

Fidelity Natl. Tit. Ins. Co. v Regent Abstract Servs., Ltd.
2008 NY Slip Op 33375(U)
December 15, 2008
Supreme Court, New York County
Docket Number: 110144/08
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EDWARD H. LEHNER

PRESENT: _____

PART 19

Justice

Index Number : 110144/2008

FIDELITY NATIONAL TITLE INSURANCE CO,
VS.
REGENT ABSTRACT SERVICES, LTD

SEQUENCE NUMBER : # 001

TURN OVER

INDEX NO. 110144-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on 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 is decided in accordance

with accompanying memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, original or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1408).

Dated: DEC 15 2008



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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
FIDELITY NATIONAL TITLE INSURANCE COMPANY,
COMMONWEALTH LAND TITLE INSURANCE
COMPANY, UNITED GENERAL TITLE INSURANCE
COMPANY and OLD REPUBLIC NATIONAL TITLE
INSURANCE COMPANY,

Petitioners,

Index No.
110144/08

- against -

REGENT ABSTRACT SERVICES, LTD. and
BRADFORD JOHN TIERNAN,

Respondent,

and

NEW YORK LIFE INSURANCE COMPANY,

Third-Party Respondent.

-----X
EDWARD H. LEHNER, J.;

FILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1412).

The determinative legal issue raised on the motions before me in this turnover proceeding, instituted pursuant to CPLR 5225, is whether a life insurance policy was in effect on the date of death of the insured under circumstances where the owner of the policy had failed to timely pay the monthly premium and sought to reinstate the policy by making a late payment which, although mailed prior to the death of the insured, was not received by the insurer until after the insured had died.

Respondent Regent Abstract Services, Inc. ("Regent") is an abstract company

that had performed services for the several petitioner title insurance companies. As a consequence of its conversion of funds that it had held in escrow on behalf of the various petitioners, on April 9, 2008 Regent executed a confession of judgment for \$5,000,000 in favor of petitioners.

By policy effective June 27, 2006, Regent had procured insurance from third-party respondent New York Life Insurance Company ("New York") on the life of one of its principals, Raymond Ferrari, in the amount of \$1,500,000. Concededly, Regent failed to make the monthly payment of premium due on January 27, 2008 within the 31-day grace period provided in the policy. Hence, on February 28, 2008, New York sent a notice to Regent, as the policy owner and beneficiary, advising that the policy had lapsed but that it could reinstate the policy if it mailed the amount due "in the enclosed return envelope no later than March 30." The notice further stated that "[i]f your payment is received by the above date, we will promptly reinstate your coverage, provided all persons covered under the policy are living when payment is received." The past-due payment was mailed on Friday, February 29 from Regent's place of business on Long Island, but not received by New York at its Cleveland, Ohio office until Thursday, March 6, and the check was deposited on March 7. However, the insured died on Monday, March 3. On April 8, after learning that Mr. Ferrari had died on March 3, New York mailed to Regent a check for the premium received on

March 6, applicable to the Ferrari policy, with a note stating that "[t]he policy could not be reinstated because the insured was not alive when we received it at our lock box." (Tr., p. 11). There is no dispute in the papers with respect to the aforesaid dates.

Section 4.2 of the policy provides for a 31-day grace period for the payment of a premium, and § 4.6 reads:

We will need evidence of insurability if we receive the required payment within 31 days after the end of the grace period, but the insured must be living when we receive it.

On May 16, petitioners' counsel forwarded an information subpoena to New York, and in July served the instant motion demanding that it turn over to petitioners the face amount of the policy in partial satisfaction of the \$5,000,000 judgment against Regent. New York opposes the motion and has cross-moved to dismiss the petition on the grounds that the policy was never reinstated because it did not receive the premium on the lapsed policy prior to the death of the insured.

Members of the family of Mr. Ferrari have sought to intervene in this proceeding asserting that Regent had assigned its rights under the policy to them, but have stipulated to be bound by the decision on the present motion as to whether the policy was reinstated.

Here, the policy provision that a lapsed policy will be reinstated only if a past due premium is received at a time when the insured is alive is clear and unambiguous.

"Unambiguous provisions of a policy are given their plain and ordinary meaning" [Lavanant v. General Accident Insurance Company of America, 79 NY2d 623, 629 (1992)], and "[c]ourts may not make or vary the contract of insurance to accomplish their notions of abstract justice or moral obligation" [Teichman v. Community Hospital of Western Suffolk, 87 NY2d 514, 520 (1996)].

In the case of Scott v. American Republic Life Insurance Company, 88 AD2d 949 (2nd Dept. 1982), where the facts were similar to those herein, the court in concluding that the lapsed policy was not reinstated wrote (p. 950):

The application for reinstatement provided that the continuation of coverage was "subject to receipt and acceptance by the Company of the premium requested *** during the lifetime and good health of *** [the] insured". In the present case there was neither a statutory nor contractual right to reinstate the policy in question In the absence of such a right, the insurer could impose certain conditions for reinstatement of its policy in the application for continuance of coverage It did so in requiring that premiums owed be accepted by the insurer while the insured was alive. In this instance, such condition was not met and the policy was therefore not revived.

See also, American Crown Life Insurance Company v. Dickson, 748 F. Supp. 184 (SDNY 1990).

In Government Employees Insurance Company v. Solaman, 157 Misc. 2d 737 (Sup. Ct. Nassau Co. 1993), relied upon by petitioners, the court, in a case involving automobile insurance, applied the so-called "Postal Acceptance Rule" and held that when the insurer requests payment by mail, the premium is deemed paid when

deposited in the post office. However, in that case the subject policy did not contain the crucial provision included in the life policy involved herein that the insured be alive when the premium is received.

Since there is no dispute herein that the insured was not alive when New York received the premium payment mailed on February 29, the lapsed policy was not, under the provisions thereof, reinstated when the premium was received on March 6. Accordingly, the cross-motion is granted and the petition is dismissed.

This decision constitutes the judgment of the court.

Dated: December 15, 2008



J.S.C.

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