

**Shou Fong Tam v Metropolitan Life Ins. Co.**

2008 NY Slip Op 31330(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0600085/2007

Judge: Walter Tolub

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SCANNED ON 5/9/2008  
\* 1 \*  
SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: TULUB  
Justice

PART 15

SIHU FONG TAM  
- v -

MBS LIFE INSURANCE CO

INDEX NO. 600085/0  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answering Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: Arlo

WALTER B. TOLUB /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: IAS PART 15

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SHOU FONG TAM a/k/a SHOU FONG CHAN,

Plaintiff,

Index No. 600085/07

-against-

Mtn Seq No.: 001

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.  
-----x

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

WALTER B. TOLUB, J.:

In this action to recover monetary damages for breach of contract and fraud, plaintiff moves to: (1) strike defendant's answer (CPLR 3126) for failure to comply with this court's May 5, 2007 Preliminary Conference Order; (2) strike the Errata Sheet to the June 12, 2007 Examination Before Trial (EBT) testimony of Regina Solomon-Stowe (Solomon-Stowe) (CPLR 3116 [a]); (3) produce Kacy McClelland (McClelland) and Joseph Gormley (Gormley) for EBT; (4) supplement defendant's May 24, 2007 "revised Privilege Log," by further identifying documents withheld; and (5) supplement defendant's responses to plaintiff's August 14, 2007 Interrogatories.

For the reasons stated below, plaintiff's motion is granted, only to the extent of ordering defendant: (1) to produce McClelland and Gormley for EBT within 45 days of service of a copy of this Decision and Order with notice of entry, (2) to

present all documents included in defendant's August 17, 2007 Second Revised Privilege log to chambers for in camera inspection within 30 days of service of a copy of this Decision and Order with notice of entry, and (3) provide plaintiff with a single date response to question five of her August 14, 2007 Interrogatories within 30 days of service of a copy of this Decision and Order with notice of entry, and is otherwise denied.

### **Background**

This action arises out of a denial of insurance claims on three life insurance policies (#889 270 096 PR, #917 213 833 PR, and #927 216 498 PR) (the policies), issued by defendant on the life of James C.H. Ngai (Ngai).<sup>1</sup> Plaintiff, who at the time of Ngai's death on March 19, 2005, was a life insurance agent for defendant, was also both the owner and beneficiary of each policy.<sup>2</sup> It is uncontested that plaintiff submitted timely claims under each of the policies; however, defendant asserts that the policies had lapsed in 2004 due to her failure to make premium payments.

Although plaintiff claims that she never received notices that the policies were about to lapse or, later, that they were

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<sup>1</sup>Said life insurance policies were issued in the amounts of \$100,000, \$250,000, and \$250,000, respectively.

<sup>2</sup>Plaintiff was at one time Ngai's fiancee; however, by March 19, 2005, he was married to another woman. It appears from the proffered documents that at the time of Ngai's death, plaintiff had no insurable interest in his life.

no longer in force, defendant avers that it sent proper notices to plaintiff of the impending lapse, and then, in July 2004, that the policies were no longer in force.

Plaintiff asserts that when, in December 2004, she became aware of the lapse in coverage, she requested that defendant waive its policy reinstatement requirements, which included either proof of her insurable interest or the permission of Ngai. There is no question that such request was denied by defendant.

On April 29, 2005, after Ngai's death, plaintiff contacted defendant by telephone, again seeking reinstatement of the policies. Plaintiff spoke to defendant employee Fran Pepin (Pepin), and although defendant alleges in its verified answer that the resultant May 2005 reinstatement was only accomplished as the result of plaintiff's negligent or intentional misrepresentations to Pepin (see Order to Show Cause, Exh. B), transcripts of the April 29, 2005 telephone conversation reveal that plaintiff made defendant's employee aware both that Ngai was dead and that she was the beneficiary of the policy. See Order to Show Cause, Exh. D.

In her verified complaint, plaintiff alleges that she is entitled to recover damages for breach of contract because either (1) the policies had disability riders that were triggered when

Ngai fell ill in 2003,<sup>3</sup> or that (2) the policies were properly reinstated upon plaintiff's payment of overdue premiums.

Defendant filed a verified answer, which includes a counterclaim for rescission of the policies, based upon plaintiff's fraudulent misrepresentations to Pepin (including the statements that plaintiff had not received the lapse notices or email communications from defendant, and that she failed to notify Pepin that she was the owner of the policies and that Ngai had died).

The instant motion arises out of discovery issues, as well as questions regarding compliance with this court's May 4, 2007 Preliminary Conference Order (PC Order).

#### **Discussion**

##### *CPLR 3126 Claims and May 2007 Privilege Log*

Plaintiff seeks to strike defendant's verified answer, based upon: (1) defendant's failure to comply with the PC Order, (2) an improper EBT errata sheet, and (3) for frivolous responses to plaintiff's Interrogatories.

CPLR 3126 contains penalties for refusal to comply with a court order or to disclose information that should have been revealed. A court has the discretion to strike "pleadings or

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<sup>3</sup> Plaintiff asserts that upon the occurrence of Ngai's illness (i.e., disability), no further premium payments were due. Under that theory, any claim by defendant that the policies had lapsed for failure to pay premiums would be in error.

parts thereof, [to stay] further proceedings until the order is obeyed, ... [to dismiss] the action or any part thereof, or to render[] a judgment by default against the disobedient party." CPLR 3126 (3). Although "[t]rial courts are accorded wide discretion in fashioning appropriate sanctions" (Cespedes v Mike & Jac Trucking Corp., 305 AD2d 222, 222 [1st Dept 2003]), "[d]ismissal is the most drastic sanction contemplated by CPLR 3126 for failure to comply with discovery." Tsai v Hernandez, 284 AD2d 116, 117 (1st Dept 2001). Prior to exercising such discretion, courts "look to whether the party seeking disclosure clearly demonstrates that the failure to disclose was willful, contumacious or manifested bad faith." Id. Such behavior should rise to the level of a "pattern of deliberate, contumacious delay" for CPLR 3126 (3) to be invoked. See Martinez v Goldrose Mgt., Inc., \_\_\_ AD3d \_\_\_, 853 NYS2d 558 (1st Dept 2008).

The PC Order upon which plaintiff seeks to strike defendant's verified answer required defendant to produce three relevant items. First, defendant was required to produce documents or to provide a privilege log and reason for withholding of such documents. Second, defendant was required to turn over any tape recordings and/or transcripts of telephone conversations between plaintiff and defendant concerning the policies, and finally, defendant was to produce a copy of the company manual, which includes the internal rules regarding

reinstatement of life insurance policies.

It is defendants' failure to provide proper detail in its privilege log that plaintiff cites to support her proposed remedy. Defendant has provided plaintiff with two privilege logs; it is the "Revised Privilege Log," dated May 24, 2007 (see Order to Show Cause, Exh. A), that is at issue here.

CPLR 3101 (a) allows for full disclosure of "all matter material and necessary in the prosecution or defense of an action." Although privileged matter, including attorney work product, is not to be disclosed (see CPLR 3101 [b], [c]), material prepared in anticipation of litigation is granted only qualified immunity, to be disclosed when a party shows that there is a "substantial need of the materials in the preparation of the case and [that party] is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

CPLR 3101 (d) (2).

"[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 377 (1991).

A communication that "aid[s] in the process of deciding whether to disclaim insurance coverage, ... as well as [any] letter of disclaimer itself, [are] part of the regular course of

... business, ... and as such are discoverable." Rosario v North Gen. Hosp., 40 AD3d 323, 324 (1st Dept 2007); see also Millen Indust., Inc. v American Mut. Liab. Ins. Co., 37 AD2d 817 (1st Dept 1971) (where the First Department held that reports made to aid in the determination as to whether to pay or to deny an insurance claim are discoverable).

On June 12, 2006, the defendant sent plaintiff a letter stating that the May 2005 reinstatement of the policies was improper (it was on that date that defendant issued plaintiff a check for \$29,157.02, representing the return premiums received for reinstatement, plus interest). Any reports made prior to that date are presumed to be in the course of business, unless defendant proffers evidence that any such report was specifically made in anticipation of litigation. Additionally, there are items on the privilege log, generated after June 12, 2006, which are labeled as "request[s] for legal advice," which are in need of further explanation to obtain such protection.

"[W]hether a particular document is or is not protected [by the attorney-client privilege or work product doctrine] is necessarily a fact-specific determination, most often requiring in camera review." Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d at 378 (internal citation omitted). Such is required here, where there has been a disclosure of some documents, and then allegations of privilege as to others, but with insufficient

descriptions in the privilege log to support such protection.

The defendant is, therefore, ordered to deliver to this court, within 30 days of notice of the date of entry of this Decision and Order, all the documents listed in the May 24, 2007 Revised Privilege Log that defendant continues to assert are privileged. Such documents should be accompanied by a 25-50 word per document explanation as to (1) the parties that were involved in the creation and receipt of the item described, and (2) why privilege is being claimed.

It is this court's understanding that the tape recording and transcript of plaintiff's one call to defendant have been turned over to plaintiff, and, additionally, that defendant has agreed to produce its corporate guide to reinstatement of life insurance policies.<sup>4</sup>

In addition to defendant's failure to timely disclose relevant documents, plaintiff seeks to use defendant's submission of (1) an allegedly improper EBT errata sheet,<sup>5</sup> and (2) allegedly frivolous responses to plaintiff's Interrogatories to support her motion to strike defendant's answer.

Several months after Solomon-Stowe's June 12, 2007 EBT, but

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<sup>4</sup> Such disclosure awaits plaintiff's signature on a non-disclosure agreement.

<sup>5</sup> Plaintiff further seeks to strike this errata sheet as violative of CPLR 3116 (a).

within the time limits set by the CPLR, Solomon-Stowe submitted an errata sheet (see Order to Show Cause, Exh. M), purporting to make corrections to the EBT transcript.

A "deposition shall be submitted to the witness for examination and ... any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." CPLR 3116 (a). Although the differences between the original EBT testimony and the corrections made by Solomon-Stowe after the fact raise issues of her credibility, (which will be heard by the trier of fact at trial), the errata sheet is admissible, as a witness has a right to change deposition testimony provided any such changes are made in accordance with CPLR 3116 (a). See Boyce v Vazquez, 249 AD2d 724 (3d Dept 1998); see also Natale v Woodcock, 35 AD3d 1128 (3d Dept 2006). It may not be used to support plaintiff's motion to strike defendant's answer.

With respect to the responses to interrogatories that plaintiff maintains are frivolous, plaintiff's seeks further responses to plaintiff's third, fourth, and fifth questions of plaintiff's Interrogatories, dated August 14, 2007. Questions three and four requests advises as to defendant's company policy regarding "communicating with owners and customers for whom English is not their first language," as well as the policy for

advising owners and customers who have "requested that policy premium be paid with dividends that there are insufficient dividends to pay premiums." See Order to Show Cause, Exh. A. The fifth question inquires as to the date that defendant contends that it notified plaintiff that she had insufficient dividends to pay the premiums due on the policies. Id.

Defendant's responses to questions three and four are that defendant "does not have any such company policy." See Order to Show Cause, Exh. L. Whatever else defendant responded following that does not change this answer, which this court holds is complete and not frivolous. With respect to question five, however, plaintiff is entitled to a single answer to a direct question. When did defendant notify plaintiff that she had insufficient dividends to pay the policies. Defendant's mention of multiple documents ranging over a period of months, including documents generated prior to plaintiff's request for defendant to use such dividends to pay such premiums due, is insufficient. Defendant is instructed to respond directly to the interrogatory-what date was plaintiff informed that there were insufficient dividends available on the policy to bring the premiums current? Defendant is instructed to respond to this question within 30 days of notice of entry of this Decision and Order.

With respect to that portion of plaintiff's that seeks

dismissal of defendant's verified answer, this court holds that, although defendant has not always been as forthcoming as plaintiff or this court may have desired, defendant's conduct does not raise to the level such that this court would be inclined to exercise its discretion to strike defendant's verified answer.

This court does take note, however, that at least one employee of defendant testified that defendant's attorneys were in possession of certain facts that would make certain allegations in defendant's verified answer a fabrication. The court is willing to entertain a motion for sanctions should plaintiff desire to so move. Defendant will given a complete opportunity to fully brief any opposition.

*Further EBTs*

The PC Order additionally requires the parties to complete all depositions on or before June 28, 2007. According to plaintiff, however, she was unable to properly prepare for Solomon-Stowe's June 12, 2007 EBT, because transcripts of plaintiff's April 29, 2005 conversation with Pepin (which revealed that plaintiff had told defendant's employee that Ngai was dead and that she was the policy beneficiary) were not produced until that day. Additionally, when plaintiff deposed

another of defendant's employees, Betsy Orfan (Orfan),<sup>6</sup> defendant similarly produced certain necessary documents immediately prior to her EBT. According to plaintiff, both Solomon-Stowe's and Orfan's testimony, as well as the turned-over documents are crucial in this action, and necessitate the deposition of Fran Pepin (which this court has already ordered). Plaintiff also maintains that the EBTs of McClelland and Gormley are necessary.

"Liberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof." Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance Inc., 226 AD2d 175, 175-176 (1st Dept 1996). Because Solomon-Stowe admitted that she was the employee of defendant that made the decision not to pay the death claims on the policies at issue (see Order to Show Cause, Exh. E, at 40), and that as part of that decision, she considered reports from McClelland and Gormley, who also interviewed plaintiff several times, and, according to plaintiff, attempted to persuade defendant's employees to lie about her claims, plaintiff is entitled to depose them to bolster her breach of contract and fraud claims. Defendant is hereby ordered to produce both McClelland and Gormley for deposition within 45 days of service of a copy of this Decision and Order with notice

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<sup>6</sup> Defendant refers to the woman deposed as Orfan, plaintiff refers to her as Orlan.

of entry.

**Order**


Accordingly, it is hereby

ORDERED that plaintiff's motion is granted, only to the extent of ordering defendant: (1) to produce Kacy McClelland and Joseph Gormley for EBT within 45 days of service of a copy of this Decision and Order with notice of entry, (2) to produce all documents included in defendant's August 17, 2007 Second Revised Privilege log to chambers for in camera inspection within 30 days of service of a copy of this Decision and Order with notice of entry, and (3) to provide plaintiff with a single date response question five of her August 14, 2007 Interrogatories within 30 days of service of a copy of this Decision and Order with notice of entry, and is otherwise denied.

Counsel for the parties are directed to appear on August 22, 2008 at 11AM at 60 Centre Street, room 335 for a compliance conference.

Dated: 5/7/08

ENTER:

  
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WALTER B. TOLUB J.S.C.

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK