

Gassman v Metropolitan Life Insurance Co.
2007 NY Slip Op 34243(U)
December 19, 2007
Supreme Court, Nassau County
Docket Number: 8130-02/
Judge: Michele M. Woodard
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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ROBERT GASSMAN and MARTIN SILVER as Executors,
of the Estate of STANLEY G. SILVER, deceased,
Plaintiffs,

-against-

METROPOLITAN LIFE INSURANCE COMPANY,
THE UNITED STATES LIFE INSURANCE COMPANY,
THE UNITED STATES LIFE INSURANCE COMPANY IN
THE CITY OF NEW YORK, ARTHUR ROTHLEIN,
individually and conducting business under the names,
A R AGENCY and ARTHUR ROTHLEIN AGENCY;
ARTHUR ROTHLEIN AGENCY, INC., JOAN SANTINI,
ETHEL J. GRIFFIN, Public Administrator of New York
County, as Administrator of the ESTATE OF GIAN CARLO
SANTINI, Deceased, ALAN M. HABERMAN, STEVEN C.
KLEINMAN,

Defendants.

**MICHELE M. WOODARD,
J.S.C.**
TRIAL/IAS Part 18
Index No.: 18130/02
**Motion Seq. Nos.:10,11,12,
13 & 14**
DECISION AND ORDER

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The motion by defendant Arthur Rothlein, A.R. Agency, Arthur Rothlein Agency and Arthur Rothlein Agency, Inc. ("Rothlein defendants") to dismiss the third, fourth and sixth causes of action of the plaintiff's complaint is granted as to the third and fourth causes of action but denied as to the sixth cause of action for the reasons set forth herein.

The cross motion by Metropolitan Life Insurance Company ("MetLife") to amend its answer to add cross-claims as to certain of its co-defendants is granted.

That branch of the cross motion by plaintiff to reargue a prior determination of this court is granted; that branch of the plaintiff's motion for leave to amend their complaint is denied for the reasons set forth herein.

Plaintiffs brought this action to seek additional sums in connection with a life insurance policy (the "Policy") that insured the life of Gian Carlo Santini (the "Insured") of which they, as executors of the Estate of Stanley Silver (a previously deceased owner and prior beneficiary), owned a one-fourth interest. The Policy was issued by Executive Life Insurance Company of New York ("ELNY") on August 27, 1985. At the time of issuance, the owners of the Policy and designated beneficiaries were Joan Santini, Arthur Rothlein ("Rothlein"), Stanley G. Silver ("Silver") and Alan M. Haberman ("Haberman"). The face amount of the Policy was \$902,000. MetLife assumed certain ELNY life insurance policies, including the Policy at issue in this action, on March 25, 1992, pursuant to an Assumption and Exchange Agreement with the Superintendent

of Insurance for the State of New York.

The Insured died on November 12, 1996 and the Policy proceeds thus became payable. Silver, an owner and beneficiary of the Policy, had died in 1989. MetLife paid the full amount of the Policy Proceeds as follows: Joan Santini: 25% as one of four beneficiaries, plus 6.2% (one-fourth of the predeceased beneficiary's, Stanley Silver's, one-fourth share), for a total of 31.2%; Arthur Rothlein: 25% as one of four beneficiaries, plus 6.2% (one-fourth of the predeceased beneficiary's, Stanley Silver's, one-fourth share), for a total of 31.2%; Alan Haberman: 25% as one of four beneficiaries, plus 6.2% (one-fourth of the predeceased beneficiary's, Stanley Silver's, one-fourth share), for a total of 31.2%; and the Estate of Stanley Silver: 6.4% (one-fourth of the predeceased beneficiary's, Stanley Silver's, one-fourth share). MetLife made this determination because Silver pre-deceased the Insured, and therefore Silver's 25% ownership interest passed to Silver's Estate, and Silver's 25% beneficiary share passed to the four owners (including Silver's Estate), pursuant to the terms of the Policy.

In the Verified Amended Complaint, plaintiffs assert six causes of action, four of which are asserted against MetLife. In the first cause of action, asserted against MetLife, plaintiffs alleged that the above distribution was improper and sought one-fourth of the Policy proceeds based upon the terms of the Policy. In the second cause of action, asserted solely against MetLife, plaintiffs sought one-third of the Policy proceeds based upon an incomplete change of beneficiary form that had been submitted to ELNY in 1990. The change of beneficiary form purported to change beneficiary designations so that the Silver Estate's beneficiary share would be one-third. Plaintiffs contended that although the form was never signed by the Silver Estate (or any of the other owners of the Policy except Rothlein), and although the Estate never otherwise sought to

change the beneficiary designation of the Policy, MetLife should nevertheless have paid the Estate one-third of the Policy proceeds pursuant to the incomplete form. Plaintiffs contend that MetLife, Steven Kleinman, Arthur Rothlein Agency, Inc. and Arthur Rothlein, individually, allegedly “did not give notice . . . to plaintiffs” of the attempt to change the beneficiaries, and of correspondence related thereto, that plaintiffs were thus prevented from consummating the changes of ownership and beneficiary and that MetLife “breached the contract of insurance.”

The third cause of action seeks relief as against MetLife as well as the Rothlein defendants and defendant Steven Kleinman. The third cause of action alleges that MetLife, the Rothlein defendants and Kleinman “failed to give notice to the plaintiffs of the requirement that they sign the Policy Change Form . . . ,” and states that this purported failure “tortiously interfered with the contractual rights of plaintiffs,” denied to plaintiffs the “opportunity to consummate the changes of ownership and beneficiary, and prevented plaintiffs from doing so” and allege that this constituted a breach of these defendants’ purported fiduciary duties to plaintiffs. Plaintiffs seek the same one-third of the Policy proceeds as in the second cause of action.

The fourth cause of action is asserted against MetLife, Arthur Rothlein Agency, Inc. and Arthur Rothlein, individually. This cause of action seeks a portion of the Policy proceeds, but on the alternate theory that the proceeds should have been distributed, not pursuant to the terms of the Policy, but pursuant to the amount of shares owned by each beneficiary in the Insured’s restaurant, Via Otto, at the time of the Insured’s death. The Verified Amended Complaint alleges that only the Estate of Stanley Silver and Arthur Rothlein owned shares at the time of the Insured’s death and the proceeds should have been distributed to them in accordance with the percentage of shares each owned. Under this theory, the plaintiffs’ Verified Amended Complaint

alleges that MetLife is liable to them in the amount of \$325,097.05.

The fifth and sixth causes of action asserted against United States Life Insurance Company and the United States Life Insurance Company in the City of New York was dismissed by an order of this court dated April 9, 2007.

Previously, this court, by an order dated December 2, 2004, had denied the motion of plaintiffs and the cross motion of MetLife, both seeking summary judgment. The court found that there were issues of fact in how the MetLife policy had been distributed. In August, 2005, the court denied plaintiffs' and MetLife's request for reargument. The December, 2004 and the August, 2005 orders were appealed. The Appellate Division, Second Department, by a decision dated February 13, 2007 granted summary judgment in favor of the plaintiffs and against MetLife on the first cause of action that plaintiffs, as executors of the Silver estate, were entitled to one-quarter of the policy proceeds instead of a smaller interest. The Second Department, in its February 13, 2007, decision, found the remaining contentions of the parties were without merit.

Plaintiffs later sought the Second Department to add a statement to the February 13, 2007 order that the remaining causes of action of the plaintiffs' complaint be severed and preserved for trial (see Exhibit D annexed to MetLife's affirmation dated August 7, 2007). The Appellate Division, Second Department, refused to revise the February 13, 2007 order (see Exhibit F annexed to MetLife's affirmation dated August 7, 2007).

The Court shall consider MetLife's cross motion to dismiss the plaintiffs' third and fourth causes of action.

A cause of action for fraud can be dismissed as duplicative of a plaintiff's contract claims inasmuch as it alleges no factual basis for recovery other than a defendant's failure to keep his, her

or its alleged promises and there are no damages sought that would not be recoverable under a contract measure of damages (*Clark Construction Corp. v BLF Realty Holding Co.*, 28 AD3d 367 [Dept 2006]; *Marshel v Farley*, 21 AD3d 935 [2d Dept 2005]).

A cause of action for fraud or for breach of a fiduciary duty which is merely duplicative of a breach of contract claim will not stand (*Clark Construction Corp. v BLF Realty Holding Co.*, *supra*; *William Kaufman Organization Ltd. v Graham & James, LLP*, 269 AD2d 171 [1st Dept 2000]).

The law of the case is a rule of practice, the articulation of a sound policy, that, when an issue is once judicially determined, that should be the end of the matter as far as the judges and courts of a coordinate jurisdiction are concerned (*Abbas v Cole*, 44 AD3d 31 [2d Dept 2007]). The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding; it applies to determinations which were necessarily resolved on the merits of a prior determination (*Hampton Valley Farms, Inc. v Flower & Medalie*, 40 AD3d 699 [2d Dept 2007]).

Here, the Appellate Division, Second Department, has determined the amount that is owed to the plaintiffs by MetLife by determining the second cause of action. Plaintiffs attempt to enhance the amount allegedly owed plaintiffs by MetLife by claiming MetLife breached a fiduciary duty or fraudulently prevented the plaintiffs from obtaining a larger amount is unavailing. There was a simple contract for life insurance. The Appellate Division, Second Department has spoken. Thus, the plaintiffs' third and fourth causes of action are dismissed as to MetLife.

The Court shall next consider the motion by the Rothlein defendants to dismiss the third,

fourth and sixth causes of action.

Paragraph 6 of the MetLife insurance policy stated that if an owner, here Stanley Silver, dies or predeceases the insured, Gian Carlo Santini, all rights and options of the owner was to belong to the Stanley Silver's executors, the plaintiffs. The Appellate Division, Second Department, specifically cited this paragraph of the MetLife policy. The Appellate Division, Second Department, has made a determination as to the plaintiffs', as executors of Stanley Silver, share of the MetLife policy. Thus, the third cause of action for alleged breach of a fiduciary duty by the Rothlein defendants and MetLife to change the amount of the MetLife policy from 25% to 33 1/3% is deemed moot by the Appellate Division's rulings.

The plaintiffs' fourth cause of action contends the MetLife policy should be distributed based on the amount of shares owned by each beneficiary in Gian Carlo Santini's restaurant at the time of his, Gian Carlo Santini's death. Again, the Appellate Division, Second Department has determined, citing the specific provisions of the MetLife policy in question that the plaintiffs are to receive 25% of the policy proceeds based on the language of the policy, not by the number of shares Silver owned in Santini's restaurant.

The Court will consider Met Life's cross motion to amend its answer.

Leave to amend will be denied where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit (*Breco Environmental Contractors, Inc. v Town of Smithtown*, 307 AD2d 330 [2d Sept 2003]).

Thus, mere lateness is not a barrier to an amendment in the absence of significant prejudice (*Edenwald Construction Co. v City of New York*, 60 NY2d 957 [1983]).

As to amended pleadings, mere lateness in absence of demonstrable prejudice, is an

insufficient basis for the denial of the motion (*Sievert v Morlef Holding Co.*, 220 AD2d 403 [2d Dept 1995]).

The permission to amend pleadings should be granted even in mid trial in the absence of operative prejudice (*Ward v City of Schenectady*, 204 AD2d 779 [3d Dept 1994]). Since a cause of action for undue delay does not accrue until payment of the judgment or the underlying action, MetLife cannot be charged with undue delay (*Vavallo v Consolidated Edison Co. of New York, Inc.*, 150 AD2d 556 [2d Dept 1989]).

A party should be permitted to amend the pleadings setting forth a cause of action for indemnification where there was no prejudice to the opposing party; since a cause of action for indemnification does not accrue until the payment of the judgment in the underlying action, the party seeking to amend cannot be charged with undue delay (*Vavallo v Consolidated Edison Co., supra*).

CPLR 203(d) provides a defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed; CPLR 203(d) applies to cross claims as well (*Long v Sowande*, 27 Ad3D 247 [1st Dept 2006]). Plaintiffs commenced this action in November, 2002. There is no dispute that it was timely when commenced. Thus, MetLife as a named defendant in the timely action, may amend its answer to include cross claims as to the co-defendants.

A cross claim that was viable at the time the action was commenced is not barred by the Statute of Limitations, especially where the amended claim arose from the same transactions and occurrences that were alleged in the original pleading (*Sievert v Morlef Holding Co, supra*).

The Court will next consider that branch of plaintiffs' cross motion to reargue a prior

determination of this court that dismissed the fifth and sixth causes of action of the plaintiffs' complaint.

The U.S. Life policy was a \$500,000 policy issued to Via Otto, Gian Carlo Santini's restaurant. Plaintiffs contend the Rothlein defendants alone obtained the proceeds of same depriving the plaintiffs, representing the estate of Stanley Silver, part owner of Via Otto, of their share (Silver's share) of the proceeds since Silver had been an owner of the corporation that owned Via Otto. Here, the plaintiffs as the executors of Stanley Silver's estate, obtained the share Silver had in the ownership of the corporate entity that owned Via Otto. The U.S. Life policy was a corporate asset (*see BSB Bank & Trust Co. v Dodge Markham Co., Inc.*, 15 AD3d 710 [3d Dept 2005]), and plaintiffs, in their executor capacity, have standing as shareholders to bring a derivative action on behalf of the U.S. Life policy corporate asset (*see Furia v Cerone*, 218 AD2d 682 [2 Dept 1995]).

The sixth cause of action contends U.S. Life and the Rothlein defendants breached their fiduciary duties and obligations to Via Otto and the shareholders of Via Otto. Plaintiffs allege U.S. Life and the Rothlein defendants engaged in fraud and conspiracy for the purpose of depriving Via Otto, its shareholders, including Stanley Silver, at the death of Gian Carlo Santini, of their rights under a U.S. Life policy and the proceeds thereto. Plaintiffs seek \$350,000 of the \$500,000 policy. U.S. Life and U.S. Life of New York City as an insurance company and its agent, owed no fiduciary duty to plaintiffs based on the facts alleged herein.

Normally, insurance companies do not owe a fiduciary duty to their insureds, absent a showing of some special relationship (*Edelman v O'Toole-Eward Art Assoc., Inc.*, 28 AD3d 250, [1st Dept 2006]). Clearly, U.S. Life, as an insurance company, does not owe plaintiffs a fiduciary

duty as a matter of law, and plaintiffs have not properly alleged a fiduciary relationship existed. The same may be said for U.S. Life of New York City (*Murphy v Kuhn*, 90 NY2d 266). Thus, the fifth and sixth causes of action against U.S. Life and U.S. Life of New York City were properly dismissed. The Rothlein defendants pose a different problem.

As to the Rothlein defendants, plaintiffs allege the Rothlein defendants changed the owner and beneficiary of the U.S. Life policy in that they caused U.S. Life to remove Via Otto as owner and beneficiary without the consent or authorization of Via Otto and that the Rothlein defendants were responsible for the alleged changes to deprive Via Otto of its rightful asset under the U.S. Life policy. Plaintiffs have standing to bring the action for the U.S. Life policy pursuant to BCL § 626(a), 626(b). The plaintiffs possess the necessary interest to be characterized as a shareholder (*see Drachman v Harvey*, 453 F.2d 722 [2nd Cir. 1972]) of Via Otto as executors of Stanley Silver's estate.

Of course, a shareholder, even in a closely held corporation, may not recover his or her individual capacity for the corporation's losses (*Abrams v Donati*, 66 NY2d 951 [1985]).

A derivative action was appropriate vehicle by which stockholder could claim some right to the corporate assets allegedly converted after dissolution, and the appropriate vehicle for the protection of rights of the corporation's creditors (*Mahi v Ziehm's Estate*, 55 AD2d 454 [3d Dept 1977]).

Here, plaintiffs allege the Rothlein defendants breached a fiduciary duty to fellow shareholders as to a corporate asset of Via Otto—the \$500,000 U.S. Life insurance policy. Plaintiffs allege the Rothlein defendants improperly disposed of the policy without properly considering/consulting other shareholders including plaintiffs who had the ownership/shares of

Via Otto via Stanley Silver.

Thus, the plaintiffs, having interest of Stanley Silver in the U.S. Life policy of \$500,00, had standing to bring a cause of action for the \$500,000 policy. Plaintiffs have a derivative claim on behalf of Via Otto. The policy (see Exhibit C annexed to plaintiffs' cross motion) indicates Via Otto was the owner of the policy—it was an asset of Via Otto.

A motion to reargue is addressed to the sound discretion of the court which decided the prior motion and said motion may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its earlier decision (*Long v Long*, 251 AD2d 631 [2 Dept 1998]).

Having reviewed its prior determination and the papers submitted herein, this Court concludes that it had previously overlooked or misapplied controlling principles of law. The court can glean from the record herein where it had mistakenly arrived at its earlier determination. Accordingly, the plaintiffs' sixth cause of action as to the Rothlein defendants is reinstated.

That branch of the plaintiffs' motion to amend their complaint as proposed (see Exhibit J annexed to plaintiffs' cross motion) is denied. Motions for leave to amend pleadings are liberally granted in the absence of prejudice or surprise (*Leszczynski v Kiley & McGlynn*, 281 AD2d 519 [2d Dept 2001]). However, leave will be denied where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit (*Breco Environmental Contractors, Inc. v Town of Smithtown, supra*). The court has examined the plaintiffs' proposed amended complaint and the amended complaint does not set forth allegations that would avoid the "law of the case" set forth by the Appellate Division, Second Department's February 13, 2007 decision. As noted, this court has reinstated the sixth cause of action as to the Rothlein defendants.

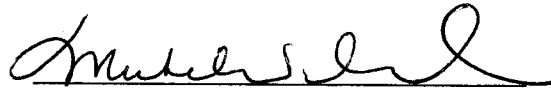
Finally, the stay of execution of the order to pay the plaintiffs their 25% of the MetLife policy is appropriate since there are issues raised as to whether the interest on the amount owed to the plaintiffs is appropriate. The stay does not violate the U.S. or New York State constitution. The stay merely seeks time for the court to direct a hearing be held to determine what amount of interest is actually owed to plaintiffs based on the Appellate Division ruling.

As to the interest ratio on the plaintiffs' share of 25% of the MetLife policy, a hearing shall be held to determine what the exact interest should be—the lesser amount claimed by Met Life and its experts—or the amount set by the clerk of the court at 9%.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: December 19, 2007
Mineola, N. Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

DEC 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE