

Integon Nalt. Ins. Co. v Zhong Shen Lin

2020 NY Slip Op 31898(U)

June 17, 2020

Supreme Court, New York County

Docket Number: 156893/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

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INTEGON NATIONAL INSURANCE COMPANY,

Plaintiff,

- v -

ZHONG SHEN LIN, as Administrator and/or Executor of the
Estate of Qi Shen Zou (a/k/a QI SHENG ZOU) and MAYRA
ENCARNACION,

Defendants.

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INDEX NO. 156893/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 47, 48, 49, 50, 51, 52

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 53, 54, 55, 56, 57

were read on this motion to/for SUMMARY JUDGMENT.

Motion sequence numbers 001 and 002 are consolidated for disposition. The motion (001) by plaintiff for summary judgment against Lin and for a default judgment against defendant Encarnacion is granted in part and denied in part. The motion (MS002) by defendant Encarnacion for summary judgment is denied.

Background

This insurance dispute arises out of a slip and fall that took place in Ozone Park. On April 11, 2017, defendant Encarnacion purportedly tripped and fell on the sidewalk abutting the premises formerly owned by Mr. Zou. Mr. Zou passed away in 2003 and plaintiff claims that when it received an application for a dwelling fire policy in December 2016, the applicant was

listed as Mr. Zou. Plaintiff argues that it cancelled the policy on August 9, 2017 once it found out that the policy was issued in the name of a deceased person. Plaintiff brings this case seeking a declaration that it need not defend or indemnify Mr. Lin (the Administrator or Executor of Mr. Zou's estate) in Encarnacion's pending action in Queens.

Summary Judgment against Lin

Plaintiff argues that it is entitled to summary judgment because Mr. Lin did not reside at the premises at the time of the loss and that the policy was procured via a material misrepresentation (the applicant is listed as Mr. Zou, who had passed away many years prior). Plaintiff contends that it received a call about the alleged injuries suffered by Encarnacion on May 30, 2017 and its investigation revealed that Mr. Zou's daughter-in-law lived at the premises with her husband, children and mother-in-law. According to plaintiff's investigator, Mr. Zou's daughter-in-law claimed she was in the process of obtaining ownership of the property from Mr. Zou's estate. Plaintiff apparently sent a disclaimer letter to Mr. Zou's widow (Ms. Chen).

In opposition, Mr. Lin claims that plaintiff has failed to meet its prima facie burden for summary judgment. He contends that he is the executor appointed to handle the affairs of his deceased uncle (Mr. Zou). Mr. Lin argues that because immediate family members of Mr. Zou resided at the property, they can be insured under the terms of the policy issued by plaintiff. He suggests that plaintiff engaged in bad faith conduct by getting a statement from Mr. Zou's daughter-in-law and that the policy attached by plaintiff does not contain a signature. Mr. Lin speculates that plaintiff was aware of the passing of Mr. Zou at all times and that there was no fraud.

In reply, plaintiff emphasizes that it would not have issued a policy in the name of a deceased person had it known the person was deceased.

Here, the Court grants plaintiff's motion for summary judgment. Despite numerous arguments raised by defendants, the fact is that the proof submitted on this motion establishes that an application was submitted for an insurance policy in the name of a person who had passed away more than a decade earlier. That material misrepresentation permitted plaintiff to disclaim coverage (*see Tower Ins. Co. of New York v Khan*, 93 AD3d 618, 619, 941 NYS2d 560 [1st Dept 2012]). It does not matter whether the application or policy was signed because defendants are arguing that the policy should be enforced and that plaintiff must abide by its terms.

Mr. Lin points to the signature on the application and claims it clearly shows it is Ms. Bao's signature (*see* NYSCEF Doc. No. 35). But that is simply not the case. It is impossible to make out who signed the application nor does it affect the Court's decision. The application clearly lists the applicant as Qi Shen Zou and contains an assertion that the applicant "declare that the information in them is true, complete and correct to the best of my knowledge and belief. This information is being offered to the company as an inducement to issue the policy for which I am applying" (*id.*) Clearly, putting Mr. Zou as applicant was incorrect. For some reason, neither Ms. Bao nor her husband filled out an application for the policy.

In fact, Ms. Bao admits in her affidavit submitted in opposition that she signed the application for the policy as instructed by her broker (NYSCEF Doc. No. 34, ¶ 19). And although Ms. Bao appears to blame her broker for giving bad advice (that it did not matter that her father-in-law was the insured but had passed away), that does not change the fact that she signed an application which listed the applicant as Mr. Zou.

Moreover, as plaintiff points out, it is unclear how a valid contract (the policy) could be formed between a deceased person and plaintiff; there cannot be mutual assent in this situation. This provides an independent ground to grant this branch of plaintiff's motion.

The fact is that defendants do not deny that an application was sent to plaintiff to insure a property in the name of a person who passed away more than a decade ago. That his family lived there is of no moment because the policy's provisions about potentially covering certain household members in the event that the insured passed away contemplates that the person passed away during the term of the policy, not that they passed away years prior to the issuance of the policy.

While Lin and Bao characterize plaintiff's actions as "bad faith," they only offer conclusory assertions that somehow plaintiff knew that Mr. Zou had passed away. The record suggests that after Encarnacion's accident, plaintiff sent an investigator to the property who learned from Ms. Bao that the insured had died in 2003. The Court cannot let a contract formed on a material misrepresentation of fact to stand nor can it find that a valid contract was formed with a dead man, even if Mr. Lin or Ms. Bao were following the advice of a broker.

Default Judgment/ Encarnacion's Motion

The Court dismisses any claims against Encarnacion pursuant to CPLR 3215(c). The record on this docket reveals that plaintiff allegedly completed service on Encarnacion in August 2018 and then did not do anything in this case until November 2019 when it made the instant motion. Plaintiff filed the RJI simultaneously with this motion. Although plaintiff's attorney filed two notices of appearance (one in October 2018 and another in April 2019), those do not satisfy the requirement that plaintiff "take proceedings" because these notices were from the

same firm that filed the complaint on plaintiff's behalf. And plaintiff offers no justification for why it did nothing for over a year.

The Court also denies Encarnacion's motion (MS002). Encarnacion moves for summary judgment on her proposed counterclaim and to compel acceptance of her answer. There is no dispute that Encarnacion is in default-- she was purportedly served via a person of suitable age and discretion in August 2018 (NYSCEF Doc. No. 3). But Encarnacion has not moved to vacate that default or attached an affidavit denying receipt of service and attacking the sufficiency of the affidavit of service. Moreover, Encarnacion's opposition to motion sequence 001 asks the Court to dismiss based on plaintiff's failure to take proceedings although she did not affirmatively move for that relief in MS 001.¹

In any event, the Court finds that this case is dismissed against Encarnacion because plaintiff failed to take proceedings within one year after her default and denies the affirmative relief she requested in motion sequence 002.

Summary

The Court recognizes that it may not have been Ms. Bao's intent to submit a false application to plaintiff. It was obviously easier to apply for insurance with the listed owner (Mr. Zou) even though he was no longer alive. According to Mr. Lin (who claims he had no idea about how the policy was secured), he was appointed executor of Mr. Zou's estate in March 2017 and Mr. Zou's family was unaware how to handle someone's assets when they pass away. Even if that lack of understanding could be a defense, it does not excuse listing Mr. Zou as owner more than 13 years after his death. The Court cannot bind an insurance company to such

¹ The Court considers the reply affirmations by plaintiff (NYSCEF Doc. Nos. 47, 53) to be filed in connection with MS002 as the "wherefore" clause asks for denial of Encarnacion's "cross-motion."

a contract nor can it impose on plaintiff the burden to investigate whether every applicant is alive or whether every fact is true when considering an application.

Accordingly, it is hereby


ORDERED that the motion (MS001) by plaintiff is granted to the extent that plaintiff is awarded summary judgment against defendant ZHONG SHEN LIN, as Administrator and/or Executor of the Estate of Qi Shen Zou (a/k/a QI SHENG ZOU) and it is further

DECLARED that plaintiff has no duty to defendant or indemnify Mr. Lin (in his capacity as Executor of Mr. Zou’s estate) in an underlying personal-injury action in Supreme Court, Queens County under index number 3049/2019; and it is further

ORDERED that the branch of plaintiff’s motion for a default judgment against defendant Encarnacion is denied and all claims against this defendant are severed and dismissed based on plaintiff’s failure to take proceedings pursuant to CPLR 3215(c); and it is further

ORDERED that the motion (MS002) by Encarnacion is denied.

06/17/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE