UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-80804-CIV-COHN/SELTZER

PRUCO LIFE INSURANCE COMPANY,

Plaintiff,
vs.

STEVEN M. BRASNER, individually and as Principal of Infinity Financial Group, LLC; MARK A. TARSHIS; INFINITY FINANCIAL GROUP LLC; WELLS FARGO BANK, N.A., as Securities Intermediary; and John Does 1-10,

Defendants.
_____/

MOTION OF DEFENDANT WELLS FARGO BANK, N.A., AS SECURITIES INTERMEDIARY, FOR RELIEF FROM SUMMARY FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b) AND INCORPORATED MEMORANDUM OF LAW

Defendant Wells Fargo Bank, N.A., as Securities Intermediary ("Wells Fargo"), by and through undersigned counsel, hereby moves the Court, under Rule 60(b), Federal Rules of Civil Procedure, for relief from the summary Final Judgment on the ground that Wells Fargo has obtained newly discovered evidence, which, despite numerous attempts, it was not able to obtain in time to move for a new trial under Rules 59(a) and 59(b), Federal Rules of Civil Procedure. Specifically, Wells Fargo now possesses evidence: (1) raising disputed issues of material fact concerning Wells Fargo's affirmative defenses of waiver, estoppel, unclean hands, and laches, requiring a trial and (2) establishing that Pruco is not entitled to retain the premiums Wells Fargo paid to it in 2009 and 2010. In support of this motion, Wells Fargo states as follows:

INTRODUCTION

On December 22, 2011, ten days after Wells Fargo was required to file its Rule 59 motion, Wells Fargo finally obtained a copy of Pruco's June 8, 2010 "Special Investigation Unit Report" – a report that Pruco had refused to produce on the ground that it was privileged. Wells Fargo, however, was finally able to obtain this report from the Florida Department of Financial Services, Division of Insurance Fraud because – even though Pruco refused to produce it to Wells Fargo – Pruco had voluntarily produced it to the Department.

This newly obtained evidence clearly reveals a pretense perpetrated on Wells Fargo and, indirectly, on this Court. Although Pruco has adamantly maintained throughout this case that it couldn't possibly have sued for rescission any sooner than it did because it learned of Brasner's fraudulent activities only through the April 2010 Wall Street Journal article, the report clearly reveals that Pruco has been "on notice" of Brasner's fraud and the questionable nature of the Berger Policy since ***2008 – not 2010 –*** and thus well before Wells Fargo's client decided to buy the Policy in December 2008. Despite its knowledge of Brasner's conduct and its suspicions of the propriety of the Berger Policy, however, Pruco took no action for more than two years, during which time it, among other things, confirmed the change of ownership of the Policy in January 2009. Indeed, after confirming the change of ownership, Pruco waited an additional year and one-half before bringing this action – all the while collecting sizeable premiums.

This evidence requires relief from the summary final judgment and a trial on Wells Fargo's affirmative defenses. At the very least, it requires Pruco to return to Wells Fargo the premiums it has paid due to Pruco's failure to act on or disclose its knowledge and suspicions. It goes without saying that if Wells Fargo's client knew that Pruco considered the Berger Policy to

be suspect as an unlawful STOLI policy, it would not have purchased the Policy and continued to pay huge premiums on it for a year and a half.

BACKGROUND

1. On July 9, 2010, Plaintiff Pruco Life Insurance Company ("Pruco") filed a five-count Complaint alleging, among other things, fraud in the procurement of a policy on the life of Arlene Berger (the "Policy") by one of its brokers, Steven Brasner. At the time Pruco filed the lawsuit, Defendant Wells Fargo, as securities intermediary (on behalf of its client Lavastone Capital LLC ("Lavastone")), owned the Policy, which Lavastone had purchased on the secondary market in January 2009.

2. In Count I of the Complaint, Pruco sought a declaration that the Policy was void *ab initio* for lack of an insurable interest at inception. (D.E. 1.) Pruco also sought to retain all of the premiums paid on the Policy from its inception in May 2006 through June 2010.

3. At the time the Complaint was filed in July 2010, Wells Fargo, on behalf of its client Lavastone Capital LLC, had owned the Berger Policy for a year and one-half, during which time it had made premium payments quarterly in the amount of approximately $35,000. Thus, by the time Pruco filed suit mid-2010, Wells Fargo had paid $206,969.23 in premiums on the Berger Policy.[1]

4. When the Court denied Wells Fargo's motion to dismiss, Wells Fargo answered and asserted numerous defenses, including waiver, equitable estoppel, unclean hands, and laches based, in part, on Pruco's dilatory failure to timely file suit. (D.E. 73.)

[1] Wells Fargo, on behalf of Lavastone, paid $112,071.12 in premiums at the time Lavastone closed on the Policy in January 2009 and then between June 2009 and March 2010, paid to Pruco another $94,898.11 in premiums – for a total of $206,969.23.

5. In its motion to dismiss and motion for summary judgment, Wells Fargo argued that, if the Policy were found to be void *ab initio*, it would be entitled to a return of the premiums paid on the Policy and that it would be inequitable to allow Pruco to retain the premiums due in part to Pruco's delay in bringing its lawsuit after it had information (both before issuing the Policy and afterwards) raising suspicions that the Policy was a fraudulently procured STOLI policy. (D.E. 30 at 14-15; D.E. 186 at 26-27.)

6. Wells Fargo based these arguments on its belief that Pruco knew well before July 2010 that Brasner was being sued for fraudulently procuring life insurance policies and had identified possible fraud in the procurement of the Berger Policy. (D.E. 186 at 27.) It was Wells Fargo's position, therefore, that Pruco should have filed suit shortly after obtaining the information instead of continuing to accept premiums on a policy it suspected to be fraudulently procured in violation of its internal anti-STOLI policies. (*See, e.g.*, D.E. 200 at 23-32.)

7. Yet throughout this case, Pruco continually maintained – both to Wells Fargo *and* to this Court – that it had *first* learned of Brasner's fraudulent conduct *only* from an article published in the Wall Street Journal in April **2010** and thus it had expeditiously sued in July 2010. (*See, e.g.*, D.E. 198 at 30; D.E. 199 at 17, ¶ 28; D.E. 177 at 21 n.13.)

8. During discovery, Wells Fargo learned of the existence of an internal Pruco report authored by Pruco special investigator Kay Ferrian ("Report"). Because Wells Fargo suspected the Report would confirm that Pruco had known in ***2008 – not 2010*** – that Brasner had engaged in insurance fraud and had identified the Berger Policy as a possible STOLI policy, it requested

Pruco to produce the Report. Pruco refused, however, claiming that it was privileged.[2] (Decl. at 3, ¶ 7.)

9. From Pruco's privilege log (which Pruco did not provide until September 2011) and subsequent discussions with Pruco's counsel, however, Wells Fargo learned that Pruco had produced the Report to the Florida Department of Financial Services, Division of Insurance Fraud ("FDFS"). (Hazouri Declaration ("Decl.") at 2, ¶ 7.)[3] Wells Fargo then rejected Pruco's assertions that the Report was privileged and maintained that Pruco had waived any privilege by voluntarily disclosing it to a third party. Thus, Wells Fargo requested FDFS to produce a copy of the Report to it. Counsel for Wells Fargo made numerous requests, orally and in writing, for a copy of the Report. (Decl. at 2, ¶ 6.) Wells Fargo even filed two Florida Public Records Act ("PRA") requests, the first on January 12, 2011 and the second on October 12, 2011. (Decl. at 2, ¶ 4.)

10. FDFS initially declined to produce the Report on the ground that its criminal investigation of Mr. Brasner was still pending. (Decl. at 2, ¶ 5.)

11. Counsel for Wells Fargo made approximately fifty requests to FDFS by telephone, email, and letter for this document but was unsuccessful in obtaining it. (Decl. at 2, ¶ 6.)

12. In its November 14, 2011 summary judgment order, the Court ruled that Pruco could retain the premiums Wells Fargo had paid but did not address the premiums Wells Fargo

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[2] Wells Fargo moved to compel production of the Report [D.E. 242], but the motion to compel was never ruled on because the Court entered summary final judgment on November 14, 2011 rendering Wells Fargo's motion to compel moot.

[3] Exhibit "1" to this motion is the Declaration of Wells Fargo counsel David R. Hazouri, Esq. and will be cited by page and paragraph number, e.g., "(Decl. at __, ¶ __)." Exhibit "A" to the Declaration is the Report authored by Pruco special investigator Kay Ferrian. The Report will be cited by page number, e.g., "(Rpt. at __)."

had deposited in the Court Registry. (Order [D.E. 246] at 27.) Thus, on December 12, 2011, Wells Fargo filed a timely Rule 59(e) motion, requesting the Court to order the premiums held in the Court Registry released to Wells Fargo.

13. Ten days later, on December 22, 2011, Wells Fargo's counsel finally received a copy of the Report from FDFS. (Decl. at 2, ¶ 4.) The Report indeed confirms that, in **2008** – ***two years before Pruco filed suit*** – Pruco considered the Berger Policy "suspicious as a potential settlement case," but, apparently because "it was already outside of the contestability period," it opted to take no action. (Rpt. at 1.) The Report states in pertinent part:

> Background: *The Division of Insurance Fraud (DIF) opened an investigation into Producer Steven Brasner of Davie, FL in 2008. The investigation confirmed Brasner submitted life insurance applications using false information regarding prospective insured's net worth. He also pre-arranged for the life insurance policies to be sold on the secondary market in a manner to* ***disguise the fact*** *that they were intended to be Stranger Originated Life.*
>
> *Brasner's Prudential appointment was terminated in 2007 because he had a large debt that went to collections and turned very messy before being repaid.* ***His name came up again in 2008 as he was named in a STOLI lawsuit from AXA.*** *Underwriting did a review of the business of the two BGA's originally named in the lawsuit which included Brasner's business.* ***They identified one of Brasner's in force cases that appeared suspicious as a potential settlement case but it was already outside of the contestability period by that time: Arlene Berger . . . .*** *SIU was asked to determine if there was any documented evidence of inflated or fraudulent financial data in this case.*

(Rpt. at 1; emphasis added.)

14. Despite the information available to Pruco and its suspicions of a "potential settlement case," it did not sue Brasner or Berger; it did not attempt to rescind the Policy; and it did not divulge its knowledge and suspicions when inquiries were made as to the Policy's status. Indeed, Pruco even verified coverage in December 2008 and then confirmed the Policy's change of ownership to Wells Fargo in January 2009. (D.E. 188 at 11-12, ¶¶ 33, 35, 36.)

15. Obviously, had Pruco promptly acted on its knowledge of Brasner's fraudulent activities and its suspicions regarding the apparent STOLI nature of the Berger Policy, Wells Fargo's client would not have purchased the Policy on the secondary market in December 2008 and paid $206,969.23 in policy premiums between January 2009 and June 2010 – in addition to the substantial amount it paid to acquire the Policy. (*See* Ex. Y at 149-155, 338-44, 351-55, attached to D.E. 187.)

16. Significantly, the Report also indicates that Pruco's statement to Wells Fargo, and by extension to this Court, in its papers that it *first* learned of Brasner's fraudulent activities from the Wall Street Journal article in April 2010, was patently *false*. Yet, in reaching its decision on the motions for summary judgment, the Court ***relied on Pruco's statement***. (*See* Order at 26 ("Pruco had no reason to know the Berger Policy was an illegal wagering contract until the Wall Street Journal published a story about Mr. Brasner's frauds in 2010.").

MEMORANDUM

I. THE REPORT SHOWS THAT THERE ARE DISPUTED ISSUES OF MATERIAL FACT CONCERNING WELLS FARGO'S AFFIRMATIVE DEFENSES OF WAIVER, ESTOPPEL, UNCLEAN HANDS, AND LACHES

In it summary judgment order, the Court concluded that Pruco had "diligently investigated all red flags" and thus Wells Fargo's defenses of waiver, unclean hands, and equitable estoppel did not preclude summary judgment. (Order at 22.) The Court based this conclusion, at least in part, on its belief that Pruco did not know until 2010 of Brasner's frauds. Of course, the Court reached this conclusion without the benefit of knowing the contents of the Report because Pruco refused to produce it to Wells Fargo or to this Court. Had the Report been produced, the Court would have realized that Pruco knew ***in 2008*** – well before Wells Fargo's client bought the Policy in December 2008 and well after Pruco had completed the underwriting

process for the Berger Policy – that the Berger Policy might be a fraudulently procured STOLI policy. Indeed, the Court would have been aware that Pruco, despite its knowledge of Brasner's conduct and its suspicions concerning the validity of the Berger Policy, deliberately chose to turn a "blind eye" to these *additional* "red flags" that were brought to Pruco's attention no later than **2008**, which was two years after the completion of the underwriting process and two years after Pruco had issued the Berger Policy. Although the Court concluded that Pruco had diligently investigated the "red flags" that occurred during the underwriting process, it did not find – because it could not, based on the available evidence – that Pruco had diligently investigated the red flags that arose in 2008.

Indeed, the opposite is true. Even though Pruco was aware in 2008 of Brasner's fraudulent activities and suspected the Berger Policy to be a "settlement" or "STOLI" Policy, Pruco permitted the transfer of the Policy to Wells Fargo in January 2009 and then collected premiums on it for another one and one-half years before finally seeking to rescind it. Under these circumstances, there is a triable issue on Wells Fargo's affirmative defenses of waiver, unclean hands, equitable estoppel, and laches. But, as explained below, at the very least Wells Fargo is entitled to a return of all premiums it paid since 2008.

II. THE NEWLY DISCOVERED REPORT SHOWS THAT PRUCO UNREASONABLY DELAYED FILING SUIT TO VOID THE BERGER POLICY AND THUS IS NOT ENTITLED TO RETAIN THE PREMIUMS

Even if the Court were to determine that the recently produced Report does not warrant a trial on Wells Fargo's affirmative defenses based on Pruco's dilatory inaction, Wells Fargo is entitled to, at a minimum, the return of all premiums it paid since 2008.[4] The Court's

[4] Wells Fargo, as securities intermediary, does not concede that it is not entitled to all of the premiums paid on the Policy and reserves the right to argue as much at a later time. But given that it is now ***incontestable*** that Pruco was aware of Brasner's fraud at least by 2008, Wells Fargo is clearly entitled to the premiums it paid between 2008 and 2010.

determination that Pruco is entitled to retain the premiums paid by Wells Fargo after 2008 unjustly enriches Pruco and provides it an entirely undeserved windfall.

In its summary judgment order, the Court determined that Pruco was entitled to retain the premiums Wells Fargo had paid on the Policy. (Order at 27.) In so ruling, the Court relied, at least in part, on Pruco's steadfast assertion that it had no knowledge of Brasner's fraudulent activities until April 2010. (*See* Order at 26 ("Pruco had no reason to know the Berger Policy was an illegal wagering contract until the Wall Street Journal published a story about Mr. Brasner's frauds in 2010."). Now, however, it is patently clear that the Court was misled and Pruco's assertions were false. On this basis alone, the Court should relieve Wells Fargo from the summary final judgment and order Pruco to disgorge the premiums paid from 2009 to 2010.

Moreover, in permitting Pruco to retain the premiums, the Court declined to apply the rule adopted by Florida courts "that when an insurance law violation 'renders the insurance contract void, the insured[] [is] entitled to restitution of the premiums paid on the insurance contract . . . [and] [t]he insurer must place the insured back in the same position the insured was in before the effective date of the policy through the return of the premium." (Order at 24 (quoting *Gonzales v. Eagle Ins. Co.*, 948 So. 2d 1, 3 (Fla. Dist. Ct. App. 2006) and citing *Leonardo v. State Farm Fire & Cas. Co.*, 675 So. 2d 176, 179 (Fla. Dist. Ct. App. 1996)). And in allowing Pruco to retain all premiums paid, the Court also overlooked the holdings in several relevant federal cases, including a subsequent decision in one of the cases, *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust***,** that the Court relied upon in its summary judgment order [D.E. 246 at 18]. *See Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 774 F. Supp. 2d 674, 681-83 (D. Del. 2011) (holding that insurer could not retain premiums received on a life insurance policy held to have been void *ab initio* for lack of an insurable interest at inception);

see also Sun Life Assur. Co. of Canada v. Berck, 719 F. Supp. 2d 410 (D. Del. 2010) (dismissing, in a STOLI case, the insurer's claim to retains the premiums paid on the policy, stating that insurer "may not have it both ways"); *Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546 (D. Del. 2010) (reasoning that "[i]f an insurance company could retain premiums while also obtaining rescission of a policy, it would have the undesirable effect of incentivizing insurance companies to bring rescission suits as late as possible as they continue to collect premiums at no actual risk").

Instead, the Court opted to apply case law from *other* jurisdictions purportedly permitting the insurer to retain premiums where the insured (or his or her trustee) has committed an intentional fraud on the insurer. (Order at 25.) The Court rejected Wells Fargo's argument that Pruco had turned a "blind eye" to numerous "red flags" and indicia of a STOLI transaction, concluding that "Pruco had no reason to know the Berger Policy was an illegal wagering contract until the Wall Street Journal published a story about Mr. Brasner's frauds in 2010." (Order at 26.)

The Report, withheld by Pruco from Wells Fargo (and thus from this Court) since July 2010 and finally received from FDFS on December 22, 2011, puts the lie to Pruco's assertions that it first learned about Brasner's frauds in April 2010 from the Wall Street Journal article. In fact, as the Report shows, Pruco knew of Brasner's fraudulent activities by at least ***2008*** and suspected the Policy of being a "potential settlement case." But it ignored this information, turning a blind eye to these additional "red flags" occurring well after the underwriting process was completed and the Policy issued. (Rpt. at 1.) Therefore, the Court's determination that Pruco is entitled to retain the premiums paid by Wells Fargo after 2008 unjustly enriches Pruco and provides it an entirely undeserved windfall.

Rule 60(b) authorizes the Court to relieve a party from a final judgment where "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b). Wells Fargo seeks relief under Rule 60(b) because, as shown above, despite herculean efforts on Wells Fargo's part, the newly discovered Report was not produced until ten (10) days after the due date for filing a Rule 59(b) and Rule 59(e) motion. (Decl. at 2, ¶¶ 4, 6.) The Report is proof that Pruco is guilty of delay, laches, and procrastination and of turning a blind eye to the indicia of fraud it unquestionably identified in 2008 – not 2010. Given this evidence, Pruco is not entitled to retain the premiums Wells Fargo (on behalf of Lavastone) paid after Pruco became aware of Brasner's fraud in 2008.

CONCLUSION

In sum, the Court should grant Wells Fargo relief from the summary final judgment, order a trial on the merits of Wells Fargo's affirmative defenses, and determine that Pruco is ***not*** entitled to retain the premiums Wells Fargo paid on the Policy based upon the following:

(1) The recently produced Report shows that there are genuine issues of material fact concerning Wells Fargo's affirmative defenses of waiver, estoppel, unclean hands, and laches. Therefore, the summary final judgment should be vacated and a trial had on these affirmative defenses.

(2) The recently produced Report proves that Pruco had discovered ample "grounds for avoiding the policy" in **2008**; therefore, Pruco is equitably estopped from retaining the premiums Wells Fargo paid (on behalf of Lavastone). In short, Pruco knew ***before Wells Fargo's client bought the Policy*** that it might be a fraudulently procured STOLI policy but nonetheless permitted a change of ownership, and took no action for another two years, all the while continuing to accept hefty premiums on a policy it suspected was defective and invalid.

(3) Pruco should not be permitted to retain the premiums based on the Court's finding that "Pruco had no reason to know the Berger Policy was an illegal wagering contract until the Wall Street Journal published a story about Mr. Brasner's frauds in 2010" because the newly obtained Report proves this statement to be undeniably false. And last,

(4) The "rule" recited in *TTSI Irrevocable Trust v. Reliastar Life Ins. Co.*, 60 So. 3d 1148 (Fla. Dist. Ct. App. 2011), which held that the party who wrongfully procured a policy on the life of an individual in whom it has no insurable interest is not entitled to a return of premiums paid, does not apply here. There was ***no evidence*** that Arlene Berger (the insured) or Wells Fargo (a good faith purchaser for value) committed fraud. Therefore, the applicable rule under the facts of ***this*** case is the one applied in *Diaz v. Florida Insurance Guaranty Ass'n, Inc.*, 650 So. 2d 675, 676 (Fla. Dist. Ct. App. 1995) (finding insurance policy void *ab initio* and directing the trial court to return all premiums the insurer collected on the policy); *Gonzales*, and *Leonardo*, 675 So. 2d at 179 (holding that insurer must return "all premiums paid within a reasonable time after discovery of the grounds for avoiding the policy"). *See also Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 774 F. Supp. 2d 674, 681-83 (D. Del. 2011); *Sun Life Assur. Co. of Canada v. Berck*, 719 F. Supp. 2d 410 (D. Del. 2010); *Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546 (D. Del. 2010).

WHEREFORE, Wells Fargo Bank, N.A., as Securities Intermediary, requests this Court to grant it relief from the summary final judgment based on the existence of genuine issues of material fact concerning Wells Fargo's affirmative defenses of waiver, estoppel, unclean hands, and laches and grant Wells Fargo a trial on these affirmative defenses. Additionally, Wells Fargo requests the Court to order Pruco to return to Wells Fargo the premiums it paid from

January 2009 through June 2010 in the amount of $206,969.23 (in addition to the premiums held in the Court Registry: $155,473.20 – for a total of $362,442.43).

Respectfully submitted,

Date: January 9, 2012
Miami, Florida

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CERTIFICATION PURSUANT TO LOCAL RULE 7.1

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has conferred with Pruco's counsel in a good faith effort to resolve the issues, but has been unable to do so.

s/ Juan J. Farach
Juan J. Farach, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all Counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Juan J. Farach
Juan J. Farach

SERVICE LIST
Pruco Life Ins. Co v. Brasner, et al.
Case No. 10-CV-80804 Cohn/Seltzer
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