IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROBERT CORRINGTON,	)	
	)	
Plaintiff,	)	
	)	**No. 01-2446 Ml/A**
v.	)	
	)	
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, and UNUM PROVIDENT CORPORATION,	)	
	)	
Defendants.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION
AND
ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSE

Before the Court is Plaintiff's Motion to Reconsider Granting of Summary Judgment and Motion to Strike Affirmative Defense, filed March 5, 2003. Defendants responded in opposition on March 20, 2003. Plaintiff filed a reply memorandum on April 2, 2003. For the following reasons the Court DENIES Plaintiff's motion for reconsideration and DENIES Plaintiff's motion to strike affirmative defense.

I. Standard of Review

A motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) may be made for one of three reasons:

1. An intervening change of controlling law;
2. Evidence not previously available has become

available; or

3. It is necessary to correct a clear error of law or prevent manifest injustice.

Fed. R. Civ. P. 59(e); Helton v. ACS Group and J & S Cafeterias of Pigeon Forge, Inc., 964 F. Supp 1175 (E.D. Tenn. 1997). Rule 59 is not intended to be used to "relitigate issues previously considered" or to "submit evidence which in the exercise of reasonable diligence, could have been submitted before." Id. at 1182.

II. Analysis

The Court previously addressed many of the issues raised in the present motion in its February 20, 2003 Order Granting Defendants' Motion for Summary Judgment and will not repeat its rulings here. Furthermore, to the extent Plaintiff seeks to introduce evidence related to Michael McManus[1], which Plaintiff and his attorney admit they were aware of prior to filing the response to the summary judgment motion, the Court will not consider such evidence. The evidence was available to Plaintiff and should have been presented at Plaintiff's first opportunity. In the present Order, the Court will reiterate two points from the summary judgment order for the purposes of clarification and will address Plaintiff's newly-raised legal arguments.

[1] The Court notes that it has previously stricken the affidavits of Gary Smith and Robert Corrington that relate to the purported testimony of Mr. McManus.

A. Clarifications

First, Plaintiff's motion for reconsideration indicates a disagreement as to the nature of an inconstestability clause. In the present motion for reconsideration, Plaintiff assumes that "[t]he spirit and intent of the incontestability clause are to prevent Defendants from raising the coverage questions many years later." (Mem. in Supp. of Pla.'s Mot. to Recon. at 10.) Plaintiff attempts to avoid the distinction, discussed in the Court's February 20, 2003 Order, between a denial of coverage and a defense of invalidity.

Under longstanding Tennessee law, an incontestability clause does not affect the scope of coverage of the policy. The incontestability clause is a statutorily required clause[2] that merely prevents a challenge to the validity of the policy. McDonald v. Mutual Life Ins. Co., 108 F.2d 32, 34 (6th Cir. 1939) ("[I]t is evident that the courts of Tennessee limit the effect of the incontestable clause to questions arising out of the validity of an issued policy."); Hellman v. Union Cent. Life Ins. Co., 175 F. Supp.2d 1044, 1052 (M.D. Tenn. 2001); Smith v. Equitable Life Assurance Soc., 89 S.W.2d 165, 167 (Tenn. 1936); Krakowiak v. The Paul Revere Life Ins. Co., 1996 Tenn. App. Lexis 346, *13 (Tenn. Ct. App. June 7, 1996) ("Tennessee has adopted the majority rule that an incontestability clause limits only the

[2] Tenn. Code Ann. 56-7-2307(3) (2002).

insurer's ability to contest the validity of a policy which would otherwise be voidable because of the insured's fraud; the clause does not expand coverage beyond the terms of the policy."); Searcy v. Fidelity Bankers Life Ins. Co., 656 S.W.2d 39, 40 (Tenn. Ct. App. 1983) ("Incontestability clauses . . . while precluding the raising of the defense that an insurance policy is invalid, do not affect the raising of coverage questions by the insurer.").

Defendants do not challenge the validity of the policy in this case. They assert that Plaintiff's illness does not come within the terms of coverage of the Policy because it was first diagnosed or treated prior to the issuance of the Policy. This is a correct reading of the unambiguous definition of "sickness" in the Policy. Nothing in Plaintiff's present motion alters this Court's finding as to the unambiguous[3] terms of the Policy. None

[3] Plaintiff makes much of the fact that in Magistrate Judge Allen's Order on Plaintiff's Motion for Protective Order, entered August 16, 2002, he denied Defendants' request to undertake discovery into the previous manifestation of Plaintiff's claimed disability. Plaintiff argues that this shows a difference of opinion among reasonable jurists and supports a finding that the Policy is ambiguous.

At the time Judge Allen issued his opinion regarding a discovery issue, Defendants' motion for leave to file an amended answer to include the first manifest defense had not been ruled upon by this Court. In his Order, Judge Allen discussed some of the relevant case law and the distinctions in the language of the Policy and merely stated "a favorable decision on defendants' motion to amend is not a foregone conclusion." Notably, Judge Allen was never asked to issue a ruling on Defendants' motion to amend their answer or on the applicability of the first manifest

of the "growing minority" of cases outside of Tennessee to which Plaintiff cites alter the fact that under Tennessee law Plaintiff's condition is not covered by the Policy.

Second, Plaintiff argues that by asserting the first manifest defense, Defendants get a "free shot" at an issue that should have been laid to rest by the incontestability clause. In making this argument, Plaintiff neglects to mention his own conduct in failing to inform[4] the insurance agent who sold him the Policy that he had previously been diagnosed with a mental illness, the same mental illness for which he is now claiming benefits. What Plaintiff is attempting to do is to create his own "free shot" at coverage under the Policy by virtue of his own failure to disclose. This is not appropriate.

B. Promissory Estoppel

In his motion for reconsideration, Plaintiff argues that Michael McManus, the insurance agent who sold Plaintiff the Policy "would have placed the coverage elsewhere to assure Corrington was covered for this disability" if he had known Defendants would deny coverage based on the first manifest

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defense. His comments regarding the affirmative defense were mere dicta and were not dispositive of any issue in this case other than whether certain discovery should be allowed.

[4] The Court acknowledges Plaintiff's assertion that he did not accept his condition at the time he applied for the Policy, but this does not change the fact that he erred in failing to inform Defendants of his previous diagnosis and treatments, including hospitalizations, for mental illness.

defense. (Mem. in Supp. of Pla.'s Mot. to Recon. at 17.) Plaintiff argues that he relied on the statements of Mr. McManus to his detriment.[5]

This argument does not make logical sense. Plaintiff's entire lawsuit is premised on the idea that Plaintiff never told his insurance agent that he suffered from a mental illness at the time he bought the Policy. As such, no representations as to coverage for his previously diagnosed and treated illness could have been discussed at the time Plaintiff purchased the Policy. Therefore, Plaintiff can not establish the element of reliance necessary to support a claim of promissory estoppel. Alden v. Presley, 637 S.W.2d 862 (Tenn. 1982).

C. Equitable Estoppel

Plaintiff also argues that Defendants should be equitably estopped from asserting the first manifest defense and denying coverage under the Policy. Under Tennessee law, estoppel is not favored and it is the burden of the party seeking to invoke the doctrine to prove each and every element. Bokor v. Holder, 722 S.W.2d 676 (Tenn. App. 1986). Tennessee courts define equitable estoppel as follows:

> The essential elements of an equitable estoppel as related to the party estopped are said to be (1) Conduct which amounts to a

[5] The Court notes that it has previously stricken the affidavit of Robert Corrington in which he raises the claim that he relied on statements of Michael McManus.

> false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts. As related to the party claiming the estoppel they are (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially.

Consumer Credit Union v. Hite, 801 S.W.2d 822, 825 (Tenn. Ct. App. 1990) (citation omitted). "The doctrine is ordinarily applicable only to representations as to facts." Id. The burden of proof is on the insured to prove that a misrepresentation was made and that the insured reasonably relied upon the misrepresentation. Robinson v. Tennessee Farmers Mut. Ins. Co., 857 S.W.2d 559, 563 (Tenn. Ct. App. 1993).

At no point has Plaintiff asserted that Defendants made any misrepresentations to him as to any facts or concealed any facts from him. Rather, as previously mentioned, it was Plaintiff who made the misrepresentation in this case. Furthermore, the Court fails to see a detriment to Plaintiff in this case. Rather, Plaintiff has benefitted from his own misrepresentation by receiving payments for a number of years under a Policy that Defendants would otherwise not have issued.

D. Course of Performance

Plaintiff also argues that pursuant to the parties' course of performance, Defendants are now forever barred from denying coverage under the Policy. Plaintiff argues that Defendants' action of "paying disability benefits for six years thereby modifies and eliminates the insurance contract coverage terms allowing defendants to refuse to pay disability benefits." (Mem. in Supp. of Pla.'s Mot. to Recon. at 22.)

Courts only consider the parties' course of conduct when reviewing contracts that contain ambiguous or uncertain terms. Bonastia v. Berman Bros., Inc., 914 F.Supp. 1533, 1538 (W.D. Tenn. 1995). Indeed, even in the case cited by Plaintiff, the court only utilized the parties course of dealings to interpret an ambiguous word in a contract. First Tennessee Bank v. Nunn & Assocs., Inc., 1991 WL 119293, *4 (Tenn. Ct. App. July 8, 1991). The case cited by Plaintiff does not stand for the proposition that the Court will use the parties' course of performance to modify and eliminate terms in an unambiguous contract. Under Tennessee law, the meaning of the Policy is clear, thus, the parties' course of performance has no applicability to this case.

E. Motion to Strike

In the motion for reconsideration, Plaintiff also asks the Court to strike the first manifest defense from Defendants' Amended Answer to Amended Complaint. Plaintiff offers no legal

or factual argument in support of the motion to strike. Accordingly, the motion to strike is DENIED.

III. Conclusion

For the foregoing reasons, the Court DENIES Plaintiff's motion for reconsideration and DENIES Plaintiff's motion to strike the first manifest defense.

SO ORDERED this ____ day of May, 2003.

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JON P. McCALLA
UNITED STATES DISTRICT JUDGE