

Buck v Columbian Mut. Life Ins. Co.

2008 NY Slip Op 32596(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 0100975/2007

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number: 100975/2007

BUCK, ROBERT

INDEX NO. _____

vs

COLUMBIAN MUTUAL LIFE

MOTION DATE 6/10/08

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

2-4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed Decision and Order.*

FILED

SEP 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/24/08

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

When the cash value on the policy was depleted to the extent that the cash value could not satisfy the next premium payment, pursuant to the policy, the insurer used the remaining cash value to purchase a death benefit according to the method set forth in the policy. The insurer used the remaining cash value in the policy to purchase a death benefit of \$16,957 and tendered this amount to Plaintiffs upon the death of their mother. The insurer's checks were returned by Plaintiffs.

Plaintiffs, the co-owners of the insurance policy, designated the address of their mother as the address at which they were to receive all premium notices. Defendant sent a notice to Plaintiffs which advised Plaintiffs that a premium payment in the amount of \$1,637 was due on December 24, 2004 and that this payment must be received by the insurer by "JANUARY 24, 2005 in order to: -Maintain your scheduled death benefit and any riders or supplemental benefits; Avoid any overdue premium adjustments; Avoid any reinstatement requirements."

The notice also provided that inquiries regarding the notice could be made by telephone at the number and extension indicated therein. After the payment specified in the notice was not received, as a result of the history of missed premium payments on the policy and the concomitant erosion of the policy's cash value, a new death benefit was purchased as provided for by the terms of the policy.

Plaintiffs commenced the instant action to recover the full death benefit listed in the policy (\$225,000) under the following theories: (a) breach of contract; (b) estoppel; (c) unjust enrichment. Defendant has made a prima facie showing of entitlement to summary judgment. Defendant has established that it does not owe Plaintiffs the full death benefit because the death benefit was reduced pursuant to the terms of the policy.

In opposition, Plaintiffs have not raised a triable issue of fact. It is well settled that "[a]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms." Broad Street, LLC v. Gulf Ins. Co., 37 A.D.3d 126, 131 (1st Dept. 2006).

Significantly, in this case, Plaintiffs do not take issue with Defendant's interpretation of the policy provisions pursuant to which the death benefit was reduced. Nor do Plaintiffs refute the specific calculations used by the insurer in arriving at the reduced death benefit. Further, Plaintiffs do not deny that they failed to make all of the requisite premium payments which, if made, would have kept the full death benefit listed in the policy in force. Nevertheless, Plaintiffs maintain that the insurer is responsible for the full death benefit.

Plaintiff's principal argument is that there is a question of fact as to whether Defendant is estopped from refusing to pay

Plaintiffs the full amount of the death benefit listed in the policy. Plaintiffs reason that Defendant was required to send premium notices not only to the address designated by Plaintiffs for that purpose, but also to Plaintiffs' insurance broker since, in the past, some insurance information was sent to the broker.

Plaintiffs do not point to any authority whatsoever for the proposition that the insurer was required to send premium notices to the broker who procured the policy. It is undisputed that Plaintiffs are the co-owners of the policy, designated the address of their mother as the address at which they were to receive premium notices, and that premium notices were received at this address for years. In fact, it is conceded that the notice concerning the premium payment due on December 24, 2004, was received at this address. Plaintiff's Memorandum of Law in Opposition, at p.5; Mosenson Affidavit in Opposition, at ¶20. Although it is apparently argued that the notice was not read until after the premium was due, it is clear that Defendant complied with all applicable notice requirements by mailing the notice to the designated address.

Plaintiffs make much of the fact that some insurance information concerning the policy had been sent to the insurance broker as well as Plaintiffs, however, that is irrelevant since Defendant was not required to send premium notices to the insurance broker. The fact that the insurer may have sent some

insurance information to the broker as a courtesy does not impose on the insurer a greater obligation with respect to all premium notices. Accordingly, Plaintiffs' contention that there is an issue of fact regarding their estoppel argument that they relied on the insurer's actions in giving some information concerning the policy to the insurance broker is without merit.

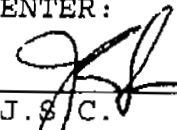
With respect to Plaintiffs causes of action for breach of contract and unjust enrichment, it is clear that Defendant did not breach the insurance contract and was not unjustly enriched since Defendant gave sufficient notice to Plaintiffs concerning the reduction of the death benefit amount and properly attempted to tender the death benefit due under the policy to Plaintiffs. Further, it is axiomatic that unjust enrichment is a quasi-contractual claim and where, as here, a matter is controlled by contract a cause of action for unjust enrichment cannot lie. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005).

Based on the foregoing, Defendant's motion is granted to the extent that its liability to Plaintiffs under the subject policy is limited to \$16,957 and the Complaint is dismissed. The Clerk is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: September 24, 2008

FILED
SEP 26 2008
5
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J. S. C.
JANE S. SOLOMON