

<b>Han v Metropolitan Life Ins. Co.</b>
2018 NY Slip Op 31260(U)
June 21, 2018
Supreme Court, New York County
Docket Number: 651238/15
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

-----X

ASHLEY HAN, as Administratrix of the  
Estate of KI SUCK HAN, SE RIM HAN,  
individually, and ASHELY HAN, individually

Plaintiffs

Index No. 651238/15

v

DECISION, ORDER and  
JUDGMENT

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

MOT SEQ 002

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover for breach of contract, based on the defendant's denial of life insurance benefits, the defendant insurer moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and on its counterclaim for a judgment declaring that it is not obligated to pay benefits under the subject policy. The plaintiffs oppose the motion. The motion is granted.

II. BACKGROUND

First MetLife Investors Insurance Company, incorrectly sued herein as Metropolitan Life Insurance Company (MetLife), asserts that it properly disclaimed coverage because, in his application for insurance, Ki Suck Han (the decedent), made material

misrepresentations of fact as to his earned annual income, net worth, and employment status. MetLife contends that the decedent had \$0 in earned annual income in 2010 and 2011, but represented in his January 2011 application that he had \$50,000 in earned annual income. It further contends that the decedent represented that his net worth was \$100,000, when it was actually significantly less than that, and that he represented that he was employed, when he actually had no full-time employment. MetLife alleges that these misrepresentations were material, and induced it to issue a term life insurance policy that it otherwise would not have issued.

MetLife moves for summary judgment dismissing the complaint, which seeks to recover the proceeds of the \$150,000 policy, and on its counterclaim, which seeks a judgment declaring that it is not obligated to pay benefits thereunder.

In support of its motion, MetLife submits the pleadings, an attorney's affirmation, the affidavit of its technical insurance advisor, Tinisha Tosoni, and the affidavit of its underwriter, Julienne Warr. It also submits the application for term life insurance submitted to it by the decedent, the life insurance policy issued to him, his widow's claim for benefits, an investigator's report of its interview with his widow, the decedent's tax returns for 2010 and 2011, MetLife's life insurance underwriting guidelines, the subject underwriting

determination, letters disclaiming coverage, and a copy of a check reimbursing the decedent's estate for the premiums previously paid.

MetLife's submissions demonstrate that, on or about January 4, 2011, the decedent applied for a term life insurance from MetLife. The application requested the decedent to provide information as to his "earned annual income," his net worth, his employer, and his employment duties. The decedent reported his earned annual income as \$50,000, his net worth as \$100,000, his employer as Tiffany Nail, and his position as "nail artist," and signed a statement in the application that all statements therein were true and complete. MetLife issued policy 211-003-347-FM to the decedent on January 10, 2011, in the face value of \$150,000, which recited that it was issued "in reliance on the statements made in the Application for insurance." The decedent died on December 13, 2012. His widow, the plaintiff Se Rim Han, made claim for the proceeds of the policy on October 17, 2013. MetLife undertook an investigation, which included the acquisition of income verification records and a personal interview with Se Rim Han, who provided MetLife with authorizations to obtain her federal and state income tax returns that she had filed jointly with the decedent for 2010 and 2011. The tax returns show that the decedent reported \$0 in earned income, defined as wages, salaries, and tips, for both 2010 and

2011. The decedent reported unearned income in the form of capital gains, interest, and dividends in the sum of only \$5,757.00 for 2010. He reported \$2,353.00 in unearned income for 2011, representing the taxable portion of a gross distribution of \$42,084.89, which was the cash surrender value of a whole life insurance policy that had been issued to him by MetLife and replaced with the subject term life policy. Moreover, MetLife's investigator asserted that, at Se Rim Han's interview, Se Rim Han stated that the decedent had not been working at the time of his death, but had been staying at home and taking care of her. The investigator further reported that she stated that she and the decedent had been living off of their savings and her small Social Security disability benefit, although she also stated that the decedent had been working odd jobs off of the books to make ends meet.

On February 14, 2014, MetLife's underwriter, Julienne Warr, determined that there was no substantiation for the decedent's representation that he had \$50,000 in earned annual income when he applied for insurance. By letter dated March 6, 2014, MetLife informed Se Rim Han that it was denying her claim for benefits, based on the decedent's misrepresentation of his earned annual income. MetLife thereafter tendered Se Rim Han a check refunding the previously paid premiums, plus interest.

In her affidavit, Warr describes MetLife's underwriting

guidelines, and attaches a copy thereof, explaining that the guidelines provide that there should be a verifiable, minimum household earned income of \$15,000 before a term life insurance policy is issued, and that unearned income should not be considered, unless it is significant. She further explains that where, as here, the proposed insured's age was between 50 and 60 years at the time of the application, the guidelines provide that the maximum amount of coverage would be 15 times annual earned income, and that a person, such as the decedent, with \$0 in earned income, would not be entitled to any coverage whatsoever. Warr avers that, based on her experience and knowledge of these guidelines, "had MetLife known that at the time the Decedent completed the Application that his earned annual income was \$0, and not \$50,000 . . . it never would have issued the policy."

In opposition to the motion, the plaintiffs submit an attorney's affirmation, the affidavit of the plaintiff Se Rim Han, the affidavit of the proprietor of Tiffany Nail, Inc., Hae Sook Kim, and an unnotarized affirmation of an attorney who accompanied Se Rim Han to her interview by MetLife. They also submit the relevant underwriting file, a copy of MetLife forms signed by the decedent referable to a change in life insurance policies that is required pursuant to New York State Department of Financial Services Regulation 60 (Regulation 60), and the 2011 cash surrender payment notice referable to the whole life policy

that was replaced by the subject term life policy.

Hae Sook Kim asserts that the decedent was a nail artist trainee at Tiffany Nail during December 2010 and January 2011, when he applied for the subject policy. She avers that, as such, he "had an earning potential of at least \$50,000 per year, including wages and tips," and that he "would have been informed" of his potential earning capacity at the time he was hired as a trainee.

Se Rim Han avers, in her affidavit, that the decedent was a trainee at Tiffany Nail. She also explains that she received Social Security disability payments, that the decedent surrendered his whole life policy in 2011 for cash, and that he received loan proceeds in the total sum of \$28,730 during calendar year 2012, although she does not identify the source of the loans or the terms of repayment.

Attorney Charen Kim asserts, in an unnotarized affirmation, that he accompanied Se Rim Han to the investigatory interview. He asserts that she has trouble with English, and did not tell the interviewer that she and the decedent were having trouble making ends meet.

The plaintiffs argue that there is a triable issue of fact as to whether the decedent misrepresented his earned annual income. Specifically, they contend that the term "earned annual income" was not expressly defined in the application, and that

its meaning is ambiguous. As such, they assert that it must be construed against MetLife, as the insurer and drafter of the application and policy, and that the affidavit of Hae Sook Kim raises a triable issue of fact in this regard since the term may be construed to include potential earned income.

The plaintiffs further contend that MetLife may not rely on alleged misrepresentations made by the decedent as to net worth or employment status, inasmuch as it did not disclaim coverage on those grounds, and cannot raise those grounds for the first time on a summary judgment motion. They further assert that MetLife did not establish, prima facie, that the decedent had significantly less than \$100,000.00 in net worth, since income tax returns do not require reporting of net worth, and net worth may not be inferred from a tax return. In addition, they argue that, in any event, their opposition papers raise triable issues of fact as to whether the decedent truthfully represented that he was employed by Tiffany Nail at the time he submitted his application.

Although the plaintiffs correctly contend that MetLife cannot now rely on the decedent's purported misrepresentations as to net worth and employment status to disclaim coverage, the term "earned annual income" is not ambiguous, and the decedent made material misrepresentations in connection therewith. Since Brighthouse established its prima facie entitlement to judgment



as a matter of law in this regard, and the plaintiffs' submissions do not rebut the showing that the decedent actually had \$0 rather than \$50,000.00 in earned annual income at the time of the application, summary judgment must be awarded to the defendant.

By order dated May 31, 2018 (SEQ 003), the court, upon the parties' stipulation, granted the plaintiff's motion to substitute Brighthouse Life Insurance Company of NY (Brighthouse) as the party defendant in place of Metropolitan Life Insurance Company, and directed the plaintiff to file an amended summons and complaint reflecting the substitution, and serve it upon the trial support office. The plaintiffs, however, did not file an amended summons and complaint, and there is no indication that they served an amended summons and complaint upon the trial support office. Hence, MetLife remains the defendant in this action.

### III. DISCUSSION

#### A. Summary Judgment Standard

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986). The “[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Vega v Restani Constr. Corp., supra, at 503.

#### B. MATERIAL MISREPRESENTATIONS

“Insurance Law § 3105(b) provides that for a misrepresentation to warrant the voiding of an insurance policy, the misrepresentation must be material, meaning that had the insurer known the truth, it would not have issued the policy.” Penn Mut. Life Ins. Co. v Remling, 268 AD2d 572, 573 (2<sup>nd</sup> Dept. 2000). Thus, where an applicant for life insurance makes material misrepresentations in the application for the issuance of a policy, and he or she dies within the two-year contestable

period of the policy (see Insurance Law §3203[a][3]), the insurer may disclaim coverage and rescind the policy. See Naghavi v New York Life Ins. Co., 260 AD2d 252 (1st Dept. 1999) Aguilar v United States Life Ins. Co., 162 AD2d 209 (1<sup>st</sup> Dept. 1990).

“Whether an applicant’s misrepresentations are material is typically an issue of fact; [h]owever, where the evidence concerning materiality is clear and substantially uncontradicted, it is for the court to decide as a matter of law, especially when the misrepresentation substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken.”

Kroski v Long Island Sav. Bank FSB, 261 AD2d 136, 136 (1<sup>st</sup> Dept. 1999) (citations and internal quotation marks omitted).

MetLife has demonstrated, *prima facie*, that the decedent misrepresented his earned annual income and that the misrepresentation was material, inasmuch as it would not have issued the policy had the decedent truthfully reported his income. As discussed below, the plaintiffs fail to raise a triable issue of fact in opposition to that showing.

#### 1. Ambiguity of Contract Terms

The construction of an unambiguous contract is an issue of law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance. See NFL Enters. LLC v Comcast Cable Communications, LLC, 51 AD3d 52 (1<sup>st</sup> Dept. 2008). The question of whether an ambiguity exists

must be ascertained from the face of an agreement, without regard to extrinsic evidence. See Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78 (1<sup>st</sup> Dept. 2013); Schmidt v Magnetic Head Corp., 97 AD2d 151 (2<sup>nd</sup> Dept. 1983).

While an answer to an ambiguous question on an insurance application cannot be the basis for a claim of misrepresentation (see Bleecker St. Health & Beauty Aids v Granite State Ins. Co., 38 AD3d 231 [1<sup>st</sup> Dept. 2007]), here, the term "earned annual income" is not ambiguous (see Toscano v Toscano, 153 AD3d 1440 [2<sup>nd</sup> Dept. 2017]) and, as with any contractual term, must be construed in accordance with its usual meaning. See Ashwood Capital, Inc. v OTG Mgt., Inc., 99 AD3d 1 (2012). Earned annual income thus must be construed to mean only actual earned income, including salary, wages, and tips, and not potential income. Although the decedent might have eventually earned \$50,000 per year had he completed a training program and thereafter worked full time at Tiffany Nail, the plaintiffs have submitted no proof that he ever worked full time thereat, and did not rebut MetLife's showing that he instead stayed at home during 2011 to care for his wife. Nor did the plaintiffs submit evidence showing that the decedent earned anywhere near \$50,000 in 2011 or 2012 from any source.

It is of no moment that the decedent may have innocently misrepresented his annual earned income, as even innocent

misrepresentations provide a basis for rescission of an insurance policy, provided that they are material. See Process Plants Corp. v Beneficial Natl. Life Ins. Co., 53 AD2d 214 (1<sup>st</sup> Dept. 1976). Contrary to the plaintiffs' contention, it is irrelevant that neither the application nor the policy expressly defined the relevant term (see Equitable Life Assurance Socy. v Rocanova, 189 AD2d 660 [1<sup>st</sup> Dept. 1993]) since the "plain meaning" (id. at 663) of the term "earned income" is unambiguous. See Toscano v Toscano, supra; cf. Naghavi v New York Life Ins. Co., supra (application defined "earned income" as amounts "reportable for personal federal income tax purposes").

Moreover, a litigant is generally bound by prior representations made in a tax return. See Peterson v Neville, 58 AD3d 489 (1<sup>st</sup> Dept. 2009). Se Rim Han and the decedent represented in their returns that the decedent's earned income in 2010 and 2011 was \$0 in salary, wages, and tips. The plaintiffs have thus effectively conceded that the decedent had no earned income when he signed the application.

## 2. Materiality of Misrepresentation

MetLife, by submitting its underwriting guidelines and an affidavit of its underwriter explaining why it would not have issued the subject policy under those guidelines had the decedent been truthful, has satisfied its burden with respect to the issue

of whether the misrepresentation was material. See Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co., 61 AD3d 412 (1<sup>st</sup> Dept. 2009); Feldman v Friedman, 241 AD2d 433 (1<sup>st</sup> Dept. 1997)

The plaintiffs' reliance on Carpinone v Mutual of Omaha Ins. Co. (265 AD2d 752 [3<sup>rd</sup> Dept. 1999]) is misplaced. There, the Court denied summary judgment to an insurer disclaiming under a policy of disability insurance, based upon the applicant's misrepresentation of his income. The Court reasoned that summary judgment was inappropriate, since the insurer "fails to cite any provision establishing that this disability policy would not have been issued had plaintiff accurately revealed his prior earnings."

Here, however, "the underwriter herself averred--not as a mere conclusion, but as an invariable fact based upon her experience" (Bleecker St. Health & Beauty Aids v Granite State Ins. Co., supra, at 232), that the insurer would have always denied an application of an applicant, such as the decedent, who showed \$0 in earned annual income. See Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co., supra; Feldman v Friedman, supra.

Since the plaintiffs' submissions do not factually contradict MetLife's showing as to materiality, they have failed to raise a triable issue of fact in this regard.

3. Alleged Misrepresentations of Net Worth and Employment

"Failure to raise a ground for disclaimer 'as soon as is reasonably possible' precludes an insurer from later asserting it as a defense." Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, PA., 21 NY3d 139, 146 (2013). MetLife's submissions reveal that, upon its investigation in 2013, it concluded that the decedent not only misrepresented his earned income on the insurance application, but also his net worth and employment status. Yet MetLife only disclaimed on the basis of the misrepresentation of income. It is thus precluded from raising any other misrepresentations as a defense to this action or a basis for rescission of the policy.

In any event, MetLife failed to show, prima facie, that the decedent's net worth was less than \$100,000, as it relies solely on his income tax returns which, by their very nature, do not provide for the reporting of net worth. Moreover, to the extent that MetLife showed, through its investigatory interview, that the decedent was not employed in January 2011, the plaintiffs' submissions contradict that showing. Hence, for those reasons as well, MetLife may neither defend the action nor obtain summary judgment on the ground that the decedent misrepresented net worth and employment status. Rather, the only ground supporting MetLife's defense and entitlement to summary judgment is the decedent's misrepresentation of earned annual income.

C. Noncompliance With Regulation 60

The plaintiffs assert that MetLife violated Regulation 60, which governs the replacement of one life insurance policy with another, by having the decedent sign his application for the subject term life insurance policy at the same time that he signed both the relevant Regulation 60 disclosure forms and his request to surrender, cash out, and replace a whole life insurance policy with the term life policy.

The plaintiffs cite to, and research has revealed, no authority for their contention that the manner and sequence of the decedent's execution of relevant documents vitiate the insurer's defense of material misrepresentation.

#### D. Certificate of Conformity

The court notes that Tosoni's affidavit was executed and notarized in Rhode Island, and Warr's affidavit was executed and notarized in North Carolina, but neither includes the certificate of conformity required by CPLR 2309. The defects do not require the court to disregard the affidavits or deny relief to the defendant, as the defect may be cured by the submission of the proper certificate nunc pro tunc. See Bank of New York v Singh, 139 AD3d 486, 487 (1<sup>st</sup> Dept. 2016).

#### IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendant's motion for summary judgment is



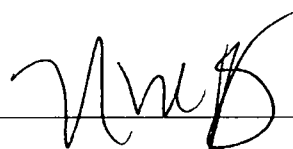
granted; and it is

ADJUDGED that the complaint is dismissed; and it is further,  
ADJUDGED and DECLARED, in connection with the defendant's  
counterclaim, that First MetLife Investors Insurance Company,  
incorrectly sued herein as Metropolitan Life Insurance Company,  
is not obligated to pay benefits under life insurance policy  
211-003-347-FM to the plaintiffs, Ashley Han, as Administratrix  
of the Estate of Ki Suck Han, Se Rim Han, individually, or Ashley  
Han, individually.

This constitutes the Decision, Order, and Judgment of the  
court.

Dated: June 21, 2018

ENTER: \_\_\_\_\_



J.S.C.

**HON. NANCY M. BANNON**