Hagen v Genworth Life Ins. Co. of N.Y.
2013 NY Slip Op 33692(U)
December 30, 2013
Sup Ct, Kings County
Docket Number: 503457/13
Judge: David I. Schmidt
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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of December, 2013.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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CHLOE HAGEN, by her mother and natural guardian, JANELLE EDWARDS,

Plaintiff,

- against -

Index No. 503457/13

GENWORTH LIFE INSURANCE COMPANY OF NEW YORK, formerly known as American Mayflower Life Insurance Company of New York,

Defendant.

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The following papers numbered 1 to 5 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers Memoranda of Law	

Upon the foregoing papers, Genworth Life Insurance Company of New York, formerly known as American Mayflower Life Insurance Company of New York, (defendant) moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint of Chloe Hagen, by her mother and natural guardian, Janelle Edwards, (plaintiff). Plaintiff cross-moves for an order (1) declaring that defendant's policy insuring the life of Hank

Hagen (decedent) was in force at the time of his death, (2) enjoining defendant from canceling the policy insuring decedent's life or refusing to pay a death benefit thereunder, (3) granting partial summary judgment to plaintiff and (4) awarding plaintiff compensatory damages, plus costs and attorney's fees.

Background And Allegations

(1)

American Mayflower Life Insurance Company of New York (American Mayflower) issued decedent a 10-year life insurance policy with a one-million-dollar face value in 2006 (the Policy). Defendant subsequently merged with American Mayflower and assumed American Mayflower's rights and duties under the Policy.

The Policy set decedent's annual premium at $320, to be paid in quarterly installments on January 3, April 3, July 3 and October 3 of each year. It stipulated that defendant would not pay death proceeds until its home office received a written claim, a copy of the Policy and "due proof that the Insured died prior to the Expiry Date while this Policy was in force." A clause titled "AMOUNT OF THE DEATH PROCEEDS" explained that "[t]he proceeds payable at the death of the Insured will be: • the amount of insurance applicable on the date of the Insured's death; less • any premium required to keep this Policy in force to the end of the policy month of death."

The Policy's "GRACE PERIOD" clause stated,

> "Any premium not paid by its Premium Due Date is in default. A grace period of 31 days is provided for payment, without

> interest, of any premium after the first premium. The Premium Due Date of an unpaid premium will be the first day of the grace period for that premium.
>
> "This Policy and all riders will stay in force during a grace period. If this Policy enters a grace period and the Insured dies before the end of the grace period, the premium required to keep this Policy in force to the end of the policy month of death will be deducted from the proceeds.
>
> "If a premium has not been paid by the end of its grace period, this Policy will terminate subject to its terms as of the Premium Due Date of that premium."

The Policy also permitted reinstatement, after termination, within five years of default and conditioned upon evidence of insurability and payment of past-due premiums, with interest.

One of decedent's 2007 payment forms reported a change of address from his prior residence to 1416 Brooklyn Avenue, Apartment 6A, in Brooklyn (the Brooklyn Apartment). Decedent, using a form dated September 20, 2012, amended the designated Policy beneficiaries to include a 40% benefit for his then-two-month-old daughter, now the plaintiff herein. That form also indicated decedent's address as the Brooklyn Apartment.

Plaintiff alleges that decedent moved to Milwaukee, Wisconsin, "at the end of 2012." Defendant alleges that it mailed, to the Brooklyn Apartment, a December 4, 2012 premium notice (the Premium Notice), a January 18, 2013 grace period notice (the Grace Period Notice) and a February 4, 2013 notice stating that the Policy had terminated but making a

"late payment offer" that would permit the Policy's reinstatement (the LPO Notice). Decedent never paid the Policy premium due January 3, 2013 (the Last Premium).[1]

Decedent was shot and killed in Milwaukee on February 14, 2013. Plaintiff subsequently submitted a claim upon the policy, which defendant rejected on the basis that decedent had permitted the Policy to terminate by failing to pay the Last Premium within the 31-day grace period.

(2)

Plaintiff commenced this action on June 23, 2013 and alleged causes of action for (1) breach of Insurance Law § 3211, (2) breach of contract, (3) negligence, (4) waiver and estoppel, (5) unjust enrichment, quantum meruit and restitution and (6) equity. She contended, "upon information and belief," that decedent notified defendant of his change of address at the end of 2012, but that defendant negligently failed to take note of it. Plaintiff also contended, on information and belief, that defendant never mailed any notices to decedent concerning the Last Premium, and she alleged that such failure to comply with Insurance Law § 3211 precluded the Policy's termination.

Plaintiff characterized the LPO Notice as ambiguous because it stated that the Policy had terminated but also indicated that defendant would accept late payment of the Last Premium. She argued that defendant's repeated acceptance of decedent's prior late premium

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[1] After oral argument on this motion, plaintiff's mother and natural guardian apparently attempted to pay the Last Premium, sending defendant a check for $83.20, dated November 13, 2013. Defendant rejected this attempted payment and returned the check to plaintiff's counsel on the basis that the Policy had already terminated.

payments established a course of conduct that should estop defendant from claiming that the Policy terminated because of the missed Last Premium. Plaintiff further contended that defendant's acceptance of premium payments applying to periods when the Policy was not in force constituted unjust enrichment and, consequently, that defendant should grant decedent credit sufficient to cover the period after his policy terminated in early 2013.

Plaintiff argued that the Policy's "AMOUNT OF THE DEATH PROCEEDS" clause required that defendant pay decedent's death benefit less the missing Last Premium, and she urged that any ambiguities in the Policy must be construed against defendant. Overall, plaintiff thus claimed that defendant breached the Policy's terms, as well as its duty of good faith and fair dealing, by terminating the Policy and refusing to pay a death benefit. Finally, plaintiff labeled both the amount and tardiness of the Last Premium de minimis and urged that "[u]nder the principles of equity, the policy should be paid to plaintiff, or alternatively, it should be paid with a deduction for that part of the premium due that would make the policy fully paid up to the date of death."

(3)

Defendant now moves, before answering, for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the action. Defendant urges that the last correspondence it received from decedent indicated his address as the Brooklyn Apartment and, further, that decedent's death certificate, plaintiff's benefit claim form and two other beneficiaries' claim forms also each listed the Brooklyn Apartment as decedent's residence. Defendant contends that billing

records indicate that it mailed the Premium Notice to the Brooklyn Apartment on December 6, 2012 and that the notice complied with Insurance Law § 3211 by indicating the amount due, the due date and that the Policy would terminate if decedent failed to pay by the grace period's end. Defendant further asserts that its records confirm that it mailed decedent the Grace Period Notice and, later, the LPO Notice, which, though neither contractually nor statutorily required, offered to reinstate the Policy upon satisfaction of four conditions:

> "(1) payment must be received within 31 days after the expiration of the grace period, (2) the bank must honor the payment on the first deposit attempt, (3) THE INSURED MUST STILL BE LIVING, and (4) if your policy contains a disability income rider the insured must not be totally disabled unless the total disability began before the end of the grace period."

Defendant contends that each of decedent's previous premium payments made beyond the applicable grace period had been an acceptance of an identical reinstatement offer.

Defendant thus argues that it did not breach the Policy by refusing to pay a death benefit, as decedent's failure to pay the Last Premium within the grace period caused the Policy to terminate. Defendant stresses that Insurance Law § 3211 requires only that an insurer send a premium notice to the policyholder's last known address and, further, that the statute creates a presumption of conforming notice when an insurance company employee affirms, under penalties of perjury, that the company properly sent such notice.

Defendant posits that plaintiff errs in asserting that the "AMOUNT OF THE DEATH PROCEEDS" clause mandates payment of a death benefit if an insured had missed only one premium payment because that clause denominates the starting point for calculating the

benefit's amount as "the amount of insurance applicable on the date of the Insured's death" and because the Policy explicitly conditions benefit payment on the Policy's being in force at the time of death. Defendant further urges that the Policy's "GRACE PERIOD" clause explicitly establishes that the Policy will terminate if the premium remains unpaid at the end of any grace period.

Defendant additionally argues that plaintiff's claims for breach of the duty of good faith and fair dealing, violation of Insurance Law § 3211 and unjust enrichment are duplicative of her breach-of-contract claim. It urges that plaintiff's negligence and unjust-enrichment claims must also be dismissed because the Policy's terms govern the relationship.

Defendant contends that it accepted late payments from decedent only during the contractually-stipulated, 31-day grace periods or as acceptance of offers to reinstate the Policy. It urges that each reinstatement offer was identical to the LPO Notice sent in February 2013 and that each indicated that the policy had terminated but would be reinstated upon decedent's meeting of certain conditions, including being alive. Each reinstatement offer, defendant stresses, also stated that "[t]his notice does not change the terms of your policy." Accordingly, defendant argues that its course of conduct was always consistent and that it may not be estopped from terminating the Policy or refusing benefit payment because decedent did not, in this instance, accept the reinstatement offer as he had in the past.

Defendant supports its motion with the affidavit of Christine Mann (Mann), a senior claims examiner for defendant. She avers, among other things, that billing and mailing

records confirm that defendant sent the Premium Notice to the Brooklyn Apartment on December 6, 2012 and subsequently sent the Grace Period Notice and LPO Notice to the same address, all via first class mail. She also notes that the United States Postal Service did not return any of those notices as undeliverable. Mann confirms that defendant had never received any payment of the Last Premium.[2]

Defendant also submits copies of the Policy, the September 20, 2012 beneficiary designation form, the Premium Notice, the Grace Period Notice, the LPO Notice and printouts of electronic records purportedly indicating these notices' mailings, as well as copies of prior reinstatement offers.

(4)

Plaintiff cross-moves for an order granting her summary judgment on her Insurance Law § 3211, breach-of-contract, waiver-and-estoppel, unjust-enrichment and equity causes of action, as well as seeking declaratory judgment that the Policy was in effect when decedent died, an injunction against defendant canceling the Policy or refusing to pay the death benefit and compensatory damages. She argues that defendant's repeated acceptance of late premium payments without penalty, after sending notices of cancellation, established a course of conduct that estops defendant from now strictly enforcing the Policy's grace-period terms and refusing to pay decedent's death benefit.

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[2] As noted above (*see* n 1, *supra*), the only attempted payment of the Last Premium occurred after oral arguments on this motion.

Plaintiff contends that ambiguities in the Policy's terms must be construed against defendant, as the drafter, and that the language of the "AMOUNT OF THE DEATH PROCEEDS" clause clearly requires defendant to pay a death benefit, less an unpaid premium, if an insured dies without paying the last premium due. Plaintiff argues that the "AMOUNT OF THE DEATH PROCEEDS" clause need not be viewed in conjunction with the Policy's other terms and that doing so would constitute "an unreasonable method of contract interpretation." Plaintiff further argues that reading the Policy as precluding benefit payment after a lapse would impermissibly cancel out the effect of the "AMOUNT OF THE DEATH PROCEEDS" clause. She contends that the word "applicable," in that clause, does not require that the policy be in force at the time of an insured's death.

Plaintiff urges that defendant bears the burden of proving that it properly canceled the Policy prior to decedent's death. She argues that the LPO Notice's heading, "IMPORTANT: PREMIUM NOTICE ENCLOSED," and enclosure of a payment slip contradicted its subsequent statement that the policy had terminated and suggested that the policy remained in effect. Plaintiff contends that the LPO Notice listed reinstatement conditions only in a small font on the reverse side and that, as an insured would not likely read them, they cannot be considered binding. She also argues that the reinstatement terms are contradictory as they state both that the Policy may be reinstated within 31 days of the grace period's end but also that reinstatement cannot occur after an insured has died. Plaintiff consequently asserts that

the LPO Notice "revived the policy by leaving open the opportunity to make the payment" and thus that defendant's termination of the policy violated Insurance Law § 3211.

Plaintiff argues that decedent's prior payments to reinstate the Policy unjustly enriched defendant as decedent paid for coverage which he did not fully receive. Accordingly, plaintiff urges that decedent possessed credit with defendant, which should now be applied to the period of purported lapse when decedent died.

Plaintiff contends, in support of her equity claim, that the law disfavors forfeiture of a life insurance policy for nonpayment of premiums. She characterizes the loss of a $400,000 benefit as a draconian penalty for late payment of an $83.20 premium and thus urges that justice requires the benefit's payment.

Finally, plaintiff argues that the Mann affidavit neither constitutes documentary evidence for a CPLR 3211 (a) (1) dismissal, nor sufficiently demonstrates that plaintiff fails to state a claim. Plaintiff stresses that Mann does not state whether defendant employed her when it purportedly mailed the notices and fails to explain defendant's procedures for mailing. Plaintiff also labels the billing record printouts as conclusory and urges that they fail to prove the notices' mailings.

(5)

Defendant, in reply, argues that plaintiff concedes that decedent's prior late premium payments were either within a grace period or made as acceptance of a reinstatement offer. Defendant stresses that it never deviated from the terms of the Policy and reinstatement

notices, and thus urges that it may not be estopped from enforcing those terms. It argues that the Policy clearly conditions a death benefit payment on the Policy's being in force at the time of death and that no insurance was applicable upon decedent's death because the Policy had terminated. The LPO Notice's terms, defendant urges, constituted only an offer of reinstatement, conditioned upon both the insured being alive and payment being made within 31 days of the grace period's end. Defendant also asserts that its billing records establish that it sent the Premium Notice in accordance with Insurance Law § 3211.

Defendant argues that decedent's payments made in accepting prior reinstatement offers created no credit with defendant because each payment was within the terms of an offer that explicitly stated that it would not alter the Policy terms. Defendant reiterates its argument that plaintiff's equitable claims must be dismissed because the Policy governs their relationship and contends that plaintiff has abandoned her negligence claim. Finally, defendant argues that plaintiff's cross motion must be denied because defendant has not yet served an answer and summary judgment would be premature. The portions of plaintiff's motion seeking declaratory judgment and injunctive relief must also be denied, defendant urges, because they would similarly require plaintiff's success on the underlying merits.

Defendant submits another affidavit from Mann, who states that she has worked for defendant since 1990 and in her current position since 1999. She explains that defendant "causes notices akin to the Premium Notice, the Grace Period Notice and the LPO Notice to be printed, processed and mailed in the regular course of its business." Mann further states

that defendant "maintains billing/mailing records for each of these types of notices in its regular course of business, including" the notices sent to decedent.

Discussion

The Dismissal Standard

A movant seeking dismissal under CPLR 3211 (a) (1) must show that "the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2012] [internal quotation marks omitted]; *see also Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 808 [2012]; *Galvan v 9519 Third Ave. Rest. Corp.*, 74 AD3d 743, 743-44 [2010]). To be "documentary," evidence "must be unambiguous and of undisputed authenticity" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2012] [internal quotation marks omitted]; *see also Flushing Sav. Bank, FSB*, 94 AD3d at 808; *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2010]).

A defendant's dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has *stated* a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading *has* a cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1181-82 [2010] [emphasis added], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*Sokol*, 74 AD3d at 1182, quoting

Guggenheimer, 43 NY2d at 275; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). A court considering a motion to dismiss for failure to state a claim generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181).

Insurance Law § 3211

Insurance Law § 3211 states, in relevant part,

> "(a) (1) No policy of life insurance . . . shall terminate or lapse by reason of default in payment of any premium, installment, or interest on any policy loan in less than one year after such default, unless, for scheduled premium policies, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due
> . . . .
> . . . .
> "(b) The notice required by paragraph one of subsection (a) shall:
>
> > "(1) be duly mailed to the last known address of the policyowner . . . ;
> > "(2) state the amount of such payment, the date when due, the place where and the person to whom it is payable; and shall also state that unless such payment is made on or before the date when due or within the specified grace period thereafter, the policy shall terminate or lapse except as to the right to any cash surrender value or nonforfeiture benefit."

Consequently, an insurer may not terminate a life insurance policy within one year of an insured's default unless it sent a premium notice that complied with Insurance Law § 3211 (*see Salzman v Prudential Ins. Co.*, 296 NY 273, 276-77 [1947] [interpreting predecessor statute]; *Elston v Allstate Life Ins. Co. of N.Y.*, 274 AD2d 938, 939 [2000]; *Tracy v William*

Penn Life Ins. Co. of N.Y., 234 AD2d 745, 747 [1996]; *Angulo v Security Mut. Life Ins. Co. of N.Y.*, 118 AD2d 745, 746 [1986], *appeal dismissed* 68 NY2d 727 [1986]; *Pinkof v Mutual Life Ins. Co. of N.Y.*, 49 AD2d 452, 454 [1975] [interpreting predecessor statute], *affd* 40 NY2d 1003 [1976]).

Insurance Law § 3211 (c) additionally provides that a presumption of proper notice may be created by "[t]he statement of any officer, employee or agent of such insurer, or of anyone authorized to mail such notice, subscribed and affirmed by him as true under the penalties of perjury, stating facts which show that the notice required by this section has been duly addressed and mailed" (*see Clark v Columbian Mut. Life Ins. Co.*, 221 AD2d 227, 228-29 [1995] [finding no presumption where the defendant insurer failed to submit "sufficient evidence to ensure that the (Insurance Law § 3211) notices mailed corresponded to and included all of the names on the computer print-out or the correct addresses of those individuals"]; *cf. Nocella v Dearborn Life Ins. Co. of N.Y.*, 99 AD3d 877, 878 [2012] [holding that establishing proper policy cancellation requires proof of actual mailing or detailed explanation of the defendant's procedure for ensuring proper mailing by employee with personal knowledge of such procedures]; *Tracy*, 234 AD2d at 747).

Here, Mann simply asserts that defendant sent the Premium Notice to the Brooklyn Apartment on December 6, 2012 and that defendant's billing and mailing records reflect that mailing. Mann confirms, in her reply affidavit, that defendant employed her in her current role during the period in question, but elaborates on defendant's mailing procedures only by

stating that defendant causes notices "to be printed, processed and mailed in the regular course of its business" and that it "maintains billing/mailing records for . . . notices in its regular course of business." Her somewhat conclusory affidavits fail to state facts sufficiently establishing proper and timely mailing of an Insurance Law § 3211 notice to warrant dismissal for failure to state a claim.

Furthermore, defendant's billing and mailing records cannot be treated as being of "undisputed authenticity" (*see Cives Corp.*, 97 AD3d at 714), and, even were these records proper documentary evidence, they do not indicate, in any comprehensible manner, what item was sent or to what address it was mailed. Defendant's submissions thus fail to conclusively establish that plaintiff has no cause of action or that her allegation that defendant failed to provide notice as required by Insurance Law § 3211 is factually baseless (*see Sokol*, 74 AD3d at 1181). Consequently, defendant's dismissal motion must be denied as to plaintiff's Insurance Law § 3211 cause of action. If Insurance Law § 3211 barred the Policy's termination, defendant's refusal to pay a death benefit would constitute a contractual breach, and defendant's motion must, therefore, also be denied as to the breach-of-contract claim.

Waiver And Estoppel

"The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). New York courts have historically found that an insurer's

acceptance of late premium payments, or other actions that indicate its intent to accept late payments, may serve to estop it from subsequently canceling a policy for a similar late payment (*see Bible v John Hancock Mut. Life Ins. Co.*, 256 NY 458, 462 [1931], *rearg denied* 257 NY 543 [1931]; *De Frece v National Life Ins. Co.*, 136 NY 144, 150-51 [1892]; *Weiner v Government Empls. Ins. Co. of Washington, D.C.*, 52 AD2d 844, 845 [1976]; *see also Scalia v Equitable Life Assur. Socy. of U.S.*, 251 AD2d 315, 315 [1998]).

Such an estoppel will not be imposed, however, where the Policy explicitly states that acceptance of a late payment does not waive the insurer's right to require prompt payment in the future (*see Traynor v John Hancock Mut. Life Ins. Co.*, 273 NY 230, 237 [1937]; 1-10 New Appleman New York Insurance Law § 10.08 [1] [d] [2d ed 2013]; *see also Brecher v Mutual Life Ins. Co. of N.Y.*, 120 AD2d 423, 426 [1986] [finding that using an insurer's prior acceptance of late premium payments to estop it from terminating the policy for late payment "would be detrimental to the public interest(, because) (i)t would discourage insurers from ever forgiving a late payment for fear of endangering their subsequent rights to declare a lapse for nonpayment"]). Furthermore, the unambiguous terms of an insurance policy stating the parties' rights and duties thereunder "must be given 'their plain and ordinary meaning'" (*Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 416-17 [2007], *lv denied* 9 NY3d 818 [2008], quoting *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]).

Here, plaintiff pleads no facts that support estopping defendant from terminating the Policy, pursuant to its terms, for a missed premium payment. Each reinstatement offer

explicitly informed decedent that the Policy had terminated and that the offer "does not change the terms of your policy." Decedent's payments to defendant falling outside of the applicable grace periods must, therefore, be considered acceptances of reinstatement offers (and all contingent terms), not late payments that defendant accepted in contradiction of the Policy's terms.

In any case, even if defendant were bound to a course of conduct by its prior actions, plaintiff fails to plead any facts that indicate that defendant's conduct in January and February 2013 deviated from any prior occasion when decedent missed a premium payment. Plaintiff admits that the LPO Notice made the same offer of reinstatement that defendant had made on prior occasions, which is the full extent of what decedent could have expected from defendant's prior conduct. No reinstatement occurred in early 2013 because the offer was not properly accepted, not because of any deviating action or inaction by defendant. Defendant never engaged in any conduct that suggested the Policy would not terminate if decedent failed to make premium payments within the applicable grace periods. Consequently, defendant's dismissal motion must be granted as to plaintiff's waiver-and-estoppel cause of action.

The Remaining Causes Of Action

Plaintiff pleads no facts in support of her negligence cause of action and does not make any opposition to defendant's motion to dismiss as it concerns that claim. Furthermore, "[m]erely alleging that the breach of a contract duty arose from a lack of due care will not

transform a simple breach of contract into a tort" (*Countrywide Home Loans, Inc. v United Gen. Tit. Ins. Co.*, 109 AD3d 953, 954 [2013], quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). Plaintiff's negligence cause of action must, therefore, be dismissed.

An unjust-enrichment cause of action is a quasi-contract claim that is "imposed by equity to prevent injustice, *in the absence of an actual agreement between the parties concerned*" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [emphasis added], *rearg denied* 12 NY3d 889 [2009]; *see also Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Accordingly, when the relationship between parties is governed by an enforceable contract, recovery under the theory of unjust enrichment is precluded (*see IDT Corp.*, 12 NY3d at 142; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-89 [1987]). Thus, plaintiff's unjust-enrichment cause of action must be dismissed.

Parties are entitled to no equitable relief where "money damages will provide them a complete and adequate remedy at law" (*DeCaro v East of E., LLC*, 95 AD3d 1163, 1164-65 [2012]; *see also Sisters of Charity Health Care Sys. Nursing Home, Inc. v Jack Miceli, D.D.S., P.C.*, 52 AD3d 805, 807 [2008]). Here, plaintiff seeks to recover a sum of money that she claims defendant owes her pursuant to the Policy's terms. Consequently, money damages would constitute a complete and adequate remedy at law, and plaintiff's equity cause of action must be dismissed.

Plaintiff's Cross Motion

As defendant has yet to serve an answer in this action, plaintiff's cross motion for summary judgment must be denied as premature (CPLR 3212 [a] ["(a)ny party may move for summary judgment in any action, *after issue has been joined*" (emphasis added)]; *see also Gaskin v Harris*, 98 AD3d 941, 942 [2012] ["'(a) motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to'" (citation omitted)], quoting *City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). Furthermore, a party "cannot move by way of [a] preanswer motion for the ultimate relief sought" and must instead wait to make a summary judgment motion after joinder of issue (*United Car & Limousine Found. v New York City Taxi & Limousine Commn.*, 178 Misc 2d 734, 735 [Sup Ct, New York County 1998]). Hence, plaintiff's cross motion must be denied in full. Accordingly, it is

ORDERED that defendant's dismissal motion is granted as to plaintiff's waiver-and-estoppel, negligence, unjust-enrichment and equity causes of action, and is otherwise denied; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.
HON. DAVID I. SCHMIDT