M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF BRONX - IA PART 17

GLOBAL ENERGY EFFICIENCY HOLDINGS, INC. and MANUFACTURERS AND TRADERS TRUST COMPANY,

Plaintiffs,

- against -

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

BY: KAHN, J

DATED: OCTOBER 22, 2018

INDEX NUMBER: 25687/2014E

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK,

Counterclaim Plaintiff,

- against-

VIRGINIA READ, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHNNY JAAR a/k/a JHONNY JAAR.

Counterclaim Defendants.

This matter came before the court for a bench trial that commenced on June 25, 2018, continued on June 26 and concluded on June 27. The parties were granted until August 17, 2018 to submit post-trial memorandums of law. At the trial the court heard testimony from four witnesses who were Dr. Michael M. Baden M.D., Steve Kotoros, Virginia Read and Dr. Lone Tahanning, M.D. In addition, 39 documents were received in evidence as well as six court exhibits. Among the court exhibits was a stipulation of 12 agreed facts.[1] Based on the

[1] During the trial, the parties agreed on the record that three [3] additional facts be accepted by the court in rendering its decision.

testimony and evidence received at trial the court makes the following findings of fact and conclusions of law.

The trial originated with the complaint in which the plaintiff pled a single cause of action for breach of contract. This claim arose out of two contracts of insurance on the life of Jhonny Jaar ("Jaar"). Jaar was the chief technology officer of the plaintiff Global Energy Efficiency Holdings, Inc. ("Global"). Given Jaar's unique and near irreplaceable value to his company, Global determined to obtain from the Defendant William Penn Life Insurance Company of New York ("William Penn") what is commonly referred to as "key man" insurance on his life with Global as the beneficiary.

A first policy of insurance (No. 564410) with a face amount of $2,000,000.00 was issued by William Penn based upon applications submitted to the company dated December 20, 2011 and January 11, 2012. A second policy (No. 582416) with a face amount of $1,000,000.00 was obtained based upon an application dated December 21, 2012. Both policies had the ratings classification of "Standard Plus Nontobacco". As per the underwriting standards promulgated by the Defendant, such a rating is applicable if the putative insured has not used tobacco[2] or marijuana within twelve months of the application for such a policy of insurance.

In all of the applications, Global and Jaar represented that Jaar never used tobacco products in any form and also never used, among other things, "marijuana . . . or other illegal, restricted or

---

[2] A single celebratory monthly cigar is permissible.

controlled substances". Both policies of insurance contained incontestability clauses that provided that William Penn could only challenge the contract if Jaar died within two years from the date of the issuance of the policies. The effective date of the policies were April 4, 2012 and February 6, 2013, respectively.

Jaar was found dead in his home by his wife Virginia Read ("Read") on the morning of January 3, 2014 at the age of 49. An autopsy was performed by the Office of the New York City Medical Examiner and in a final report dated February 18, 2014 an immediate cause of death was "atherosclerotic cardiovascular disease". A contributing cause of death was determined to be "acute mixed drug intoxication including ketamine and methylenedioxymethamphetamine". The Medical Examiner's toxicology report also noted the presence of "canna binoids" in Jaar's blood. Contained in the Medical Examiner's records was a supplemental case information report containing the following information: "[a]ccording to NYPD, who spoke to decedent's wife, Ms. Virginia Read, she states that he is a chronic marijuana smoker and she thinks he took ecstasy and possible ketamine or a 'molly' last night". The report also noted that there "was a bag found with marijuana, pipes and smoking paraphernalia". In deposition and trial testimony, Read confirmed the statements regarding Jaar's illicit drug use the night before his death and that Jaar "had used marijuana", but she denied stating that Jaar regularly or chronically smoked marijuana.

Global filed claims for death benefits with William Penn in late January 2014. Thereafter, William Penn retained Steve Kotoros

("Kotoros") to conduct an investigation into the circumstances surrounding Jaar's death. As part of Kotoros' inquiry, he conducted an in person interview of Read in April of 2014. After the interview, Kotoros prepared a written "confirmation of interview" which Read apparently signed in the presence of a witness on April 24, 2014. In that document, Read denied that Jaar ever "smoked cigarettes or used tobacco products . . . of any kind during his adult life" and stated that "he never used alcohol or drugs on a regular basis".

Subsequently, William Penn decided internally to deny Global's claims under the policy and Defendant's trial counsel, Robert Meade, Esq., requested, through personnel of William Penn, that Kotoros re-interview Read allegedly because of the discrepancies between Read's interview assertion that Jaar had never used drugs or smoked and the toxicology results contained in the Medical Examiner's report.[3]

Kotoros' recollection and performance of the second interview of Read was the subject of significant disagreement at trial. Kotoros testified at trial that he interviewed Read a second time on or about August 13, 2014 by telephone. He averred that Read stated Jaar used marijuana daily for three years prior to his death and that he periodically took ecstacy and ketamine with friends. Kotoros further testified that he took accurate contemporaneous notes which he transformed the same day into an unsigned written report for William Penn.

On cross examination, Kotoros acknowledged that he testified at

[3] The parties stipulated on the record during trial to this information being admitted as facts.

his deposition that he had no independent recollection of the second interview. Kotoros then admitted he had reviewed his deposition that day in preparation for the trial and that he was possibly conflating that recent review with actual recollection. He then professed to having no present recollection of the second interview with Read at all. Kotoros then reversed course and claimed that Read told him date ranges for Jaar's marijuana use, just not specific dates. Kotoros also testified that it was uncommon to perform a second interview with a witness and he departed from his well established practice of obtaining a written statement of every interview. Kotoros attempted to justify this anomalus behavior by averring that William Penn did not request he obtain a further written statement from Read.

On August 15, 2014, the Plaintiff Manufacturers and Traders Trust Company ("M&T Bank")took an assignment of the majority of the disputed insurance policy proceeds from Global to satisfy a term note and pay down a line of credit it had given to Global.

In a letter to Global dated September 15, 2014, William Penn denied Global's claim for benefits under the disputed policies on the basis that the applications contained material misrepresentations regarding Jaar's heath and that if these disclosure had been made, William Penn would not have issued the policies in dispute. This litigation ensued.

At the commencement of the trial, the parties stipulated that the Plaintiff met its burden of proof - -with stipulated facts of Jaar's

death, the existence of the life insurance policy covering Jaar, and Plaintiffs' status as the beneficiary of that policy (*see e.g. Green v William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570 [1st Dept 2010, Saxe, J concur])- - and that the only matter to be tried would be the Defendant's affirmative defense under CPLR §3105[b] that the applicant made material misrepresentations of fact.

The ultimate issue for this court to determine at trial is whether Jaar made a material misrepresentation regarding alleged smoking [cigarettes/marijuana] or illicit drug use such that the Defendant would not have issued the life insurance policies. More specifically, the parties agreed that the question to be answered is, did Jaar smoke within one year prior to the application for each life insurance policy or use drugs within the same periods?

During trial it was agreed by the parties that the court would reserve decision on certain legal and evidentiary issues and that these questions would be determined by the court in its decision after trial. Those issues are as follows:

1. Is the Defendant's burden of proof to demonstrate Jaar made material misrepresentations in his applications by a preponderance of the admissible evidence or by clear and convincing proof?

2. Does the doctrine of law of the case bind the trial court to the evidentiary determinations made by Hon. Mary Ann Brigantti in her decision dated May 15, 2018 which denied the Plaintiffs' motion for summary judgment, and if not:

   a. Are the hearsay statements regarding Jaar's marijuana and drug use attributed to Read in Medical Examiner's report

properly received in evidence as admissions, and

b. Is Kokoros' report of his second interview with Read admissible in evidence as past recollection recorded and are the alleged statements therein attributed to Read properly in evidence as admissions.

3. Depending on the evidentiary rulings in nos. 2a and 2b, is the opinion of Dr. Michel M. Baden, M.D. ("Dr. Baden"), the Defendant's retained expert medical examiner, based upon a sufficient foundation of evidence in the record.

As to the burden of proof necessary for the Defendant to establish its affirmative defense in this matter, contrary to the Plaintiffs' arguments, this court could find no case that expressly adjudicated the level of proof required to prove a claim of a material misrepresentation in the particular context presented here.

The purpose of a burden of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." (*In re Winship*, 397 US 358, 370 [1970]). In our common law jurisprudence there are three customary evidentiary burdens of proof: beyond a reasonable doubt, clear and convincing and preponderance. In a typical dispute between private litigants over a sum of money, the community interest in the outcome of such suits is minimal, and, therefore, only a preponderance of evidence is necessary to sustain a party's burden in such civil matters (*see In re Storar*, 52 NY2d 363, 379 [1981]). The heightened intermediate standard of clear and convincing evidence while not alien to civil law, is

generally applied in cases involving "denial of personal or liberty rights" (*In re Capoccia*, 59 NY2d 549, 553 [1983]) or where issues of "particularly important personal interests are at stake" (*In re Storar*, supra). The issue tried before the court falls well outside either of these significant classifications and presents a routine contract dispute, albeit a multi-million dollar one.

The cases cited by Plaintiffs to support the application of a clear and convincing evidence standard are not to the contrary and distinguishable. All the cited cases by the Plaintiffs for direct authority involved claims in which fraud, willfulness or where other manner of scienter on the part of the insured was necessary. In cases where fraud is claimed, a burden of clear and convincing evidence indisputably applies (*see e.g. Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 10 [1972]). Actions for contract recession or in tort for damages based on fraudulent representations requires proof the offending party "knowingly uttered a falsehood intending to deprive [the aggrieved party] of a benefit and that [the aggrieved party] was thereby deceived and damaged [emphasis added]" (*Channel Master Corp. v Aluminium Ltd. Sales, Inc.*, 4 NY2d 403, 406-07 [1972]; *see also Lama Holding Co. v Smith Barney*, Inc., 88 NY2d 413, 421 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). However, not "every claim of misrepresentation or omission rises to the level of fraud. An omission or misrepresentation may be so trifling as to be legally inconsequential or so egregious as to be fraudulent, or even criminal. Or it may fall somewhere in between, as it does here"

(*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 349-50 [1999]). To rescind a contract of insurance based upon a material misrepresentation of fact, the issue of scienter, or whether the misrepresentation was knowingly made, is not a necessary element in a defendant's burden of proof (*see Kulikowski v Roslyn Sav. Bank*, 121 AD2d 603, 604-05 [2nd Dept 1986]; *Fernandez v Windsor Life Ins. Co.*, 83 Misc2d 301, 305 [Sup Ct, Queens Cty 1975]). Innocent misrepresentations, when material, are sufficient to frustrate a claim under an insurance contract (*Kulikowski v Roslyn Sav. Bank*, supra). Since the affirmative defense of material misrepresentation presented here clearly does not involve an inquiry into knowing, willful or fraudulent conduct on behalf of the insured, clear and convincing proof is not necessary.

The Defendant's argument that, under the doctrine of law of the case, this court is bound by the evidentiary rulings made by Hon. Mary Ann Brigantti in her decision denying the Plaintiffs' motion for summary judgment is without merit. In particular, the Defendant seeks a finding that Justice Brigantti's decision that statements attributed to Read regarding Jaar's alleged marijuana use contained in Kotoros' August 13, 2014 report are "admissions against interest" that this court must accept in evidence in rendering its decision after trial.

"The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v Cohoes*, 37

NY2d 162, 165). However, it is a flexible doctrine, "not an inescapable straightjacket" (*Garcia v New York*, 104 AD2d 438 [2nd Dept 1984]). Considering these principles, it has been held that "evidentiary" type rulings made in a motion for summary for summary judgment do not have preclusive effect on the trial judge to re-consider the admission or exclusion of the evidence as part of an overall record developed in a plenary proceeding at which, among other things, testimony made at depositions and in affidavits may change and where witness' credibility may be assessed (*see Banque Indosuez v Sopwith Holdings Corp.*, 257 AD2d 519 [1st Dept 1999]; *William Iselin & Co. v Continental Ins. Co.*, 101 AD2d 720 [1st Dept 1984]; *see also Shannon v Satterlee*, 28 AD3d 1114 [4th Dept 2006]; *Strouse v UPS*, 277 AD2d 993 [4th Dept 2000]; *Caster v Increda-Meal, Inc.*, 238 AD2d 917 [4th Dept 1997]).

Admitted into evidence by stipulation of the parties was the "Report of Autopsy" issued by the Office of the Chief Medical Examiner of the City of New York of the examination performed on Jaar. That report was received in evidence subject to this court's ruling on the admissibility of a hearsay statement attributed to Read. Specifically, in the portion of the report titled "Supplemental Case Information" is a statement attributed to Read in which she allegedly reported to unidentified New York Police Department personnel that Jaar was a "chronic marijuana smoker". Defendant asserts that this hearsay statement must be admitted into evidence as part of a business record or as a party admission. Plaintiff argues that the purported

statement does not fall under any hearsay exception.

Read's alleged statement that Jaar was a "chronic marijuana smoker" is indisputably hearsay as it was made out of court and is being offered for the truth of its content (*see generally People v Goldstein*, 6 NY3d 119, 127 [2005]). Indeed, the statement is at a minimum double hearsay as it passed from Read to NYPD personnel then to a member the Medical Examiner's office. Typically, hearsay is inadmissible based upon consideration of due process and fundamental fairness (*see People v Settles*, 46 NY2d 154, 166 [1978]), but numerous exceptions to the rule permit the admission of hearsay if the proponent demonstrates that the evidence is reliable (*see Nucci v Proper*, 95 NY2d 597, 602 [2001]).

The Defendant's reliance on the business record exception to the hearsay rule, codified in CPLR §4518, and its claim that the statement is an admission is misplaced. The business records exception to the hearsay rule provides:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR §4518 [a]).

Implied into this statutory language by the Court of Appeals is the principle that all entries in a business record must be made by persons engaged in the enterprise of the business and, consequently, under the compulsion of a business duty to report and/or record the

information in question (*see Johnson v Lutz*, 253 NY 124). Furthermore, where information is passed between more than one person, every participant in the chain of information sought to be admitted into evidence must be under a contemporaneous business duty to report the information or some other hearsay exception must apply to permit the information into evidence (*see Matter of Leon RR*, 48 NY2d 117, 122 [1979]).

Here, the record is bereft of the identity of the individual who purportedly heard Read state Jaar was a "chronic marijuana smoker" and Read had no duty to report information concerning Jaar's drug use to the NYPD (*see Memenza v Cole*, 131 AD3d 1020 [2nd Dept 2015]; *Murray v Donlan*, 77 AD2d 337 [2nd Dept 1980]). Also, there was absolutely no proof adduced identifying each person in the chain of information from Read to the Medical Examiner, much less the existence of a duty on the part of each individual to report the statement accurately. As such, Read's statement in the Medical Examiner's report does not satisfy the business records exception.

The claim that the statement may be received in evidence as an admission also fails. Even assuming that Read, based upon her admitted financial interest in the outcome of this litigation, is in privity with the Plaintiffs such that her potential admissions could be received against the Plaintiffs (*see* Jerome Prince, Richardson on Evidence § 8-232 [Farrell 11th ed 1995]), since the statement is a multiple hearsay statement, each re-statement must fall within a hearsay exception (*see Kamenov v Northern Assur. Co. of Am.*, 259 AD2d

958, 959 [4th Dept 1999]; *O'Connor v Port Jefferson*, 104 AD2d 861 [2nd Dept 1984]). Again, there is no proof of between who and how many persons this information meandered before it reached the Medical Examiner. Such information is inherently suspect, unreliable and can not be admitted into evidence as an admission.

The Defendant's argument in the memorandum of law that Read's statements to Kotoros are admissible as spontaneous declarations or excited utterances is without merit. "'Excited utterances' are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative" (*People v Vasquez*, 88 NY2d 561, 574 [1996]). Such statements are admitted because "as the impulsive and unreflecting responses of the declarant to the injury or other startling event, they possess a high degree of trustworthiness, and, as thus expressing the real tenor of said declarant's belief as to the facts just observed by him, may be received as testimony of those facts" (*People v Caviness*, 38 NY2d 227, 231 [1975]). In determining the admissibility of such a statement, the court must assess "not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim" (*People v Edwards*, 47 NY2d 493, 497 [1979]).

Here, the proof in the record regarding Read's mental state on the day of Jaar's death was decidedly undeveloped and unspecific. Indeed, the only facts noted by the Defendant in their post trial memorandum of law were that Read had discovered her deceased husband

and her testimony that she was in "shock" when questioned by police. Absent was any evidence from the person who allegedly heard the statement, Read's demeanor and emotional state at time of the statement, as well as information regarding how long after discovering Jaar's body it was purportedly made. More importantly, the statement at issue, that Jaar was "chronic" user of marijuana, was not a description of a just observed event nor was it exclamatory in nature (*see Schner v Simpson*, 286 AD 716 [1st Dept 1955]).

Defendant seeks to admit into evidence the hearsay statements Kotoros allegedly elicited from Read regarding Jaar's drug use as admissions or through his report, dated August 13, 2014, as portions of a business record or past recollection recorded.

The requisites for past recollection recorded are that "the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (*People v Taylor*, 80 NY2d 1, 8 [1992]). Past recollection recorded, like most exceptions to the hearsay rule, is based in the "guarantee of correctness" (*Iannielli v Consolidated Edison Co.*, 75 AD2d 223, 230 [2nd Dept 1980]). Thus, early cases identified as factors underlying the exception as an absence of a motive to falsify and the existence of an affirmative need for accuracy, or, in other words, an "honestly made" record (*see Halsey v Sinsebaugh*, 15 NY 485, 488 [1857]; *Iannielli v Consolidated Edison*

Co., supra at 229).

The acceptance or rejection of these supposed statements by Read depends almost entirely on the evaluation of the testimony of Kotoros. The report Kotoros drafted on August 13, 2014 does not qualify as a business record since he acknowledged that he departed from his longstanding practices when he interviewed Read the second time. Kotoros averred at trial that a re-interview of a witness was uncommon and that he did not have Read sign a written statement which was the standard practice he followed some 1,500 times prior. As such, the report was not created in the regular course of his business nor done in accord with his regular practices.

The report also does not qualify as a past recollection recorded. On direct, Kotoros testified, in direct contravention of his deposition testimony, that he recalled Read told him that Jaar used marijuana on a daily basis for three years prior to his death. Kotoros also newly recalled that Read told him that Jaar used ecstasy and ketamine with friends. If this testimony is credited, then Kotoros has present recollection of the interview with Read which disqualifies it as a past recollection recorded.

However, the court does not find Kotoro's testimony on this point remotely credible (*see* PJI 1:22). At his deposition, Kotoros professed to having no recollection whatsoever of this conversation with Read. Then, at trial, under direct examination by the Defendant's counsel, his recollection was restored. But minutes later, under cross-examination by Plaintiffs' counsel, he changed tack again and admitted absolutely no recollection of the second interview.

Kotoros testified with specificity of his recollection of the first interview with Read which was performed in accordance with his long held practices. On the other hand, there is the second interview of Read which Kotoros admitted was a singularly uncommon event in his career and was conducted four months later than the first. Irrespective of yielding revelatory information for the Defendant, his contract employer, that would unquestionably support its previously made decision to deny coverage under the policies, the substance of this particular interview conveniently passed within and without of Kotoros' memory.

Kotoros' status as a long time former insurance company employee whose work as an "independent" investigator has only been on behalf insurance companies also brings the trustworthiness of his report into question (*Iannielli v Consolidated Edison Co.*, supra at 231).

Any assertion that this varying testimony is the innocent product of memory enhancement from Kotoros having read his deposition testimony immediately prior to testifying rings decidedly hollow since his recollection of the events on direct testimony was completely contradictory with his deposition. In sum, the court is not persuaded Kotoros' testimony credibly demonstrates that he "correctly represented his knowledge and recollection" and that the report has the hallmarks of accuracy and truthfulness that characterize a past recollection recorded.

The court is also persuaded this report and its contents are inadmissible as it was created solely in anticipation of this litigation. The parties agreed that the interview was done at the

request of Defendant's trial counsel after the decision to deny the claim had already been made (*see People v Roth*, 11 NY2d 80 [1962]).

Lastly, absent the document containing Read's purported admissions being in evidence and without any credible testimony from Kotoros that he actually independently recollects his conversations with Read in the second interview, the disputed statements by Read allegedly made to Kotoros can not be received in evidence as admissions.

Accordingly, Kotoros' report dated August 13, 2014 is inadmissible hearsay and its alleged recount of conversations with Read will not be considered by the court in making its overall determination.

Turning to the question of the admissibility of opinions rendered by Dr. Baden, the Plaintiffs assert that the opinion of Dr. Baden does not support precisely when Jaar was using tobacco, marijuana and/or drugs and that there is insufficient factual support in the record for his opinions. The necessity that an expert's opinion be supported by facts in the record or personally known to the expert is a most basic legal doctrine common to both the federal and New York State courts (*see Romano v Stanley*, 90 NY2d 444 [1997]; Fed Rules Evid rule 702, 703).

Dr. Baden testified that he reviewed, among other things, the Medical Examiner's report, samples of the lung tissue retrieved during the autopsy, the records of Dr. Jose A. Cortes[4] ("Dr. Cortes"), and

[4] A physician who treated the plaintiff for a respiratory infection in February 2013.

the statements allegedly made by Read to NYPD personnel. Dr. Baden opined that based upon his analysis, Jaar was a continuous smoker of marijuana from three years prior to his death. Dr. Baden testified that the slides revealed anthracosis, a grey-black coloration as opposed to the otherwise normal pink color, of the cells in the lungs as well as the presence of numerous large carbon particles. Dr. Baden averred this was evidence that Jaar was a smoker for years, perhaps two to three years. Notwithstanding this finding, Dr. Baden admitted that he could not definitively opine when the years of smoking occurred based on the slides alone. His opinion in that regard was based upon his consideration of Read's statements contained in the Medical Examiner's report and his interpretation of a notation in Dr. Cortes' record of February 19, 2013 which he took to mean that Jaar told Cortes he was a current smoker.

As this court held supra that the statements attributed to Read in the Medical Examiner's report are hearsay and inadmissible, that portion of Dr. Baden's opinion can not be properly founded on that information as it is clearly unreliable (*see Hambsch v New York City Transit Authority*, 63 NY2d 723 [1984]; *Wagman v Bradshaw*, 292 AD2d 84, 87 [2nd Dept 2002]). Although Dr. Baden offered testimony to ostensibly support a finding that Read's statement "is of the kind accepted in the profession as a basis in forming an opinion", entirely missing is proof sustaining the "reliability" of the statement itself. As noted supra, Read's statement is patently undependable since it is, at a minimum, double hearsay recorded by unidentified persons (*see State v Dove*, 18 Misc. 3d 254 [Sup Ct Bronx Cty 2007]). Furthermore,

even if Read's statement was shown to be reliable, Dr. Baden's testimony makes plain that such information was the "principal basis" for his opinion as to the time period for Jaar's alleged smoking and not "a link in the chain of data" which led Dr. Baden to his opinion on that point (*see Borden v Brady*, 92 AD2d 983, 984 [1983]; *see also Hinlicky v Dreyfuss*, 6 NY3d 636, 645-646 [2006]).

Dr. Baden's analysis of Dr. Cortes' notes does not pass reliability muster either when balanced against the deposition testimony of Dr. Cortes which was placed in evidence. Dr. Cortes explained that his notation meant that Jaar had "a past event of smoking" in his life, not that he was a current smoker. He also averred that he counsels all his patients, smokers and non-smokers alike, on smoking cessation.

Based on the above analysis, Dr. Baden's determination that Jaar smoked for the three years prior to his death is not sufficiently supported by evidence in the record. At most, his opinion that Jaar had smoked for two to three years at some time in his life was the only portion of his ultimate conclusion that is evidentiarily viable.

The final question to be addressed is the overarching one which was presented for trial. It was necessary for the Defendant to prove by a preponderance of the admissible evidence that Jaar made a material misrepresentation in the application process by demonstrating Jaar used tobacco [other than a monthly "celebratory cigar"], marijuana or illicit drugs within 12 months prior to either the December 2011 or the December 2012 applications.

The Defendant has introduced affirmative evidence that Jaar used

illicit drugs and smoked marijuana during his lifetime. The results of the Medical Examiner's toxicology report, and indeed the ultimate finding that Jaar's drug use was a contributing factor in his death, has not been contested. Read acknowledged that she was aware that Jaar had used ketamine, ecstacy and smoked marijuana shortly prior to his death. Read also testified at trial and in her deposition that she first realized Jaar was using drugs when she discovered his "pouch" containing marijuana and paraphernalia in August 2013. The portion of Dr. Baden's opinion that Jaar used marijuana for a period of time was supported by record facts.

What was verily contested by the parties was when Jaar made use of these substances. More precisely, the question to be attended is whether it is more likely than not that Jaar smoked -tobacco or marijuana- or used illicit drugs within the relevant periods. On this issue, the evidence introduced by the Defendant was ultimately entirely circumstantial.

In addition to the evidence submitted by both parties via stipulation, the Defendant attempted to satisfy its burden by proffering at trial and highlighting in its post trial memorandum, *inter alia*, Dr. Baden's testimony, the Medical Examiner's records containing, inter alia, Read's hearsay statements, Kotoros' testimony about his second interview with Read and his report with Read's hearsay statements, Read's trial testimony and excerpts of her deposition, Dr. Cortes' records and Read's testimony regarding stress as a motivation for Jaar's drug use.

The alleged statement attributed to Read that Jaar was a "chronic

marijuana smoker" has been excluded as inadmissable hearsay. Even if considered by the court, it would be of minimal value in reaching a conclusion. Although the dictionary definition of "chronic" is "long term", there is nothing else in the statement to imply the duration and time period of the use purportedly reported by Read to the NYPD.

The statements imputed to Read by Kotoros during his second interview contained in his August 13, 2014 report have also been excluded as hearsay based primarily on Kotoros' lackluster candor on this point at trial. Even assuming the court were to credit Kotoros' initial claim on direct examination[5] that he had independent recollection of his conversations with Read, the court would nonetheless defer to Read's recollection of that interview, albeit imperfect, over the patently incredible sudden remembrance by Kotoros. Likewise, the greater flavor of credibility lay with Read on this point also because of Kotoros' admission that he had read his deposition testimony just prior to trial and he acknowledged that may have tainted his recollection.

Unlike Kotoros, whose testimony on the most salient issue before the court completely changed, twice, between his deposition and trial testimony, Read was relatively uniform on the issue of her awareness of Jaar's smoking and drug use and the time frames for same. The inconsistences in Read's testimony given at trial as well as discrepancies between her trial testimony and that given at her deposition are, in this court's experience and opinion, well within

[5] A claim he subsequently recanted by again admitting he had no independent recollection of the second interview.

the ambit of routine variances found in the testimony in many proceedings. The written confirmation of Kotoros' interview of Read in April 2014 regarding Jaar's drug use does not present as great an incompatibility as the Defendant asserts. In the written statement, Read states Jaar never used drugs on a "regular basis". Contrary to the Defendant's assertions, this statement is consistent with her testimony regarding her knowledge of Jaar's drug use.

As to bias, both Reed and Kotoros have demonstrable ties to the parties which colors their testimony. Read has a direct financial interest in the outcome of this case as well as an emotional bond to Jaar. On the other hand, Kotoros has a long history as a compensated employee of and independent contractor for the insurance business. In the opinion of the court, this leaves the influence of bias of their respective testimonies on relatively equal footing.

The Defendant's focus and arguments on the notation of "+smoke" in Dr. Cortes' records is, in the court's analysis, overstated. First and foremost, it is not direct evidence of smoking during the relevant periods since the note was made in February 2013, after the policy applications were executed. The only evidence adduced of a physician's notion regarding smoking recorded during one of the relevant periods was from Dr. St. Louis who noted in February 2012 that Jaar neither smoked regularly nor used recreational drugs.

The Defendant highlighted its post trial memorandum as proof of smoking and drug use in the relevant periods Read's testimony that Jaar suffered job stress for many years and that Jaar told her that his admission of marijuana and drug use shortly prior to death was to

relieve stress. This evidence, while relevant, suffers from the defect much of the other evidence does, that it is indirect and tenuous of the actual issue to be attended.

In the court's judgement, the Plaintiff's evidence that Jaar did not smoke or use illicit drugs during the disputed periods more than adequately counterbalances the Defendants' unpersuasive circumstantial proof of the timing of Jaar's smoking and drug use.

The plaintiff's retained expert medical examiner, Dr. Lone Tahanning ("Dr. Tahanning"), opined that based upon her analysis, Jaar was not a long term smoker of either tobacco or marijuana. Dr. Tahanning highlighted five pieces of non-hearsay evidence in the record as the foundations for her opinion, to wit: Jaar's chest x-ray taken within the year of his death, Dr. Cortes' records, Jaar's lab records from within 10½ months of his death, the autopsy record and autopsy materials. Further, as to Jaar's drug use, she found that it had not affected the function of his liver. In the court's opinion, Dr. Tahanning's analysis and conclusions were superior to those drawn by Dr. Baden. Dr. Tahanning's analysis was based solely on evidence in the record whereas Dr. Baden's opinion relied notably on inadmissible, unreliable hearsay. The court also finds Dr. Tahanning's testimony to be more cogent, concise and, ultimately, her conclusions more convincing. As such, in resolving the conflicting opinions rendered by the experts, the court accords greater weight to the opinion of Dr. Tahanning than those proffered by Dr. Baden in reaching its decision herein (*see Mazella v Beals*, 27 NY3d 694 [2016]; *Taieb v Hilton Hotels Corp.*, 131 AD2d 257 [1st Dept 1987]; *Coates v Peterson & Sons*, 48 AD2d

890 [2nd Dept 1975]; *see also* PJI 1:90). Parenthetically, the court notes it would have reached this result even if it was determined Dr. Baden's conclusions regarding when Jaar smoked were properly substantiated.

Although, tempered by the recognition of a potential for bias, the testimony of Read and the deposition testimony of those who knew Jaar weighs against a conclusion that Jaar was a chronic user of marijuana or illicit drugs. Read, who lived with Jaar, averred that he did not smoke tobacco products. While she stated that Jaar acknowledged his drug use to her, it was not for the time periods which would affect the viability of the policies at issue. This testimony was corroborated by Kotoros' initial interview with Read, the only reliable hearsay received at trial, which was in writing, signed by Read, witnessed and, unlike his later report, done in accordance with Kotoros' usual practices. Read's assertions in this regard were corroborated by the deposition testimony of friends, including those who resided with him, and co-workers that they were unaware of smoking and drug use by Jaar.

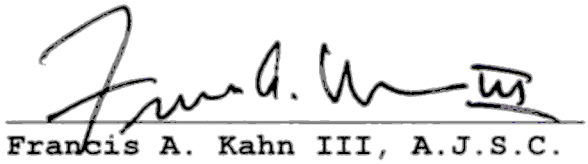
Of lesser importance, but nonetheless confirming of the plaintiffs' claim that Jaar was not a smoker, was the uranalysis performed at the behest of the defendant William Penn which revealed no nicotine in Jaar's system. Dr. Tahanning opined that a heavy smoker, as Jaar is alleged to have been by the Defendant, would find it highly difficult to cease smoking long enough to yield a negative test.

Lastly, the Defendant's argument the doctrine of "habit" raises a

rebuttable presumption of smoking and drug use by Jaar is nothing more than an exercise in "bootstrapping". In addition to not raising the issue at trial, the Defendant has not proffered a sufficient number of instances of the conduct in question to warrant the application of the doctrine (*see Halloran v Virginia Chemicals, Inc.*, 41 NY2d 386, 393 [1977]).

Accordingly, the court finds that the Defendant has not established, by a preponderance of the credible evidence, that Jaar made a material misrepresentation in the life insurance application process, to wit that Jaar used tobacco, marijuana or illicit drugs within 12 months prior to either the December 2011 or the December 2012 applications. Resultantly, the Plaintiffs have demonstrated that the Defendant breached the contracts of insurance and are entitled to a judgment in the amount of $3,000,000.00 plus legal interest and disbursements.

Settle judgment.



Francis A. Kahn III, A.J.S.C.