Schoonover v Massachusetts Mut. Life Ins. Co.
2013 NY Slip Op 32682(U)
October 23, 2013
Sup Ct, New York County
Docket Number: 650192/2010
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS Justice PART 53

James A. Schoonover

INDEX NO. 650192/10

MOTION DATE

-v-

Mass. Mutual, et al

MOTION SEQ. NO. 003
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

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

is decided in accordance with accompanying memorandum decision and order.

Dated: 10/23/13

CHARLES E. RAMOS, J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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JAMES A. SCHOONOVER and KATHERINE W. SCHOONOVER, AS TRUSTEES OF THE ALAN GORDON STRAUS 98 INSURANCE TRUST,

Plaintiffs, Index No. 650192/2010

- against -

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, MID AMERICA GROUP, INC., A DIVISION OF GALLAGHER BENEFIT SERVICES INC., and SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP,

Defendants.

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Hon. Charles E. Ramos, J.S.C.

Defendant Massachusetts Mutual Life Insurance Company (herein "Mass Mutual") moves for summary judgment pursuant to CPLR 3212 to dismiss plaintiffs James A. Schoonover and Katherine W. Schoonover's, as Trustees of the Alan Gordon Straus 98 Insurance Trust (herein "Plaintiffs"), claim for breach of contract.[1] Plaintiffs cross-move for summary judgment as to liability on the same claim.

Background

Alan Gordon Straus was formerly a partner at Skadden, Arps, Meagher & Flom LLP (herein "Skadden").

In 2001, Mid America Group Inc. (herein "Mid America"), a life insurance broker, submitted an insurance enrollment form

[1] For purposes of this motion, the term Plaintiffs is used to refer to both James Alan Schoonover and Charles Daniel Way Schoonover as the original trustees of the Alan Gordon Straus 98 Insurance Trust, as well as James Alan Schoonover and Katherine W. Schoonover as the current trustees of the Alan Gordon Straus 98 Insurance Trust.

(herein the "Enrollment Form") to Mass Mutual on his behalf, for the issuance of a certificate under the Skadden Group Flexible Premium Adjustable Life Insurance Policy (herein the "Policy"), insuring the life of Straus (hereinafter, the "Insured").

The Enrollment Form named as owners of the Policy "James Alan Schoonover and Charles Daniel Way Schoonover (owners), Trustees of the Alan Gordon Strause (sic) 1998 Trust dated 2-23-98."

On the Enrollment Form, no address for the owner was provided. Several lines below, in the "Remarks" section of the Enrollment Form, it reads:

> "Correspondence Mailing Address: c/o Skadden Arps Slate Meagher & Flom LLP
> Four Times Square, New York, NY 10036
> Attn: Linda Franklin" (Exhibit A, annexed to Mass Mutual's 2/15/13 Affidavit of Mark Fenaughty)(the "Skadden address").

In 2002, Mass Mutual issued certificate number 75031768 (herein the "Certificate"), insuring the Insured's life for $2,500,000. Skadden paid the initial premium on the date the Certificate was issued. Mass Mutual billed monthly charges, rather than billing the premium, and the account value of the Certificate increased for each payment received.

From the date of issuance until the Insured's retirement in December 2006, Skadden made all payments to Mass Mutual necessary to keep the account value sufficient to cover all monthly charges.

The Insured retired in December 2006. At that time, the account value of the Policy was sufficient to cover monthly charges through March 2007. At the time of the Insured's retirement, Skadden sent an email to Mid America requesting that premium statements for the Certificate be sent directly to his home address, located at 749 Washington Street, New York, NY 10014 (herein the "Washington Street address") following his retirement. This was in accordance with the Policy and the Certificate.

On February 2, 2007, Mid America advised Mass Mutual that the Insured had retired and his Certificate was made portable. Mid America also submitted a census reconciliation form advising Mass Mutual of the Insured's home mailing address, listing the Washington Street address.

On February 9, 2007, Mass Mutual sent a portability letter to "James and Charles Schoonover, Trustees," the owners,[2] to the Skadden address, giving them the option to continue the Policy ("February 2007 Portability Letter"). The use of this address for this purpose is disputed. The letter provided that "unless there is a bill attached, you will receive the next invoice on your Certificate Anniversary listed above. The parties dispute whether a bill was attached to this letter.

When the Insured's account value was depleted in April 2007, Mass Mutual sent a pre-lapse notice to the owners, dated April 2,

[2] The Certificate owners, trustees of the Alan Gordon Straus 98 Insurance Trust, are now James and Katherine Schoonover.

2007 (the "April 2007 Pre-Lapse Notice") to the Skadden address. The notice advised that the account value was insufficient to pay the monthly charges and that the payment of $621.81 was required by June 2, 2007 to keep the Certificate in force.

On April 16, 2007, Mid America, which had been in contact with Skadden, sent Mass Mutual an email which states:

> "We received copies of the Notification of Pre-Lapse Status... mailed to [Insured's] previous employers Skadden ... **I sent an email to your [Mass Mutual's] office along with a Census Reconciliation Report requesting to place the above mentioned participants on direct bill status. Their individual mailing addresses were included in the report. The Insured's policy should not have lapsed since they never received their billing statement for the 4/1/07 quarterly premium payment. Apparently the address was not changed in your system and all correspondence went directly to their employer instead of the insured.** Please reinstate these policies and resend the April 2007 quarterly billing notice to the address indicated on the census report for each"[3] (Exhibit H, annexed to Fenaughty Aff.).

In response to this email, Mass Mutual prepared a new pre-lapse notification on April 16, 2007 (the "Second Pre-Lapse Notice), and mailed it the same day to the Insured's Washington Street address addressed to "James & Charles Schoonover." The use of this address for this purpose for the owners is also disputed.

No payment was made on the Certificate by the owners, who did not receive either a premium billing notice or a pre-lapse notice. On June 5, 2007, Mass Mutual sent a Notification of

[3] The Census Report indicated that the Insured's home address was the Washington Street address.

Terminated Coverage, to the Insured's Washington Street Address, again addressed to "James & Charles Schoonover." This notice at this address is disputed.

In May 2009 the owners learned that the Policy had been terminated, whereupon they wrote to Mass Mutual requesting immediate reinstatement of coverage along with a check for $20,000, representing the premium amounts necessary to bring the account current. Mass Mutual formally denied the request for reinstatement on February 17, 2010, and returned the $20,000 check, although the Insured died on December 24, 2009.

Thereafter, Plaintiffs commenced this action seeking to enforce the Policy and obligating Mass Mutual to pay the death benefit of $2,500,000 to plaintiffs.

Discussion

In support of its motion, Mass Mutual maintains that summary judgment is appropriate because there is no dispute that the Certificate lapsed as a matter of law for nonpayment of the premium on June 3, 2007. Mass Mutual mailed a pre-lapse notice to the Insured at the address provided on the Enrollment Form, the Skadden address, which was the same address contained within its records. Mass Mutual points out that it also sent a pre-lapse notice to the Insured at his home address, the Washington Street address, and was never advised that notices should be delivered to a different address not in its records. Further, Mass Mutual maintains that plaintiffs' claims are barred by the

statute of limitations set forth in Insurance Law § 3211 (a) and (d).

In opposition to Mass Mutual's motion, plaintiffs assert that Insurance Law § 3211 (d) does not relieve Mass Mutual of its obligations under the Certificate to provide quarterly premium notices to the Insured and to provide the owners, in the event of a default, with a pre-lapse notice, which Mass Mutual did not do because it was sent to Skadden rather than to them. According to plaintiffs, Mass Mutual has failed to demonstrate that it provided the notices required by the Certificate, and thus, summary judgment is appropriate in their favor, citing to *In re Preston's Will* (29 NY2d 364 [1972]).

I. Insurance Law

Insurance Law § 3211 (a) provides that a life insurance policy will not lapse before one year for non-payment of premiums unless the insurer gives a 30-day notice. Section (d) of the same provision of the Insurance Law states:

> [N]o action shall be maintained to recover in any life insurance policy ... **which has lapsed because of default in making such payment** (...) unless the action is instituted within two years from the date of such default (emphasis added).

However, section 3211 of the Insurance Law does not apply to "any policy of group insurance" (Insurance Law § 3211 [f] [1]). Mass Mutual does not cite to any authority to support its assertion that the coverage at issue, the Group Flexible Premium Adjustable Life Insurance Certificate, does *not* qualify as group

life insurance, and itself even characterizes the coverage at issue as a "group" policy (*see e.g.* Mass Mutual's Response to Plaintiff's Rule 19-A Statement, ¶ 51). This issue is resolved in plaintiffs' favor. In addition, as discussed below, the section is otherwise not a bar to plaintiffs' claims.

II. Notice of Premiums Due

Where the insurer, by the insurance contract it has drawn, limits its right of cancellation beyond what is otherwise required by law, the contract takes precedent (*DeUrbaez v Lumbermen's Mutual Casualty Co.*, 116 AD2d 534, 535-536 [1st Dept], *reversed on dissenting opinion,* 68 NY2d 930 [1986]). Strict compliance with the notice provisions of the insurance policy is a condition precedent to a valid cancellation, and the failure to give notice as required by the policy will preclude an effective cancellation (*National Factors v Waters,* 42 Misc 2d 822, 829 [Sup Ct, NY County 1964]; *see also* 5 Couch § 71:1; 68A NY Jur 2d Insurance § 977 [2013]).

Moreover, forfeiture of life insurance coverage for nonpayment of premiums is not favored in the law, and will not be enforced absent a clear intention to claim that right (*In re Preston's Will,* 29 NY2d 364). The "right to forfeit a policy is waived where the insurer's act or omission caused the insured justly to believe and to act on the belief that the contact was continued in force" (*Id.*). In the same vein, an insurer may not depend upon a default to which its own wrongful act or negligence

contributed, and but for which a lapse might not have occurred (*Id.*).

Here, the Certificate and the Policy entitle the Insured to a billing notice after he retired from Skadden, and conditions cancellation of the Policy upon the giving of that notice to him, in addition to a pre-lapse or default notice to the owners of the Certificate, the plaintiffs.

The Policy states that after an employee disassociates from his employer, the insurance will no longer be deducted from the Insured's wages but will be directly billed to the insured:

> "[A]ny insurance then in effect will remain in force, provided it is not fully surrendered by the Owner. All insurance that is continued will be automatically changed from deduction of wages to a **direct billing status**" (emphasis added) (Exhibit B, annexed to Fenaughty Aff.).

The Certificate, consistent with the Policy in this regard, states that if the Insured "become[s] disassociated from the Employer, **we will send the billing statements directly to you [the Insured]** for this certificate" (emphasis added) (Exhibit B, annexed to the Stark Aff.). This would require that a billing statement be sent to the Insured at the Washington Street address. This was not done.

The Certificate thereafter states that if the account value becomes insufficient to cover monthly charges;

> Mass Mutual will "allow a grace period for payment of the amount of premium needed to increase the account value so that the monthly deduction can be made. This grace period begins on the date the deduction is due.

> It ends 61 days after that date or, if later, 30 days after we have **mailed a written notice to the Owner at the last known address shown on our records.** This notice will state the amount required to increase the account value to cover the charges. **During the grace period, this certificate will continue in force.** This certificate will terminate without value if we do not receive payment of the required amount by the end of the grace period (Exhibit B, annexed to the Stark Aff.).

Under the plain terms of the Certificate, in the event that an Insured disassociates from his employer, the Certificate requires that a billing statement be sent directly to the Insured. Thereafter, if a timely payment is not received, the Certificate requires that a default or pre-lapse notice be sent to the owner at the last known address in its records, prior to termination by the insurer.

To the extent that the Certificate limits Mass Mutual's right of cancellation to the transmittal of a billing statement directly to the Insured followed by a default or pre-lapse notice to the owner, these provisions take precedent over section 3211 (d) of the Insurance law.

With this in mind, the Court determines that Mass Mutual failed to provide the proper billing statement to the Insured in the first instance of premiums due.

It is undisputed that Mass Mutual was informed that the Insured had retired and was no longer employed at Skadden in December 2006, was aware of the existence of the trust agreement containing the address of the owners, and received several requests to send the billing notices to the Insured's home

address (Mass Mutual"s Rule 19-A Statement, ¶ 12; Plaintiff's Rule 19-A Statement ¶ 57).

For instance, the record demonstrates that at the time of the Insured's retirement, Skadden sent an email to Mid America requesting that premium statements for the Policy be sent directly to the Insured's Washington Street address, in accordance with the Certificate. Mid America then advised Mass Mutual that the Insured had disassociated from his employer, his Certificate was made portable, and sent a census reconciliation form advising Mass Mutual of the Insured's home address, the Washington Street address.

Notwithstanding this knowledge, Mass Mutual continued to use the Skadden address and the disputed use of the Washington Street address (for the Second Pre-Lapse Notice).

It is also undisputed that at the time of the Insured's retirement in December 2006, the account value of the Policy was sufficient to cover monthly charges through March 2007.

As for the notices that were sent, the record reflects that Mass Mutual sent the February 2007 Portability Letter addressed to the owners to the Skadden address. Mass Mutual alleges that a premium invoice was attached to the February 2007 Portability Letter, which plaintiffs dispute. On this issue, Mass Mutual employee, Mark Fenaughty, testified that although a premium invoice was stored on its network drive, the drive does not show when it was sent or even if it was sent (*See* Stark Aff. in Opp.,

¶ 18; Exhibit H, annexed to the Stark Aff.). Skadden, in response to a subpoena duces tecum, represented that it did not find a copy of a premium notice in its filing, and other Skadden employees testified that a premium notice was never received (Exhibit K, annexed to the Stark Aff.).

In any event, the February 2007 Portability Letter, addressed to the owners and sent to the Skadden address, did not qualify as a billing statement sent directly to the Insured, as the Certificate and Policy require.[4]

Moreover, It is evident that Mass Mutual failed to provide proper notice of a default or pre-lapse notice to the owners, to which they were entitled under the Certificate, although their correct address was listed in the trust agreement contained in Mass Mutual's files.

When the Insured's account value was depleted in April 2007, Mass Mutual sent the April 2007 Pre-Lapse Notice to the Skadden address, addressed to the owners, although the Certificate requires **"a written notice to the Owner at the last known address**

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[4] The Policy states that after an employee disassociates from his employer:

> "[A]ny insurance then in effect will remain in force, provided it is not fully surrendered by the Owner. All insurance that is continued will be automatically changed from deduction of wages to a direct billing status" (Exhibit B, annexed to Fenaughty Aff. at 4).

The Certificate states that if the Insured "become disassociated from the Employer, **we will send the billing statements directly to you [the Insured]** for this certificate" (**emphasis added**) (Exhibit B, annexed to the Stark Aff.).

shown on our records" (emphasis added). Plaintiffs correctly contend that the Skadden address was not the proper address.

Mass Mutual maintains that it complied with the Certificate requirement by sending the notice to the Skadden address because this was the address listed on the Enrollment Form under "Correspondence." However, there is ample evidence in the record that Mass Mutual was on notice that the Insured had retired, that the appropriate mailing address for billing notices was not the Skadden address, and the owners' correct address was listed in Mass Mutual's files.

On February 2, 2007, Mid America advised Mass Mutual that the Insured had retired and his updated mailing address was the Washington Street address. This notification would have required Mass Mutual to send the billing notice to the Insured at his home address. There is no dispute that all that was sent to the Washington Street address was the Second Pre-Lapse Notice, and not the billing notice.

On April 16, 2007, Mid America again advised Mass Mutual by email that the Policy should not have lapsed for non-payment because the Insured never received a billing premium statement, and to update the address in its system from the employer's address to the Insured's home address (Exhibit H, annexed to Fenaughty Aff).

An employee from Mid America, Kathy Fynes, testified that she spoke to the customer service department at Mass Mutual

several weeks after sending the April 16, 2007 email and was reassured over the telephone that Mass Mutual would or did send the premium notice to the Insured at his home address (Exhibit T, annexed to the Stark Aff.; Plaintiffs' Rule 19-A Statement ¶ 63). In response, Mass Mutual avers merely that Fynes did, in fact, testify in this manner (Mass Mutual's Response to Plaintiff's Rule 19-A Statement, ¶ 62). This Court finds Ms. Fynes' statement to be credible and unopposed.

Fynes memorialized her communication with Mass Mutual in an e-mail dated May 16, 2007 to Skadden; the e-mail chain reflects that Skadden had received a pre-lapse notice for the Insured (Plaintiff's Rule 19-A Statement, ¶ 62). Fynes's May 16, 2007 e-mail states:

> "I was informed on 4/26/07 [by Mass Mutual] that new notices were mailed to the individual participants on 4/16/07."

In fact, Mass Mutual failed to provide proper "written notice to the Owner at the last known address shown on our records," as the Certificate requires, by sending a pre-lapse notice addressed to the owners to Skadden and then to the Insured's home address, because the owners' correct address was contained within Mass Mutual's files (Response to Plaintiffs' Rule 19-A Statement, ¶¶ 56- 57).

This issue, resolved against Mass Mutual, requires a holding that the Certificate could not have lapsed as a matter of law for non-payment of premiums on June 3, 2007 when Mass Mutual declared

it terminated. The inevitable conclusion is that Mass Mutual brought about the very default that occurred (*see In re Preston*, 29 NY2d 264). There, the Court of Appeals held that the defendant-insurer improperly rescinded a life insurance policy because it had failed to give requisite notice to one of two assignees. The Appellate Division found that the policy lapsed for non-payment of premiums due within a five-year period, despite the lack of notice, and dismissed the complaint. In reversing the Appellate Division and granting judgment to the assignee on the policy, the Court of Appeals noted that it was undisputed that the insurer had notice of the assignment of the policy, and the insurer subsequently did not give the assignee the requisite notice of premiums due, as the policy required. The Court reasoned that an insurance company cannot depend upon a default in which its own negligence or wrongful act contributed, "and but for which a lapse might not have occurred." Likewise, in this action the Certificate requires that Mass Mutual send a billing notice to the Insured at his actual home address and default or pre-lapse notice to the owners at the last known address set forth in their records. This, Mass Mutual failed to do.

Consequently, this Court rejects Mass Mutual's assertion that Insurance Law § 3211 (d) bars plaintiffs' claim, which is inapplicable in light of the notice requirements of the Certificate, and the cases upon which it relies are inapposite.

The Court has considered Mass Mutual's remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the defendant Mass Mutual Life Insurance Company's motion for summary judgment is denied; and it is further

ORDERED that the plaintiffs James A. Schoonover and Katherine W. Schoonover as Trustees of the Alan Gordon Straus 98 Insurance Trust's cross-motion for summary judgment is granted as to the first cause of action, and the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendant Massachusetts Mutual Life Insurance Company in the amount of $2,500,000 at the statutory rate from December 24, 2009 until the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: October 23, 2013

ENTER:

J.S.C.