Arizona Premium Fin. Co., Inc. v American Tr. Ins. Co.
2017 NY Slip Op 31037(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 654130/2013
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 654130/2013
ARIZONA PREMIUM FINANCE
vs.
AMERICAN TRANSIT INSURANCE CO.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 2/4/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 60-62-123
Answering Affidavits — Exhibits _____ **No(s).** 191-256
Replying Affidavits _____ **No(s).** 279

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/2/17

SHIRLEY WERNER KORNREICH, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ARIZONA PREMIUM FINANCE COMPANY, INC., Index No.: 654130/2013

Plaintiff, **DECISION & ORDER**

-against-

AMERICAN TRANSIT INSURACNE CO.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Defendant American Transit Insurance Co. (ATIC or the Carrier) moves, pursuant to CPLR 3212, for summary judgment against plaintiff Arizona Premium Finance Company, Inc. (Arizona). Seq. 001. Arizona opposes and moves for summary judgment against the Carrier. Seq. 002. For the reasons that follow, the Carrier's motion is denied and Arizona's motion is granted in part and denied in part.

I. Background

Unless otherwise indicated, the following facts are undisputed.[1]

[1] The parties were unable to agree on a joint statement of undisputed facts. Therefore, the court has not considered the Carrier's proposed statement of material facts, which was submitted in violation of this part's rules. *See* Dkt. 61. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system. It should be noted that, contrary to the Carrier's protestations, the fact that some of Arizona's moving papers were e-filed one business date after the court-ordered filing deadline is not grounds to deny Arizona's motion. The Carrier's argument that Arizona's motion is *jurisdictionally* defective is frivolous, and otherwise falls on deaf ears given the Carrier's own violations of the court's e-filing rules (such as its failure to e-file documents in OCR text-searchable format) and its myriad discovery violations (some of which are discussed herein). Arizona's counsel proffered an acceptable excuse for its slight calendaring mistake, which did not prejudice Carrier. *See* Dkt. 257 at 7-8. The court is excusing the parties' procedural and technical oversights in the interest of justice so this case can be decided on the merits, but cautions the parties to adhere to the court's rules and orders in the future.

Arizona is a finance company that provides funding for auto insurance policies issued to commercial livery and black car drivers in New York. It "provides upfront funding to customers of insurance premiums for a period of insurance coverage in exchange for customers' monthly installment payments." *See* Dkt. 125 at 4. Arizona explains that its financing:

> enables drivers to pay for and obtain insurance they would otherwise not be able to afford. However, in the event that such insured drivers are unable to make their payments to the premium finance company, New York statutory law grants the authority to the premium finance company to cancel the policies and requires the insurance company - in this case ATIC - to return the unearned portion of the premiums to the premium finance company. **Simply put, unearned premiums represent the portion of the insurance policy that has yet to occur once the policy has been cancelled. Since the insurance company has not yet provided insurance, that portion of the up-front premium payment is given the term "unearned."**

See id. (emphasis added).

"In this lawsuit, [Arizona] is seeking those unearned premiums owed to it by ATIC." Dkt. 191 at 6. Specifically, at issue in this case are 46 of the Carrier's auto insurance policies that, indisputably, were fully funded by Arizona, but for which the drivers defaulted on their payment obligations to Arizona. There is no question of fact that the Carrier was fully paid its premiums and provided insurance. Prior to the expiration of the subject policy periods, Arizona exercised its statutory right to cancel those policies due to the drivers' default. There also is no question of fact that, "[d]espite these cancellations, [the Carrier] has refused to return unearned premiums." *See* Dkt. 125 at 5. Consequently, Arizona seeks summary judgment based on the Carrier's undisputed non-payment, while the Carrier seeks summary judgment due to Arizona's supposed failure to strictly comply with the statutory prerequisites to recovering unearned premiums.

During the relevant time period, according to its website (and as confirmed in discovery), the Carrier's "business [was] produced through a network of appointed producers located throughout New York State." *See* Dkt. 129 at 2.[2] The website states that the Carrier "is, and has always been, dedicated to the traditional producer based insurance model." *Id.* Between 2011 and 2013, three of the Carrier's producers, non-parties 195 Brokerage, Inc., TA/Anchor Insurance, and Yudy Vargas Brokerage (collectively, the Producers), solicited Arizona to provide premium financing for the Carrier's auto insurance for certain livery and black car drivers. Arizona agreed to do so. The drivers obtained auto insurance from the Carrier, and Arizona paid the premiums. To memorialize this arrangement, Arizona entered into virtually identical premium finance agreements (the PFAs)[3] with the drivers. *See* Dkt. 78-123. After the PFAs were executed, Arizona sent Notices of Premium Finance (the NPFs) to the Carrier to indicate the details of the PFAs. *See, e.g.*, Dkt. 78 at 5. The Carrier does not dispute having actual knowledge of the PFAs and NPFs, as it issued the insurance and received its premium payments from Arizona.[4] However, after Arizona sent statutory "intent to cancel" notices (the

[2] This language appeared on the Carrier's website as of September 25, 2013, before this instant action was commenced. After this lawsuit was filed, the Carrier changed the language on its website to refer to the Producers as "brokers", presumably to buttress the Carriers' argument that that Producers' supposed status as brokers instead of agents is legally significant. Below, the court rejects this argument, not only because apparent agency is present, but also because the status of the Producers as brokers would not alter the outcome of this case.

[3] The only material differences in the PFAs are the "amount, and the particulars relative to amount, the insured, the producer, and which ATIC insurance policy was involved in the transaction." *See* Dkt. 125 at 7.

[4] While the Carrier denies receiving Arizona's initial mailing of the NPFs, as discussed herein, that fact is not relevant to the question of whether Arizona is entitled to reimbursement of unearned premiums.

Cancellation Notices) (*see, e.g.*, Dkt. 78 at 15), the Carrier refused to reimburse Arizona for the unearned premiums for each of the 46 subject policies.

In this action, Arizona seeks the unearned premiums for these 46 policies. That money represents premiums for time periods for which the Carrier did not actually provide insurance. In other words, the Carrier is trying to maintain funds for which it provided no service whatsoever. It seeks to do so on the ground that, purportedly, it did not timely receive the Cancellation Notices because they were addressed to ***530*** West 34th Street (the 530 Address) instead of the Carrier's actual Manhattan address, ***330*** West 34th Street (the 330 Address).[5] As explained herein, the Carrier claims to have never received 32 of the 46 Cancellation Notices because they were mailed to the 530 Address.[6] Arizona, however, proffers deposition testimony from the long-time head of the Carrier's mailroom, who testified that the Carrier often received mail from Arizona at the 330 Address that erroneously bore the 530 Address on the envelope. *See* Dkt. 257 at 14 ("Luis Campbell [] has been the supervisor of ATIC's mailroom for 29 years without interruption. Mr. Campbell testified that he was responsible for 'all incoming and outgoing mail.' Mr. Campbell further testified that he received mail that contained incorrect addresses while he was stationed in Manhattan.") (internal citations omitted), citing Dkt. 273 (Luis Campbell's 8/28/15 Dep Tr.).

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[5] As discussed herein, the Carrier also has a location in Brooklyn where the other Cancellation Notices were sent and actually received.

[6] The 530 Address was listed by the Carrier on its Yellow Pages webpage. *See* Dkt. 191 at 10 n.4 ("this address continues to be listed on the yellow pages."), citing http://www.yellowpages.com/new-yorkny/mip/american-transit-insurance-6717123 (last visited by Arizona on July 6, 2016; the court has confirmed the 530 Address is still listed on this website as of the date of this decision).

Arizona commenced this action on November 27, 2013 by filing a complaint, which has never been amended. The complaint asserts four causes of action: (1) breach of contract; (2) unjust enrichment; (3) conversion; and (4) breach of fiduciary duty.[7] On July 31, 2014, the Carrier filed an answer to the complaint, which also has never been amended. *See* Dkt. 11.[8]

The parties conduced discovery between July 31, 2014 and March 30, 2016, when Arizona filed a Note of Issue.[9] *See* Dkt. 56. The parties filed their respective summary judgment motions on June 3, 2016. The court reserved on the motions after oral argument. *See* Dkt. 281 (12/8/16 Tr.).

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[7] While the parties' briefs only address the breach of contract claim, the court *sua sponte* dismisses the unjust enrichment, conversion, and breach of fiduciary duty claims as impermissibly duplicative. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987) (unjust enrichment and conversion claims cannot be maintained where there is governing written contract); *see Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004) ("claim for breach of fiduciary duty fails to allege conduct by defendants in breach of a duty other than, and independent of, that contractually established between the parties and is thus duplicative.").

[8] The Carriers' answer is dated January 14, 2014, but was not e-filed until July 31, 2014, after the Carrier was directed to do so in the preliminary conference order. *See* Dkt. 9 at 4.

[9] The discovery process was contentions, especially at the outset. Without delving into the details, which are irrelevant for the purposes of this motion, it should be noted that by order dated December 11, 2014, Arizona was required to provide the Carrier with specific information regarding the policies for which it is asserting a claim, and the Carrier was then required to respond by indicating, *inter alia*, the specific bases for refusing to reimburse unearned premiums on a policy-by-policy basis. *See* Dkt. 28. In an order dated March 5, 2015, the court noted the Carriers' failure to provide all of the required responses, as well as its counsel's failure to personally appear at the compliance conference at which such responses were supposed to be addressed. *See* Dkt. 35. On pain of default, the Carrier finally complied. *See* Dkt. 37. The responses eventually provided by the Carrier form much of the basis for Arizona's motion and demonstrate that the vast majority of the relevant factual issues in this case are not in dispute.

II. Legal Standard

A. Summary Judgment

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Applicable Premium Financing Law[10]

Banking Law § 576(1) "set[s] forth the requirements that a premium finance agency must follow to cancel a borrower's policy upon default." *Honeymoon Diamonds v Int'l Jewelers*

[10] Premium financing is a highly regulated area. *See* Banking Law § 554 *et. seq.* The court will not discuss the myriad applicable regulations which are not at issue in this case.

Underwriters Agency Ltd., 111 AD3d 460 (1st Dept 2013). The statute expressly provides that, upon the cancellation of a financed insurance policy, **the insurance carrier must return the gross unearned premiums due under the insurance contract to the premium finance agency**, subject to the retention of a certain minimum earned premium." *Premins Co. v Travelers Indem. Co.*, 37 AD3d 799, 801 (2d Dept 2007) (emphasis added). "[T]o properly cancel the policy, the [premium finance company is] required to deliver to the carrier 'advance written notice of cancellation.'" *Goldstone Amber St. Realty Corp. v N.Y. Marine & Gen. Ins. Co.*, 127 AD3d 691, 693 (2d Dept 2015). Specifically, § 576(1) provides:

> When a premium finance agreement contains a power of attorney or other authority enabling the premium finance agency to cancel any insurance contract or contracts listed in the agreement, **the insurance contract or contracts shall not be cancelled unless such cancellation is effectuated in accordance with the following provisions.**
>
> (a) Not less than ten days written notice shall be mailed to the insured at his last known address as shown on the records of the premium finance agency, of the intent of the premium finance agency to cancel the insurance contract unless the default is cured within such ten day period and that at least three days for mailing such notice is added to the ten day notice. **A copy of the notice of intent to cancel shall also be mailed to the insurance agent or broker.**
>
> ...
>
> (d) **After the notice in paragraph (a) above has expired, the premium finance agency may thereafter, in the name of the insured, cancel such insurance contract by mailing to the insurer a notice of cancellation stating when thereafter the policy shall be cancelled,** and the insurance contract shall be cancelled as if such notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract. A copy of the notice of cancellation shall also be mailed to the insured.
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> ...
>
> (f) **The insurer or insurers within a reasonable time not to exceed sixty days after the effective date of cancellation, shall return whatever gross unearned premiums are due under the insurance contract or contracts on a pro rata basis to the premium finance agency for the benefit of the insured or**

> **insureds**. However, upon such cancellation the insurer or insurers shall be entitled to retain a minimum earned premium on the policy of ten percent of the gross premium or sixty dollars, whichever is greater.
>
> ...

(emphasis added). These requirements are consistent with Insurance Law § 3428(d), which states:

> Whenever an insurance contract the premiums for which are advanced under a premium finance agreement as defined in section five hundred fifty-four of the banking law, is cancelled, **the insurer or insurers within a reasonable time not to exceed sixty days after the effective date of the cancellation shall return whatever gross unearned premiums are due under the insurance contract** or contracts to the bank, lending institution, premium finance agency or sales finance company, for the benefit of the insured.

(emphasis added). "An insurer must establish **strict compliance** with § 576 in notifying **its insured** of intent to cancel a policy." *1395 Second Ave. Rest., Inc. v All City Ins. Co.*, 207 AD2d 271, 272 (1st Dept 1994) (emphasis added).[11]

Importantly, while a policy cannot be canceled without a notice of cancellation being mailed to the carrier, fulfilling the statutory mailing obligation is, without more, insufficient. That is because the Court of Appeals has held that Banking Law § 576 did not abrogate "the common-law rule that cancellation of an insurance contract becomes effective **when it is received by the insurance company**," and, therefore, "an insurance company must **receive** a notice of cancellation **before such cancellation can become effective**." *Crump v Unigard Ins. Co.*, 100 NY2d 12, 14 (2003) (emphasis added); *see id.* at 17-18 ("We conclude that the plain language of the statute ... does not indicate an intent to abrogate the common-law rule that extends the period of coverage until the insurer receives the notice of cancellation. ... To the

[11] The "strict compliance" rule only appears to apply to providing notice to the *insured*, not to the carrier. In this case, there is no question of fact that Arizona strictly complied with its statutory notice obligation to the drivers.

contrary, the express intent of the amendment was **to give notice to the defaulting insured of its opportunity to cure the default so as to prevent coverage gaps**, and that would be undermined if the statute were interpreted to abrogate the common-law rule") (emphasis added).[12] Hence, to establish a policy's effective date of cancellation, the premium finance company must present evidence of when the Carrier "actually **received a copy** of the notice of cancellation." *Deerbrook Ins. Co. v McGregor*, 19 AD3d 417, 418 (2d Dept 2005) (emphasis added); *see Nocella v Fort Dearborn Life Ins. Co. of N.Y.*, 99 AD3d 877, 878 (2d Dept 2012) (plaintiff must prove both mailing and actual receipt by carrier).[13]

III. Discussion

As an initial matter, summary judgment is granted to Arizona on 11 of the 46 policies for which the Carrier does not dispute that it actually and timely received all required notices.[14] For

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[12] In other words, § 576 is principally concerned with the right of the insured not to lose coverage absent strict compliance with its notice requirements. *See Gotkin v Allstate Ins. Co.*, 142 AD3d 17, 26 (2d Dept 2016) ("The purpose of the notice requirement is to ensure that **policyholders are clearly notified** as to any impending cancellation.") (emphasis added). Neither the statute not the case law expresses a similar concern with respect to the insurance company. This makes sense, as the law cares about the insured not improperly losing coverage; public policy is surely more ambivalent about the possibility of extra coverage. The Carrier's proffered public policy arguments, therefore, are inapposite since its rights, and not those of the insured, are at issue here. This case does not implicate the possibility of an insured wrongly losing coverage; it is only about an insurance company refusing to return premium payments for which it provided no service (i.e., unearned premiums). That being said, as discussed herein, the question of whether the Carrier's denial of receipt is bona fide or feigned is an issue of fact with respect to 32 of the policies and requires a trial to resolve.

[13] While "proof of proper mailing gives rise to a presumption that the item was received by the addressee," here, there is no proof of proper mailing with respect to the Cancellation Notices sent to the 530 Address. *See Nocella*, 99 AD3d at 878, quoting *Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679 (2d Dept 2001). As discussed herein, the issue is whether Arizona can prove the Carrier received the Cancellation Notices that were mailed to the 530 Address.

[14] The Carrier's other proffered defenses are rejected further herein.

these 11 policies, Arizona mailed the Cancellation Notices to another of the Carrier's locations in Brooklyn (the Brooklyn Location), and they were received.

Summary judgment also is granted on 3 polices for which the Carrier denies receipt of the NPFs, but concedes receipt of the Cancellation Notices. For these 3 policies, the Cancellation Notices were sent to the Brooklyn Location, but the NPFs were mailed to the 530 Address. There is no statute or case that permits a carrier to keep unearned premiums where, as here, it had actual (albeit possibly late) notice of the NPF, accepted premiums and provided coverage, and actually received a Cancellation Notice. The concerns underpinning the strict requirements to cancel coverage do not apply to the carrier's receipt of an NPF, especially when the carrier has actual notice that the premium finance company, instead of the insured, was paying the premiums. Indeed, Banking Law § 576(1) does not condition the carrier's obligation to repay unearned premiums on every technical requirement of the premium financing regulatory structure. NPFs are not mentioned in § 576(1). The only relevant notice mentioned in § 576(1) is the Cancellation Notice.

Summary judgment is granted to Arizona on these 14 polices.[15] Arizona shall, as set forth below, submit an order directing the entry of judgment on these 14 policies. *See* Dkt. 257 at 13 n.9 (identifying the 14 policies). The record indicates that the unearned premiums for the first 11 policies total $347,980.75, and that the unearned premiums for the other 3 policies total $41,372.45. *See* Dkt. 194 at 2-3. The judgment, therefore, should be for $389,353.90 plus pre-

[15] The court rejects the Carrier's other regulatory non-compliance arguments, which are inapplicable under Banking Law § 577-a because the subject policies were not procured by wholesale producers. Simply put, since the Producers dealt directly with the insured (instead of dealing with another intermediary retail producer), the Producers are considered to be retail (and not wholesale) producers under § 577-a(d).

judgment interest running from December 3, 2014. *See id.* at 3. According to Arizona, the unearned premiums on the remaining 32 polices total $411,452.24. *See id.*

With respect to the remaining 32 policies, it is undisputed that all of the Cancellation Notices were mailed to the Carrier, but the envelope bore the 530 Address. While the Carrier denies receipt of the Cancellation Notices sent to the 530 Address, Arizona has raised a question of fact about actual delivery to the Carrier's mailroom at the 330 Address (i.e., *Crump*'s receipt requirement) based on the cited deposition testimony of Mr. Campbell, the mail-room supervisor. Although Mr. Campbell did not testify that the Cancellation Notices were actually received, his testimony that the Carrier regularly received mail from Arizona addressed to the 530 Address is evidence that the finder of fact may consider when deciding whether to believe the Carrier's denial of receipt.[16] *See Shia v McFarlane*, 46 AD3d 320, 321 (1st Dept 2007) ("testimony regarding the premium finance company's cancellation and mail room procedures was based on the witness's personal knowledge"). Where, as here, there is evidence of the mail

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[16] Arizona explains, and the Carrier does not dispute, that:

> Every document sent by [Arizona] to ATIC at its Manhattan location was addressed to 530 West 34th Street, yet employees stationed in Manhattan admitted receiving mail from Arizona Premium. Similarly, **its officers testified that they had a "pile of documents", or a "folder" of Arizona Premium documents. However, no "pile" or "folder" has ever been provided to Arizona Premium.**

Dkt. 191 at 13 (emphasis added; internal citations omitted); *see id.* n.8 ("ATIC officer Dudley McLean had specifically directed Campbell to deliver all mail received from Arizona Premium directly to him in the underwriting department. Campbell would receive the mail from Arizona Premium and deliver the mail to Veronica Booth-Campbell in underwriting, who would then deliver it to Dudley McLean. McLean testified that after July 2011 'everything that was received from Arizona was placed in a folder and that was kept in my office.'") (citations omitted). Below, the Carrier is directed to either produce this "pile or folder" with an explanation of why it was not previously produced in discovery or, if it does not have the "pile or folder", explain why. In such case, the court will hear argument as to whether and, if so what, spoliation sanction would be appropriate.

room's general practices and proof that the 530 address was listed by defendant on their Yellow Pages site, but no definitive evidence of whether the Carrier actually received the statutorily required notice, summary judgment should be denied, and this question of fact should be resolved at trial. *Friedman v Allcity Ins. Co.*, 118 AD2d 517, 519 (1st Dept 1986); *see 1395 Second Ave. Rest.*, 207 AD2d at 273 ("the holding in *Friedman* was that despite the lack of sufficient proof of an office practice that would give rise to a presumption of receipt, and despite lack of proof that the notice was mailed to the broker, as required by the statute, **the insured's denial of receipt simply raised a factual issue which must await determination at trial**.") (emphasis added); *see also Lumbermens Mut. Cas. Co. v Comparato*, 151 AD2d 265, 267 (1st Dept 1989) (trial conducted as to whether there was "possibility that a notice could have been sent to the wrong address.").[17] Summary judgment on the remaining 32 polices is denied.

Finally, there is no merit in the Carrier's argument that it has no liability under the subject policies (and therefore, no liability to return unearned premiums) because the Produces were merely brokers acting without authority to bind the Carrier. While the record on this motion supports Arizona's position that the Producers acted with apparent authority [*see Hallock v State*, 64 NY2d 224, 231 (1984)], if not actual authority, the Carrier's acceptance of premiums

[17] It should be noted that while Banking Law § 576(1)(a) has a ten-day requirement for the notice provided to the insured, § 576(1)(d), which governs the requirement that Cancellation Notices be provided to the Carrier, *does not* have a ten-day rule (or any specific deadline). Rather, notice to the Carrier may be provided "after" the insured gets its notice. Consequently, even if the finder of fact concludes that the Cancellation Notices mailed to the 530 Address were never received by the Carrier, the record indicates that the Carrier eventually did receive notice. While the effective date of the policies' cancellation turns on the date the Cancellation Notices were received (since the unearned premiums are calculated based on the total time coverage was in effect, which turns on when the policies were actually canceled), Arizona may still recover even if the Carrier did not actually receive the Cancellation Notices mailed to the 330 Address, so long as it establishes that, at some point "after" it provided notice to the drivers and after the mailing to the 530 Address, Arizona otherwise provided proper notice to the Carrier.

and failure to promptly repudiate the policies procured by the Producers constitutes a ratification of the polices, which the Carrier has no right to now disavow. *See Allen v Riese Org., Inc.*, 106 AD3d 514, 517 (1st Dept 2013) ("Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it."), citing *Dinhofer v Med. Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 (1st Dept 2012) ("These claims are also barred by the doctrine of ratification, since plaintiff failed to act promptly to seek rescission of the consent, and indeed accepted and retained [its] benefits.") (internal citation omitted). Moreover, it is well settled New York law that an insurance company's continued acceptance of premiums precludes the insurance company from seeking to rescind the policy. *U.S. Life Ins. Co. in City of N.Y. v Blumenfeld*, 92 AD3d 487, 488 (1st Dept 2012); *see Bible v John Hancock Mut. Life Ins. Co. of Boston, Mass.*, 256 NY 458, 462 (1931); *U.S. Life Ins. Co. v Grunhut*, 83 AD3d 528, 529 (1st Dept 2011); *Sec. Mut. Life Ins. Co. of N.Y. v Rodriguez*, 65 AD3d 1, 7 (1st Dept 2009). Here, the Carrier knew that the Producers originated the subject policies and accepted the premium payments made by Arizona.[18] Under these circumstances, the Carrier has no right to contest the validity of the Polices.

The court has considered the parties' remaining arguments and finds them unavailing. Accordingly, it is

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[18] If the Carrier's position really is that there is no legal basis for the policies to ever have been in effect, perhaps it ought to refund *all* of the premium payments. It is incongruous (if not downright cynical) for the Carrier to base its argument on the public policy driven strict statutory compliance rule, which makes it hard to disclaim coverage, while also taking the position that the circumstances of this case would have resulted in the drivers not having coverage due to the Producers' supposed lack of authority. The validity of the policies and their effective cancellation are separate issues. Under the circumstances of this case, the Carrier's continued acceptance of premiums while having actual knowledge that the policies were originated by the Producers (which is apparently the case with all of the Carrier's polices under its "traditional producer based insurance model") precludes the Carrier from disclaiming coverage for time periods prior to the drivers' default.

ORDERED that the Carrier's summary judgment motion is denied, Arizona's summary judgment motion is granted in part with respect to the discussed 14 policies and with respect to the Carrier's argument that the Producers' supposed lack of authority absolves the Carrier of liability, and Arizona's summary judgment motion is otherwise denied; and it is further

ORDERED that, in searching the record, the court *sua sponte* dismisses Arizona's causes of action for unjust enrichment, conversion, and breach of fiduciary duty as duplicative of its breach of contract cause of action; and it is further

ORDERED that, within one week of the entry of this order on NYSCEF, Arizona shall e-file (and fax the e-filing confirmation notice) a proposed order directing the entry of judgment on the unearned premiums for the 14 policies for which it is granted summary judgment (with language indicating that the remaining claims in this action shall be severed and continued), along with a brief letter explaining its calculation of the amounts owed and the date from which 9% pre-judgment interest should run; and within one week thereafter, the Carrier may e-file (and fax the e-filing confirmation notice) a counter-proposed order, with a redline of Arizona's proposed order, along with a brief letter explaining its disagreement (if any) with Arizona's calculations; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, the Carrier must either (1) produce the "pile or folder" discussed herein to Arizona, e-file an affidavit confirming that it has done so, and, in that affidavit, explain why the "pile or folder" was not produced earlier in discovery; or (2) e-file an affidavit representing that the Carrier is certain that the "pile or folder" is not currently in its possession, custody or control because it (a) never existed; or (b) was, but no longer is, in its possession custody or control, in which case the Carrier shall disclose

why and, based on that explanation, why a spoliation sanction should not be issued; and it is further

ORDERED that a telephone status conference will be held on May 17, 2017 at 5:00 pm, at which time the parties' proposed judgments, the "pile or folder" issue, and the pre-trial conference will be addressed.

Dated: May 2, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.