

Greenwald v New York Life Ins. Co.

2007 NY Slip Op 33031(U)

August 29, 2007

Supreme Court, Queens County

Docket Number: 0027004/2006

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----X
RACHEL L. GREENWALD,

Plaintiff,

-against-

NEW YORK LIFE INSURANCE COMPANY and
SHAYA ILOWITZ,

Defendants.
-----X

Index No.: 27004/06

Motion Dated:
May 22, 2007

Cal. No.: 12 & 13

The following papers numbered 1 to 13 read on this motion by defendant New York Life Insurance Company (No. 13) to dismiss the complaint; and separate motion by defendant Shaya Ilowitz for similar relief (No. 12).

Papers
Numbered

2 Notices of Motion - Affidavits - Exhibits	1 - 7
Answering Affidavits - Exhibits	8 - 10
Replying Affirmation	11 - 13
Memorandum of Law of defendant New York Life Insurance Company	
Reply Memorandum of Law of defendant New York Life Insurance Company	

Upon the foregoing papers it is ordered that these two motions to dismiss the complaint are jointly decided as follows:

In February 1986, Israel Greenwald procured an \$850,000 life insurance policy through defendant New York Life Insurance Company. ("New York Life.") Mr. Greenwald dealt with defendant Shaya Ilowitz, an agent with New York Life. The policy named plaintiff as the designated beneficiary. After payment of the first premium, Mr. Ilowitz delivered a conditional receipt to Mr. Greenwald. When Mr. Greenwald failed to appear on February 10, 1986 to pick up the policy, Mr. Ilowitz delivered the policy to the plaintiff.

The evidence indicates that Mr. Greenwald was murdered on February 10, 1986 at the behest of the Luchese crime family, but his bullet-ridden body was not discovered until April 1, 2005.

In the interim, Mr. Greenwald was deemed deceased as of February 10, 1991 by decree of the Surrogate's Court, Queens County, dated September 3, 2004.

On March 18, 1986, plaintiff issued a check in the sum of \$1,800.00 for payment of the policy premium. Defendant Ilowitz avers, however, that this check was for a premium for a Metropolitan Life Insurance policy, not the policy at issue. Sometime between March 18, 1986 and April 3, 1986, defendant New York Life sought to void the policy and instructed defendant Ilowitz to retrieve the policy from the plaintiff. In 2000, plaintiff requested that defendant New York Life furnish information pertaining to the policy. Thereafter, on June 22, 2000, defendant New York Life advised plaintiff that the subject policy was declined. In August and/or September 2005, plaintiff made a claim for benefits under the policy. Defendant New York Life declined payment under the policy. Plaintiff commenced the instant action on December 6, 2006 seeking to recover benefits under the policy. The instant motions to dismiss ensued.

Defendants argue that the action is barred by the Statute of Limitations and must be dismissed. The Statute of Limitations for actions sounding in breach of contract is six years. (CPLR 213[2].) In actions to recover proceeds under a life insurance policy, the Statute of Limitations period begins to run from the date of death of the insured. (Grunblatt v First Unum Life Ins. Co., 19 AD3d 449, 449 [2005]; Gallo v Sav. Bank Life Ins. Fund, 257 AD2d 600, 601 [1999].) EPTL § 2-1.7(a) provides for a presumption of the time of death in the case of missing persons. Under the version of EPTL § 2-1.7(a) in effect in 1986, a person who is absent for a continuous period of five years shall be presumed to have died five years after the date such unexplained absence commenced.¹ Where a cause of action under a life insurance policy is based upon a statutory presumption of death, the cause of action accrues after the expiration of the presumptive period. (see Connor v New York Life Ins. Co., 179 AD 596, 598-599 [1917]; 20A Appleman, Insurance Law and Practice, § 11613 [rev. ed 1980].) Courts in other jurisdiction are in agreement with this approach. (see Carman v Prudential Ins. Co. Of Am., 748 P2d 743 [1988] [Alaska]; Hopper v Dependable Life Ins. Co., 615 So 2d 263 [1993] [Fla].)

Applying the above principles to the case at bar, the court

¹ Under amendments to EPTL § 2-1.7(a), effective January 1, 1994, a person is presumed dead after a continuous absence of three years.

finds that plaintiff's action is untimely. Mr. Greenwald disappeared on February 10, 1986, and pursuant to EPTL § 2-1.7(a) then in effect, he was presumed dead on February 10, 1991. Indeed, this is the date of death set forth in the September 3, 2004 decree of the Surrogate's Court. The cause of action, thus, accrued on February 10, 1991, and the Statute of Limitations expired on February 10, 1997. Inasmuch as plaintiff did not commence this action until December 6, 2006, the case is now time-barred.

Plaintiff contends that, in any event, the doctrine of equitable estoppel precludes the assertion of the defense of the Statute of Limitations herein. The doctrine of equitable estoppel is an extraordinary remedy whereby a defendant may be estopped from pleading the affirmative defense of Statute of Limitations when the plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action. (Paterra v Nationwide Mut. Fire Ins. Co., 38 AD3d 511, 512 [2007]; Garcia v Peterson, 32 AD3d 992, 992 [2006].) In order for a plaintiff to obtain the benefit of the doctrine of equitable estoppel, it must be shown that the defendant's affirmative wrongdoing produced the long delay between the accrual of the cause of action and the institution of the legal proceeding. (Putter v North Shore Univ. Hosp., 7 NY3d 548, 552 [2006].)

In the matter at hand, contrary to the plaintiff's contention, there is no evidence that plaintiff was induced or misled into commencing this action in an untimely fashion. Indeed, plaintiff contends that she was informed by defendant New York Life as early as 1986 that there was no policy in effect. Moreover, plaintiff notes that in June 2000 she was advised that the application for the subject policy was declined. These averments do not establish that defendants' conduct lulled plaintiff into inactivity in the belief that her claim would ultimately be processed. (Minichello v Northern Assur. Co. Of Am., 304 AD2d 731, 732 [2003].) Indeed, defendants' conduct should have encouraged plaintiff to seek to her enforce any rights she thought she may have under the policy.

Accordingly, this motion by defendant New York Life Insurance Company and the motion by defendant Shaya Ilowitz to dismiss the complaint are granted, and the action is dismissed.

Dated: August 29, 2007

AUGUSTUS C. AGATE, J.S.C.

