# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Index Number : 651107/2011
PENNACHIO, ROBERT
vs.
HERMITAGE INSURANCE COMPANY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 650129/11
MOTION DATE 3/27/13
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 7/17/13

BJ
BARBARA JAFFE 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 : IAS PART 12

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ROBERT PENNACHIO,

Plaintiff,

-against-

HERMITAGE INSURANCE COMPANY,

Defendant.

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Index No. 650129/11

Subm.: 3/27/13
Motion Seq. No. 001

**DECISION & ORDER**

BARBARA JAFFE, JSC:

**For plaintiff:**
Harry A. Cumins, Esq.
Wilkofsky, Friedman, et al.
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212-285-0510

**For defendant:**
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Law Office of Max W. Gershweir
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New York, NY 10038
212-665-4000

By notice of motion dated April 25, 2012, defendant moves pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

## I. BACKGROUND

Plaintiff owns a commercial property in Staten Island, and at some unspecified time, defendant issued to him an insurance policy covering damage to the property and loss of business income. (EFD 16). Sometime before April 20, 2010, defendant issued to plaintiff a renewal of the policy providing, *inter alia*, that it may be cancelled for nonpayment of the premium, and that defendant will "mail or deliver [its] notice of cancellation to the address shown on the policy" 15 days before the effective date of cancellation. (EFD 23). The renewal policy contains a clause providing that mortgagees may recover for loss sustained as a result of damage to the property, and that if the policy is cancelled for nonpayment of the premium, defendant will provide them with at least 10 days' written notice. (*Id.*).

On April 20, 2010, defendant mailed to plaintiff an invoice reflecting that his first

payment was due on or before May 15, 2010 to "avoid cancellation of the policy." (*Id.*). Defendant received no payment, and on May 21, 2010, as reflected in an affidavit of mailing of that date, it mailed to plaintiff and his insurance broker, Nicholas Miraglia, a notice of cancellation indicating that the policy would be cancelled effective June 10, 2010 unless plaintiff paid the premium on or before that date. (EFD 19, 25). Plaintiff failed to do so, and on June 11, 2010, defendant mailed to plaintiff and Miraglia a confirmation of cancellation. (*Id.*).

On June 29, 2010, Miraglia sent by facsimile transmission a letter to Trans World Facilities (Trans World), an insurance broker that served as an intermediary between defendant and its insureds, reflecting that plaintiff's address had changed. (*Id.*). On July 7, 2010, defendant issued an endorsement altering the policy to reflect plaintiff's new address and mailed to both his old and new addresses an invoice advising that the policy had been cancelled on June 10, 2010 and that payment of the premium would not result in reinstatement of the policy. (*Id.*). Thereafter, the policy was never reinstated. (EFD 22).

On or about April 26, 2011, plaintiff commenced the instant action with the filing of a summons and verified complaint, alleging that on September 8, 2010, the property caught fire and sustained structural damage, resulting in the loss of business income. (EFD 17). He seeks insurance coverage for both. (*Id.*).

By affidavit dated March 19, 2012, Miraglia states that on June 1, 2010, he received a notice of cancellation of plaintiff's policy, that he called plaintiff immediately thereafter to inform him of it, and that he emailed plaintiff on June 18, 2010 advising of the cancellation. (EFD 20).

By affidavit dated March 21, 2012, Jonathan Gordon, Vice President of Trans World,

states that Trans World first learned of plaintiff's new address from Miraglia's June 29, 2010 facsimile transmission and that he notified defendant of the change the same day. (EFD 16).

By affidavit of the same date, Ana Moreno, defendant's manager of operations, states that defendant maintains a list of mailed cancellation notices and an affidavit of mailing for each notice, and that the May 21, 2010 affidavit reflects that a cancellation notice was mailed to plaintiff at the address originally set forth in the policy. (EFD 24).

By affidavit dated May 21, 2012, Maria Gargiulo, Relationship Administrator in the Department of Commercial Lending of Santander Bank, mortgagee for the property, states that she performed a fruitless search of the bank's records for a notice of cancellation of the policy. (EFD 41).

By affidavit dated September 14, 2012, plaintiff denies that Miraglia told him his policy was going to be cancelled unless he paid his premium, and also denies that he received a notice of cancellation. (EFD 39). He explains that he moved in October 2009 and immediately notified Miraglia of his new address, and that Miraglia "assured [him] that all insurance company correspondence would be directed to that address from that point on." (EFD 39).

## II. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*,

64 NY2d at 853).

"The burden of proving valid cancellation of an insurance policy is upon the insurance company disclaiming coverage based on cancellation." (*Lehrer McGovern Bovis, Inc. v Public Serv. Mutual Ins. Co.*, 268 AD2d 388, 388 [1st Dept 2000]; *accord Badio v Liberty Mut. Fire Ins. Co.*, 12 AD3d 229, 229 [1st Dept 2004]). Pursuant to Insurance Law § 3426(c), where an insurance policy is renewed, and the insurer seeks to cancel it for nonpayment of the premium on or after the date of renewal, it must provide the insured and his or her broker at least 15 days' written notice before the cancellation is effective.

A. Notice to plaintiff

Mere denial of receipt is insufficient to rebut the presumption of proper service raised by an affidavit of mailing. (*ATM One, LLC v Landaverde*, 2 NY3d 472, 478 [2004]; *Nassau Ins. Co. v Murray*, 46 NY2d 828, 829-30 [1978]; *Wells Fargo Bank, NA v Edwards*, 95 AD3d 692 [1st Dept 2012]). Accordingly, as Moreno's affidavit and the May 21, 2010 affidavit of mailing reflect that more than 15 days before the effective date of cancellation the notice was mailed to plaintiff at the address shown in the policy, and absent any evidence that defendant received notice of plaintiff's new address before the June 29 facsimile, defendant demonstrates that there exist no triable factual issues as to the validity of its cancellation. The parties' dispute as to whether Miraglia notified plaintiff of the cancellation is immaterial.

B. Notice to Santander Bank

There exists no binding authority for the proposition that an insurer must send notice to both the insured and a mortgagee covered by the policy in order to validly cancel it, or, conversely, that an insurer may validly cancel the policy as to the insured notwithstanding its

failure to do so as to the mortgagee. However, as a mortgagee clause "gives rise to a separate insurance of the mortgagee's interest, independent of the mortgagor's right of recovery" (*Reed v Fed. Ins. Co.*, 71 NY2d 581, 589 [1988]), and as Insurance Law § 3426(c) does not require that an insurer provide the insured's mortgagee with notice in order to effectively cancel a policy, it follows that an insurer's failure to notify the mortgagee of cancellation has no bearing on the validity of its cancellation as to the insured. Accordingly, as defendant demonstrates that it provided plaintiff with proper notice of cancellation, its failure to notify Santander of it is immaterial. (*See Shants, Inc. v Capital One N.A.*, 38 Misc 3d 1217[A], 2013 NY Slip Op 50123[U] [Sup Ct, Nassau County Jan. 31, 2013] [insurance broker's motion for summary judgment declaring that coverage exists in favor of insured because of ineffective notice of cancellation denied, as record reflected that insured received proper notice, and insured cannot "bootstrap its claim that the [n]otice was invalid as to it based upon the rights of the mortgagee"]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for an order dismissing the complaint is granted.

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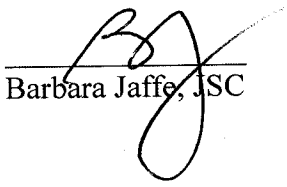

Barbara Jaffe, JSC

DATED: July 17, 2013
New York, New York