Rettner v CM Life Ins. Co., Inc.
2014 NY Slip Op 30273(U)
January 21, 2014
Supreme Court, New York County
Docket Number: 110856/11
Judge: Paul Wooten
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[* 1]
SCANNED ON 1/31/2014

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

RONALD M. RETTNER, TRUSTEE FOR THE MARCELLE RETTNER MANDELBAUM LIFE INSURANCE TRUST,

Plaintiffs,

- against-

CM LIFE INSURANCE COMPANY, INC., 1311 ENTERPRISES, LLC d/b/a FIFTH AVENUE FINANCIAL,

Defendants.

INDEX NO. 110856/11

MOTION SEQ. NO. 001

FILED
JAN 31 2014
NEW YORK
COUNTY CLERK'S OFFICE

The following papers were read on this motion by defendant CM Life Insurance Company, Inc. for summary judgment, pursuant to CPLR 3212.

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

Cross-Motion: ☐ Yes ■ No

Before the Court is a motion by defendant CM Life Insurance Company Inc. ("CM") for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint in this action for wrongful cancellation of a life insurance policy.

BACKGROUND

Ronald M. Rettner (plaintiff or Rettner) is the trustee of the Marcelle Rettner Mandelbaum Life Insurance Trust (the Trust). CM is an insurance company and, since 1996, a wholly owned subsidiary of Massachusetts Mutual Life Insurance Company (Mass Mutual). Co-defendant 1311 Enterprises, LLC d/b/a Fifth Avenue Financial (Fifth) is an insurance broker. The Trust was the owner of a $1 million flexible premium adjustable life insurance policy insuring the life of Marcelle Rettner Mandelbaum (Mandelbaum) issued by CM on September 19, 2000 (the Policy). As alleged in the complaint, Fifth and its predecessor, Cowan Financial, had "placed numerous insurance policies" on plaintiff's behalf for over 15 years, and had

assumed the responsibility of notifying plaintiff of premium funding arrangements for the policies and alerting him of any shortfall and potential policy terminations (Nagotko affirmation, exhibit 1, ¶¶ 13-15).

Initially, the beneficiary of the Policy was the Rettner Family Limited Partnership #1 Ltd., which owned the Policy until October 7, 2009. According to plaintiff, periodic premiums of $25,105 were paid from the inception of the Policy through October 7, 2009, aggregating over $217,000 (*see* Rettner opp aff, ¶ 3). On October 8, 2009, ownership of the Policy was transferred to the Trust (*see* Stebbins June 12, 2012 affidavit, exhibits C and D). The transfer document provided that all notices were to be sent to Rettner's home address. On December 7, 2010, plaintiff received a notice dated November 30, 2010 apprising him that the Policy had been terminated because of non-payment of premiums. According to the terms of the Policy, the premiums were to be automatically paid from the proceeds of the Policy (complaint, ¶ 11). In September 2010, the premiums due exceeded the Policy proceeds and CM allegedly notified Rettner and Fifth first of the shortfall and then of the Policy's impending cancellation (*see id.*, ¶¶ 16-20).

Plaintiff avers that he did not receive either of those notices and was not aware there was a problem until he received the November 30 termination notice (*see* Rettner opp aff, ¶¶ 6, 12). Plaintiff immediately tendered a $30,000 check to CM to cure the default (*see* complaint, ¶¶ 23-25) and asked, both directly and through his agent, to have the Policy reinstated because he had not received any notice of default. By letter dated December 7, 2010, Mass Mutual notified plaintiff's agent that reinstatement of the policy would not be considered without the submission of a completed two-part application and a HIPAA release (*see* Stebbins June 12, 2012 aff, exhibit I). That letter also apparently refused the agent's tender of overdue premiums, stating "Mass Mutual prefers to conduct the underwriting process on a non-prepaid basis. If the reinstatement is approved, we will contact you regarding the cost due to reinstate the policy" (*ibid.*). By letter dated January 13, 2011 enclosing the notices purportedly sent to him (*see id.*,

exhibit K), CM denied Rettner's request to reinstate the Policy, although his $30,000 check was "accepted and cashed" (complaint, ¶ 8) despite Mass Mutual's letter to plaintiff's agent. Thereafter, plaintiff attempted to have CM reinstate the Policy in accordance to its terms, but that application (*see* Stebbins aff, exhibit J) was denied on the ground that the decline in Mandelbaum's health in the 10 years since her initial application had rendered her uninsurable (*see id.*, exhibit L; Rettner opp aff, ¶¶ 14-15). Subsequently, this action ensued.

Plaintiff's complaint (Nagotko affirmation, exhibit 1) contains two causes of action. The first, against CM, seeks (i) a declaration that the policy was improperly cancelled and (ii) an order compelling CM to reinstate the policy. The second cause of action (not at issue here) seeks a $1 million judgment against Fifth if it is determined that CM's cancellation of the policy was valid. CM's answer (*id.*, exhibit 2), which amounts to little more than a general denial, contains 25 affirmative defenses (dubbed "separate defenses"), including "equitable fraud" (11th), the "doctrine of avoidable consequences" (15th), the "inapplicability of the doctrine of *respondeat superior* (21st) and "this answering[sic] did not make any representations to plaintiffs[sic]" (22nd). What CM's answer does not contain is the affirmative defense of effective cancellation of the Policy. Fifth's answer (*id.*, exhibit 3), is remarkably similar to CM's answer (although the 21 affirmative defenses are actually called affirmative defenses) and denies any connection to Rettner, Mandelbaum, the Trust or the Policy. Fifth has not appeared on this motion.

CM is now moving for summary judgment dismissing plaintiff's claims against it arguing that the Policy was validly cancelled for non-payment of premiums, that plaintiff did not cure the payment default until after the expiration of the grace period, and that plaintiff's timely application to reinstate the policy was properly denied because Mandelbaum, who had been afflicted with Parkinson's, dementia and cardiac disease since her initial application 10 years earlier, was no longer insurable.

The thrust of plaintiff's claims against CM – and opposition to its instant motion – is that

CM wrongfully cancelled the Policy because the default notices it purportedly sent to plaintiff did not comply with statutory or Policy requirements, CM did not adequately establish that it had sent plaintiff the notices, and CM wrongly refused to reinstate the policy while nonetheless cashing plaintiff's $30,000 check and collecting more than $217,000 in premiums over the life of the policy. Plaintiff also argues that CM's motion for summary judgment is premature because discovery has not been completed, largely due to CM's failure to comply with plaintiff's discovery demands.

DISCUSSION

Insurance Law § 3211(a)(1) provides that all life insurance policies that terminate solely for non-payment of premiums shall terminate no less than a year from the default unless the insurer first sends out a notice of the impending default and termination. For flexible policies such as the Policy, the notice shall be mailed "no earlier than and within thirty days after the day when the insurer determines that the net cash surrender value under the policy is insufficient to pay the total charges that are necessary to keep the policy in force.

There are four notices at issue in this litigation. The first is a "Notice of Payment Due" (Stebbins aff, exhibit E) which notifies plaintiff as trustee that a payment of $25,105 is due on August 23, 2010. The notice is undated, but the fine print on both of its pages states that it was prepared on July 30, 2010.

The second notice, entitled "Special Notice," is dated September 24, 2010 (*id.*, exhibit F). This notice advises that the Policy "is in danger of terminating. It is in its grace period as a result of not having met the required premium" and "coverage will terminate unless a premium payment is made." It further states that the billed amount of $22,100.32 is "sufficient to cover the various charges under [the P]olicy until ... August 23, 2011." It then goes on to state that a lesser payment of $2,988.19 will suffice "to keep the [P]olicy active," but only until October 23, 2010, when the Policy will enter another grace period. If the lower amount is chosen, it must be paid by October 22, 2010, and if a payment is not received by November 27, 2010, the Policy

and its coverage will terminate. The payment stub on the notice states "Billed: Grace Notice; Date Due: 9/23/10; Amount Due: $22,100.32."

The third notice, also entitled "Special Notice," is dated October 23, 2010 (*id.*, exhibit G). The notice advises that a minimum payment of $4,653.50, payable no later than November 22, 2010, is required to keep the Policy active until November 23, 2010 when it will again enter a grace period. If no payment is made, the Policy will terminate on November 27, 2010. The information on the notice's payment stub is identical to that of the September 23, 2010 notice.

The fourth and final notice at issue, dated November 30, 2010 (*see id.*, exhibit H) is entitled "Termination Notice" and is the only notice plaintiff contends he received. It informs plaintiff that the Policy is "no longer in force" and its coverage has ended (no date specified) "because there was not sufficient value to cover the September 23, 2010 monthly charges." The notice also states "We hope that you will choose to reinstate your policy. Your prompt action can greatly simplify the requirements for resuming your valuable coverage." No time frame is specified for either the reinstatement or plaintiff's "prompt" action.

CM admits that the third notice is not contemplated by the statute but rather is a "courtesy" notice allowing the Policy to go into an additional grace period before it is terminated for non-payment. Plaintiff admits he received the fourth notice, advising him that the Policy had been terminated. Thus, it is the first two notices, particularly the second one, which CM must show were properly mailed to plaintiff.

"As the party that seeks to rely upon cancellation of the policy, defendant had the burden of proving as a matter of law that the policy was cancelled.... In meeting this burden, an insurance company may create a presumption that the insured received a notice of cancellation by describing the standard operating procedure used by the insurance company to ensure that such notices are properly made ... or the insurance company can provide proof of actual mailing" (*Tracy v William Penn Life Insurance Company of New York*, 234 AD2d 745, 747 [3d Dept 1996] [citations omitted]). However, not just any operating procedure will give the insurer

the benefit of the presumption of mailing. "[I]n order for the presumption to arise that the notice was received by the insured, "office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed" (*Nassau Insurance Company v Murray*, 46 NY2d 828, 830 [1978]; *see also Lumbermens Mutual Casualty Co. v Comparato*, 151 AD2d 265 [1st Dept 1989]). Because "[f]orfeiture for nonpayment of premiums is not favored in law and will not be enforced absent a clear intention to claim that right" (*In re Preston's Will*, 29 NY2d 364 [1972]), the insurer is required to prove the adequacy of its operating procedure through the testimony of individuals with personal knowledge thereof (*see Caprino v Nationwide Mutual Insurance Co.*, 34 AD2d 522, 523 [1st Dept 1970]).

In support of its motion for summary judgment, CM submitted only the June 12, 2012 affidavit of Michael Stebbins ("Stebbins") and the exhibits thereto. Stebbins states that the basis of his "personal knowledge" is his "capacity as a Senior Customer Service Specialist" for Mass Mutual. He described the triggering events for each notice and how those notices are generated by "CM's computers," and how the notices are sorted and driven to the Post Office (¶ 16). Thus, in setting forth its *prima facie* case, "the only evidence produced with respect to the mailing procedures used by CM was the affidavit of [Stebbins], an employee whose statements with respect to the mailing procedures utilized were premised largely upon 'information and belief.' There was no affidavit from an employee at the actual mailing location who could attest first-hand to the methods and procedures utilized by [CM] in order to ensure that the notices are "always properly addressed and mailed" (*LZR Raphaely Galleries, Inc. v Lumbermens Mutual Casualty Company*, 191 AD2d 680, 681-682 [2d Dept 1993]).

In response to plaintiff's well founded opposition, CM submitted along with its reply memorandum of law affidavits from several of its employees including Stebbins and documentary evidence. In his August 30, 2012 supplemental affidavit, Stebbins backs away from his erstwhile frequent references to CM's computers and explains how since CM became a subsidiary of Mass Mutual, all CM notices are generated by the Mass Mutual computers and

bear the name "Mass Mutual Financial Group," a business entity rather than a legal one. Stebbins also provides an additional basis for his personal knowledge: frequent communications with Cathy Hastings ("Hastings"), the Mass Mutual employee actually in charge of overseeing the printing and mailing of notices.

In her August 26, 2012 affidavit, Hastings, Team Specialist of Print and Mailing in the Print and Mail Service of Mass Mutual's Corporate Administration Department, sets forth the exact procedure used by Mass Mutual to generate and send out notices related to CM's policies. According to Hastings, all notices for CM policies are generated by Mass Mutual's computer, and each one is given an identifying number and printed out in daily batches (¶¶ 11-15). A printer operator will then "manually compare the total from the Job cover page to the ID numbers assigned to the last notice printed for the Job" (¶ 17). If the total number of pages listed on the cover page conforms to "the identifying number assigned to the last notice" in the batch, the print operator will physically band or clip the batch and place it on the mailing table (¶ 18). Any discrepancies in the count are resolved by Hastings. The Mass Mutual computer retains sufficient information to create a "snapshot" of the batch of notices printed on any particular day (¶ 20). To illustrate the procedures, Hastings provides "snapshots" for two of the notices a bar. Interestingly, she has provided the ones related to the third and fourth notice rather than the first two, which as discussed above are much more crucial. The snapshot for the third notice dated October 24, 2010, which plaintiff denied receiving, shows that an unidentified notice addressed to Marcelle Rettner[sic] Life Insurance Trust dated 09/01/07 c/o Ronald M. Rettner Trustee" at "34 Bonwit Rd[,] Rye Brook[,] NY 10573-1437" was printed on November 3, 2010 (*see* Hasting's exhibit A, item #20). The snapshot for the termination notice again shows only that an unspecified notice to the same adressee as above was printed on November 30, 2010 (exhibit B, item #15). Control sheets for the two mailings (respectively, exhibits C and D) are also provided, showing postage and damaged counts. They are both initialed, presumably by the workers who processed the run and counted the notices. Neither of

those workers have provided affidavits. According to Hastings, once everything has been bundled and tallied, the envelopes are "placed into a mail tray for outgoing first class mail and sealed with plastic wrap," and the trays are sent to Mass Mutual's pre-sort mailing facility (¶ 36-37), where the envelopes are "pre-sorted and then picked up by the U.S. Postal Services for delivery." (¶ 38).

Also as part of its reply papers CM submitted the August 31, 2012 affidavit of Barbara Smith ("Smith"), Director of Mass Mutual's Operations Support Department, who is responsible for processing returned mail, including notices. Smith describes: how the mail returned as undeliverable is sorted and grouped by content; how each item is individually logged; the efforts that are made to locate the addressees; how the computerized records are updated to reflect new addresses; and how the returned notices are re-mailed to the new addresses. Based on a review of her records and Stebbins' supporting affidavit, Smith avers that none of the notices mailed to Rettner were returned to Mass Mutual as undeliverable.

In short, through its reply submissions CM, aided by plaintiff's analysis of the infirmities in CM's original support for its motion, has almost succeeded in making a *prima facie* case.

The function of reply papers is to address arguments made in opposition to the motion or cross-motion and not to permit the movant or cross-movant to introduce new material (*see Dannasch v Bifulco*, 184 AD2d 415 [1st Dept 1992]; *Ritt by Ritt v Lenox Hill Hospital,* 182 AD2d 560 [1st Dept 1992]). Thus, CM cannot supply all the critical and essential elements of its evidentiary burden through its reply papers (*see Migdol v City of New York*, 291 AD2d 201 [1st Dept 2002] [affidavit of employee submitted with reply papers was properly rejected by the court since it sought to remedy basic deficiencies in movant's *prima facie* showing]). The First Department has stated that a court should not consider "arguments making their initial appearance in reply papers" (*Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]). Here, CM is introducing not new arguments, but new evidence, and it is particularly offensive because in CM's response to plaintiff's second demand for names and addresses of

witnesses, CM provides only one witness – Stebbins – who presumably has personal knowledge of everything (*see* exhibit 3 to Nagotko Sept 4, 2012, affirmation in further support). The identity of the two other reply affiants, who did have personal knowledge, was not disclosed to plaintiffs. "If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted. Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion" (*Lumbermens Mutual Casualty Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995]).

Moreover, even if this Court were inclined to consider CM's reply submissions rather than the supporting ones, they would still fall short. "Specifically, the respondents failed to offer proof that an employee normally checked the names and addresses on the mailing envelopes against those either on the notices or on a master list of insureds who had defaulted in payment" (*LZR Raphaely Galleries, Inc. v Lumbermens Mutual Casualty Company*, *supra*, 191 AD2d at 682 [internal citations omitted]). The procedure described by Hastings mentions only that the worker tallied the page count to make sure the number of notices being sent matched the cover sheet. At no time did she indicate that anyone checked the address on each envelope against the list of notices being sent. "Although an officer may testify as to office practice and policy, when reliance is placed on a mailing sheet, proof must include testimony that the employee checks the names and addresses on the envelopes with those on the mailing sheets in the regular course of business" (*Lumbermens Mutual Casualty Co. v Comparato*, *supra*, 151 AD2d at 267 [internal citation omitted]). There is also no indication that a copy of the notice was sent to Fifth (*see Friedman v Allcity Insurance Co.*, 118 AD2d 517, 519 [1st Dept 1986]).

Moreover, CM's reply submissions do not satisfy the essential element of mailing. "While [Hastings'] affidavit ... has established the manner in which ... notices were generated, printed, reviewed, forwarded to the mail room, assembled in the mail room, enveloped and

posted, she has failed to establish their mailing. . . 'Mailing is the deposit of a paper enclosed in a first-class postpaid wrapper [duly addressed]. . . in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State' (*Zwelsky v North American Company for Life and Health Insurance of New York*, n.o.r., 2011 WL 2447587 [Sup Ct, NY Co, 2011] [internal citation omitted]). Hastings stated that the trays of sorted notices were left in a Mass Mutual facilty until the Post Office sent someone to pick them up. In contrast, Stebbins averred that the notices were driven to the Post Office. Neither affiant states that the notices were actually mailed, and CM has not furnished the affidavit of a postal worker stating that the notices were regularly picked up or accepted by postal employees. Since CM's evidence "establish[es] that the various notices were generated by defendant's computer system ... [but not] that the notices were actually mailed to [plaintiff, CM] .... fails to establish the presumption that the notices generated ... were in fact delivered to [plaintiff], and as such, the delivery of the notices remains a genuine issue of fact" (*Maharan v Berkshire Life Insurance Co.*, 110 F Supp 2d 217, 221 [WDNY 2000], citing *Caprino v Nationwide Mutual Insurance Co.*, *supra*, 34 AD2d 522). "[W]here cancellation or surrender of the policy is an issue, it is the province of the court to determine all questions of law, and questions of fact ordinarily are to be determined by the jury. Thus whether an insurance policy provision has been cancelled is a question of fact for the jury, where the party to receive the notice denies that it was ever delivered" and the insurer has not established its entitlement to the presumption of receipt as a matter of law (45 C.J.S. Insurance § 825).

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue (*see Rotuba Extruders Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), or where the issue is even arguable (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], rearg den 3 NY2d 941 [1957]). Defendant, as movant, has the burden of submitting enough evidence to demonstrate the absence of material issues of fact (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]), keeping in

mind that "affidavits submitted are probative of the facts contained therein only to the extent that the affiant has personal knowledge of those facts" (*Hansel'n Gretel Brand, Inc. v Allstates Food Corp.*, 86 AD2d 858, 859 [2d Dept 1982]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992], citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]), focusing on issue finding and not issue determination (*Esteve v Abad*, 271 App Div 725, 727-728 [1st Dept 1947]). As discussed above, applying these standards, the Court finds that CM has failed to meet its burden.

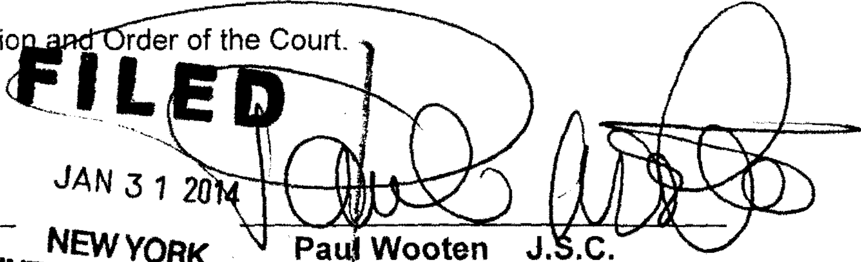
CONCLUSION

Accordingly, it is

ORDERED that CM's motion for summary judgment dismissing plaintiff's complaint against it is denied in its entirety; and it is further,

ORDERED that counsel for plaintiffs is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.



Dated: 1/21/14

Paul Wooten J.S.C.

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