, or *experience*." (Emphasis added.) *Id.* at 500. It is on this last word that Mr. Di Rito hinges his argument, insisting that MetLife enjoys a position of superiority—and a concomitant duty to disclose material facts to its insureds—solely "by reason of its underwriting experience."

¶ 36 As MetLife points out, however, Mr. Di Rito cites no case standing for the proposition that an insurer's superior knowledge of insurance products and markets is sufficient to create a duty to disclose information to its insureds. We have concluded in other cases that *Connick* should not be read so broadly. In *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 657 (2001), *as modified on denial of reh'g* (Nov. 27, 2001), for example, we held that a duty to disclose only arises where one party is "clearly dominant, either because of superior knowledge

of the matter derived from *** overmastering influence on the one side, or from weakness, dependence, or trust justifiably reposed on the other side." And we determined that no such relationship existed between a car dealer and a prospective customer. *Id.* We similarly decline to find a "clearly dominant" position of superiority here, where Mr. Di Rito has alleged only an unremarkable asymmetry of information present in many dealings between a consumer and a company from which that consumer is purchasing a product.

¶ 37 In sum, Mr. Di Rito failed to allege either an affirmative misrepresentation by MetLife or a duty to disclose based on the telling of a half-truth or the existence of a special relationship. His fraud claims were properly dismissed under section 2-615 of the Code.

¶ 38 B. Leave to Amend

¶ 39 Mr. Di Rito argues that the circuit court erred in refusing to allow him to amend his complaint to address the deficiencies discussed above. Whether to allow amendments to pleadings is within the sound discretion of the circuit court, and we will not reverse its decision absent an abuse of discretion. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69. Denial of leave to amend is not an abuse of discretion where a proposed amendment would not have cured the defective pleading. *Id.* ¶ 78. Mr. Di Rito acknowledges that the allegations of his proposed amended complaint are not all that different from his initial allegations, and were indeed made "to highlight certain facts" because Mr. Di Rito felt the circuit court's order "did not seem to address the actual gist of [his] claim." According to Mr. Di Rito, then, the proposed amendments were intended to "highlight" that MetLife's "half-truth was in the context of a risk disclosure—here the risk of future premium increases," that, "in contrast to [MetLife's] 102% premium increase in 2014, [its] 18% premium increase in 2008 did not alarm [Mr. Di Rito] because it was neither sudden nor drastic," and that the superiority Mr. Di Rito alleged MetLife

had over him was based on its experience as an insurer.

¶ 40 In our view, these clarifications are nothing more than the reasonable inferences which must already be drawn from Mr. Di Rito's initial allegations. We have already concluded that, even when construed in the light most favorable to Mr. Di Rito, those allegations were insufficient to state a claim for fraud.

¶ 41 In light of our holding that Mr. Di Rito's complaint was properly dismissed for failure to state a claim upon which relief could be granted, we need not decide whether dismissal was also proper under section 2-619, either because Mr. Di Rito's claims were barred by the filed rate doctrine or because they were untimely.

¶ 42 IV. CONCLUSION

¶ 43 For the reasons stated above, we affirm the circuit court's dismissal with prejudice of Mr. Di Rito's fraudulent misrepresentation and fraudulent concealment claims against MetLife.

¶ 44 Affirmed.