

**Koppel v Prudential Life Ins. Co. of
Am.**

2007 NY Slip Op 32165(U)

July 13, 2007

Supreme Court, New York County

Docket Number: 0602445/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHKE, J.S.C.

PART 10

Justice

Index Number : 602445/2005

KOPPEL, ELAINNA

vs

PRUDENTIAL LIFE INSURANCE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 13 2007

JUDITH J. GISCHKE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

Elainna Koppel,
Plaintiff

-against-

The Prudential Life Insurance
Company of America,
Defendant.

-----X

DECISION/ORDER

Index No.: 602445/05
Seq. No.: 001

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Def's n/m (§3212) w/MA affirm, exhs	1
Pltff's opp w/RHA affirm, exhs	2
Def's reply w/MA affirm	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

In this action, plaintiff Elainna Koppel, the widow of Ross Koppel, contends she is the named beneficiary of her deceased husband's life insurance policy and that although the policy was in effect at the time of his death, defendant ("Prudential") has refused to pay her benefits. The court has before it Prudential's motion for summary judgment dismissing the complaint. Issue was joined and the note of issue has been filed. This motion was brought timely and it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Background

The parties' dispute centers on whether a certain life insurance policy that Mr.

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Koppel had with Prudential, naming plaintiff as the beneficiary, was in effect or had been cancelled at the time of his death. Plaintiff alleges that the policy was in effect on the day her husband died (February 11, 2005) whereas defendant argues it had been cancelled for non-payment of premiums effective August 1, 2004, and that Mr. Koppel had been properly notified of such cancellation.

It is undisputed that Mr. Koppel, an accountant and a member of the American Institute of Certified Public Accountants ("AICPA") was issued a \$2,000,000 life insurance policy. The policy, effective April 1, 2004, required that he pay premiums of \$1,800 semi-annually. Defendant Prudential is the insurance provider for qualifying and participating AICPA members who apply for insurance coverage. AICPA Trust is the Trustee (the "Trust") and policy holder of these individual members' policies. AON is the plan agent or administrator for the Trust.

While plaintiff contends there is a factual dispute about whether Mr. Koppel failed to pay his semi-annual premium due on time (e.g when it was due on April 1, 2004), there is no proof offered by plaintiff that her husband did. In any event, this dispute is subsumed within the larger issue of whether, as defendant alleges, Mr. Koppel was properly notified that his policy would be cancelled effective August 1, 2004, and therefore has no legal obligation to pay benefits to plaintiff.

In support of its motion for summary judgment, defendant relies upon a copy of a letter sent to plaintiff's lawyer before this action was commenced, but after the insured died. This (unsworn) letter, dated April 13, 2005, is from an AON plan agent (Ms. Binetti). She states that Mr. Koppel was billed for his semi-annual premium which was due April 1,

2004. No copy of the bill is attached to the letter nor is it part of this record. Ms. Binetti also states that AON sent a deficiency notice to "Mr. Ross" on June 15, 2004 and a final deficiency notice on July 15, 2004. Neither of these deficiency notices are a part of this record. Ms. Binetti also states in her letter that AON sent Mr. Koppel a cancellation notice on August 18, 2004 which was effective August 1, 2004. Prudential has provided a copy of a cancellation notice dated August 17, 2004. The notice provides that although cancellation is effective August 1, 2004, "[i]f you wish to reinstate your coverage, we require a payment of \$1,800 to pay your account through September 30, 2004."

Neither side disputes that Mr. Koppel did, in fact, send the Trust a check dated December 22, 2004 in the amount of \$1,800. It is also undisputed that this check was cashed by AON and retained by it for a period of time. In its letter dated January 31, 2005, AON notified Mr. Koppel that the check was, however, being returned because the account "ha[s] been cancelled since AUGUST 1, 2004 and is not eligible for reinstatement. Under the Terms of the plan you can only reinstate within 90 days of cancellation without going through medical underwriting." The "plan" terms have not been provided to the court and are not a part of this record. The insurance policy itself is not a part of this record either.

The Trust issued a refund check dated February 2, 2005. Mr. Koppel died on February 11, 2005 following a brief illness.

Defendant presents several legal and factual arguments in support of its motion. The first argument is that the plaintiff's deceased husband was properly notified that his insurance policy was being cancelled, and that it was, in fact, cancelled effective August

1, 2004, following several notices (those described by Ms. Binetti). Defendant contends further that the receipt, cashing and brief retention of the \$1,800 payment by Mr. Koppel did not reinstate the lapsed policy because he made the payment after September 30, 2004.

The next argument is that AON is not Prudential's agent, but the agent of the Trust. Prudential contends that all of Mr. Koppel's interactions regarding his policy (application, approval, payment, etc.) were with AON, not defendant. Thus, Prudential contends that it simply followed AON's instructions, that Mr. Koppel had not paid his premium on time, had not reinstated the account, therefore his account had been closed, and he was no longer insured.

Mr. Flynn, defendant's account manager testified at his examination¹ before trial about how Prudential and AON conduct their business. He testified that AON is a "plan agent" and it administers the AICPA trust plans for the Trust. He stated that there is no contract between AICPA and AON, nor between AICPA and Prudential, nor between Prudential and AON. Mr. Flynn testified that AON collects premiums and sends them to Prudential on a monthly basis, but Prudential has no way to know who those payments are from. AON also decides whether someone is entitled to insurance coverage, and if so, and a claim is filed, AON will send the necessary paperwork to Prudential.

In opposition, plaintiff first contends that her husband never received a cancellation notice and that defendant has to prove AON notified her husband that his policy was cancelled. She argues, as a matter of law, that defendant has not complied with the

¹Only a partial transcript of his EBT is provided

notice requirements of the Insurance Law, section 3211 (a) (1). This statute provides as follows:

“No policy of life insurance [* * *]² shall terminate or lapse by reason of default in payment of any premium [* * *] in less than one year after such default, unless a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due.”

Plaintiff contends there is no evidence in admissible form about whether AON followed these legal requirements. She further contends that because defendant has no personal knowledge about AON's office procedures, there is a factual dispute for trial about whether the deceased insured was properly notified. Plaintiff, who was deposed, testified that she saw a letter arrive at their home (dated September 1, 2004), after the alleged cancellation. She has provided a copy of that letter. The letter is a notice and bill for the insured's semi-annual premium payment due October 1, 2004. Plaintiff claims this raises another factual dispute about whether the policy was in effect at the time of her husband's death.

Discussion

“The proponent of 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.” Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68

²Indicates omitted language that is not relevant for the purposes of this motion or the court's analysis.

N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). If the proponent fails to make out its respective *prima facie* case for summary judgment, however, then that motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). The court's function on this motion is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957).

Neither side has provided a copy of the insurance policy, nor any other information about the terms of coverage. The sole source of information about what the terms of the "plan" is Ms. Binetti's letter, which is unsworn. Moreover, the events she relates in the letter are those which she appears to have no personal knowledge of. Since this letter is not evidence in admissible form, it does not support defendant's motion for summary judgment.

Next, although defendant contends that the insured was properly notified that his insurance was cancelled, it has not proved this essential element of its case. The copy of the cancellation notice is not, by itself, proof that Mr. Koppel was notified his policy was cancelled. Moreover, the cancellation notice is consistent with the bill AON sent on September 1, 2004, notifying Mr. Koppel that his next premium was due October 1, 2004. Although Mr. Flynn testified at his EBT about the procedures AON follows when premiums are not paid, he does not have personal knowledge whether those procedures were followed in *this* particular case. Ins Law § 3211 (a) (1). He merely assumes that they were.

The cancellation notice is dated August 17, 2005. However, the letter from Ms. Binetti indicates the notice was sent August 18, 2005 to "Mr. Ross." While at first blush

these could be attributable to minor transcription errors, on this motion defendant has the burden of proving its case, that the policy lapsed by operation of law, and that there are no factual disputes to be tried. It has not met this burden. In any event, plaintiff raises a factual dispute as to whether the insured was properly notified. She contends she resided with him and that she never personally observed any such notice come in the mail. Under New York law, the statute requiring notice is strictly construed in favor of the insured, and against the insurer. Mariano's Pizzeria Inc. v. Associated Mutual Insurance Cooperative, 24 AD3d 206 (1st Dept 2005). Since the issue of timely notice is central to Prudential's defense, but no one with personal knowledge has laid a foundation for the cancellation notice Prudential relies upon, it is not evidence in admissible form. See: Tracy v. William Penn Life Insurance Co., 234 AD2d 745 (3rd dept 1996) (no proof of office practice).

Although Prudential relies upon AON's actions to justify their decision not to pay benefits to the insured's widow, Prudential argues that AON is not its agent after all, but actually the agent of the Trust. This argument fails for a number of reasons.

Even accepting Mr. Flynn's description of how AON administers the plan for the Trust and only collects premiums for Prudential, Prudential, not AON, is the insurance provider. Thus, it is the insurance agreement between Prudential and Mr. Koppel that is at the core of this case alleging that Prudential breached its insurance contract with the insured which is to pay benefits to his beneficiary (plaintiff) at the time of his death. Therefore, any argument that Prudential has not engaged in any wrongdoing because it simply followed AON's instructions to cancel or pay on the policy, shifts the blame to a non party and ignores the contract Prudential had with the insured. This argument does not support defendant's motion for grant of summary judgment.

The issue of whether the check Mr. Koppel sent on December 22, 2004 reinstated the policy because AON accepted it as a late payment presents a mixed question of law and fact. There is the overarching dispute about whether the insured was properly notified of the policy's cancellation in accordance with the Insurance Law. There is also the separate issue of whether the cashing and retention of the check (albeit for a short period of time) was intentional or a mere oversight. See: Alsens Amer. Portland Cement Works v. Degnon Construction Co., 22 NY 34 (1917). Although defendant contends it has no obligation to "defend" AON's decision to take such action, this is a self-serving claim.

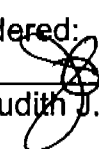
For all of these reasons, defendant has not met its burden on this motion for summary judgment. Plaintiff has, in any event, raised material factual disputes that warrant a trial. Certain disputes present mixed issues of law and fact that must await trial of the disputed fact before the court can resolve the issue of law. Defendant's motion is denied.

Conclusion

Since issue has been joined, this case is ready to be tried. Plaintiff shall serve a copy of this decision on the Office of Trial Support so the case can be scheduled for trial. Any relief not expressly addressed herein has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 13, 2007

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So Ordered: 
Hon. Judith J. Gische, JS