

Shou Fong Tam v Metropolitan Life Ins. Co.
2009 NY Slip Op 32668(U)
November 5, 2009
Supreme Court, New York County
Docket Number: 600085/07
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: ToLUB

PART 15

Index Number : 600085/2007
TAM, SHOU FONG
vs.
METROPOLITAN LIFE INSURANCE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

THE motion is for _____

PAGES 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

is granted

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/15/09

ToLUB J.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

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

Plaintiff,

Index No.
600085/07

-against-

Motion Sequence Nos.
003 and 004

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

FILED

NOV 16 2009

NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In this action to recover monetary damages for breach of contract and fraud, in motion sequence 003, defendant moves for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for summary judgment on both causes of action in her complaint.

In motion sequence number 004, plaintiff seeks to strike defendant's answer.

For the reasons detailed below, defendant's motion and plaintiff's motion and cross motion are granted, only to the extent of ordering defendant to turn over all documents dated prior to January 9, 2007 that were previously claimed as privileged, and is otherwise denied.

Background

This action arises out of a denial of plaintiff's claims on three insurance policies (#889 270 096 PR, #917 213 833 PR, and #927 216 498 PR) (the policies) on the life of James C.H. Ngai (Ngai).¹ It is uncontested, that plaintiff, who was at one time the fiancée of the insured, was both the owner and beneficiary of the policies at the time of Ngai's March 19, 2005 death, but had no insurable interest in his life on that date.

Defendant admits that, after Ngai's death, plaintiff, a Financial Service Representative in defendant's employ, submitted timely claims under each of the policies. However, defendant contends that, because the policies had lapsed in 2003 for failure to make the required insurance premium payments, plaintiff was not entitled to recover under the policies.

Plaintiff, however, only admits that she received notices of premiums due and pending lapses in January 2004. See Plaintiff's Affidavit at ¶12. She asserts that, after the receipt of such notices and during the early months of 2004, she made several phone calls to defendant in an attempt to avoid any policy lapse. Plaintiff has also proffered evidence that she faxed a dividend withdrawal form to defendant, in which she indicated her intention to pay the premiums due through policy dividends or

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

loans on the face value of the policies.

Defendant contends, however, that at the time of plaintiff's faxed dividend withdrawal request, the policies required not only the payment of premium, but also reinstatement. Additionally, defendants maintain that they were unable to comply with plaintiff's faxed request, because there were insufficient dividends and/or policy cash value to equal the premiums that were due on the policies. According to defendant, plaintiff was notified by e-mail of that fact on April 21, 2004. See Kacy McClelland Affidavit, Exh. A.

Plaintiff denies receiving such notification, asserting that she specifically requested all notices under the policies be sent to her by regular mail (at least partly because she had an eye condition that prevented her from retrieving her e-mail on a regular basis). Plaintiff additionally contends that it was defendant's customary business practice for it to notify policyholders of a pending lapse by regular mail and not by email, and that because she was not so informed, defendant violated the Insurance Law.

According to plaintiff, it was not until July 2004, when she received the letters that the policies had already lapsed, that she became aware that there were insufficient dividends or loans that could be taken out against the face value of the policies to cover the premiums due. Plaintiff asserts that, upon learning

that the policies had lapsed, she immediately attempted to correct the situation and spoke to several of defendant's representatives on the telephone over a period of several weeks. Plaintiff contends that all those telephone conversations occurred prior to the insured's death in March of 2005.

Defendant, however, ultimately refused to waive its usual requirements for a policy reinstatement after lapse--either proof of the owner's insurable interest in the life of the insured or permission of that insured.

After Ngai died, plaintiff again sought to reinstate the policies. On April 29, 2005, plaintiff spoke with defendant's employee Fran Pepin (Pepin), and, as a result of that conversation, reinstatements of the policies were issued in May of 2005.

In its counterclaim, defendant seeks to rescind the policies, based upon the fact that plaintiff achieved their reinstatement by making negligent or intentional misrepresentations to Pepin. Those alleged misrepresentations include her not receiving the notice of insufficient dividends or face value to cover the premiums, as well as Ngai's status and her ownership of the policies.

The transcript of plaintiff's April 29, 2005 conversation with Pepin, however, reveals that she did inform Pepin both of Ngai's status and the fact that she was the policies' owner.

Plaintiff asserts that defendant and its attorneys were aware of that fact, and that defendant's counterclaim was false prior to the filing of the verified answer.

Discussion

Motion to Strike Answer

The Court notes that it issued a decision on this motion sequence on October 7, 2008 which was filed with the County Clerk's Office on October 9, 2008.

This Court directed that a Special Referee supervise disclosure. The parties never served the Referee Clerk in room 119M and therefore the matter was never calendared. However, this memorandum decision resolves the issues raised in motion sequence 004 and as such, this Court's prior decision and order dated October 7, 2008 is vacated.

Plaintiff moves to strike defendant's answer, based upon defendant's knowingly false statements in its verified pleading, as well as for its failure to willfully disclose documents required for the prosecution of this action.

CPLR § 3126 allows this court to strike pleadings for a party's "refus[al] to obey an order for disclosure or [willful failure] to disclose information which the court finds ought to have been disclosed." Striking of a pleading has been held to be a drastic remedy, that should not be employed unless it is proven that a party's conduct is willful. See *Stone v Speiser*, 267 AD2d

157 (1st Dept 1999); see also *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287 (1st Dept 1999).

Although defendant may have been less than forthcoming about available documents in the past, there is no question that defendant has produced all documents for in camera inspection. Striking the answer because of the delay in producing the documents is not an appropriate remedy herein.

Further, as respects defendant's putting forth a counterclaim it knew to be untrue, plaintiff has not proffered any evidence that, on March 23, 2007, corporate officer Robert A. Linzey, who verified the answer, was aware of the fact that the statements made in the counterclaim regarding plaintiff's failure to notify Pepin that Ngai was dead and that she was the policy owner were untrue.

Therefore, plaintiff's motion to strike defendant's answer is denied.

Summary Judgment

In her motion papers, plaintiff first maintains that defendant's motion for summary judgment is premature, in that no Note of Issue and Certificate of Readiness for Trial has been filed in this action, and because this court has yet to rule upon whether the records of defendant's investigation into plaintiff's claims under the policies are privileged.

However, pursuant to CPLR § 3212 (a), "[a]ny party may move

for summary judgment in any action, after issue has been joined." Issue was joined when defendant filed its verified answer in 2007, and, therefore, this motion is not premature.

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; see also *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once the movant has met its burden, however, its opponent must raise more than mere conclusions or unsubstantiated allegations to raise a triable issue. See *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 (1988).

Defendant seeks summary judgment dismissing plaintiff's complaint in its entirety. It first asserts that plaintiff's first cause of action for breach of contract should be dismissed because, plaintiff admits receiving premium notices in October of 2003. Defendant maintains that, because the policies lapsed when the premiums that were due in December 2003 went unpaid, plaintiff was not just seeking to pay overdue premiums in January

2004, she was seeking reinstatement, which under defendant's underwriting requirements included proof of an insurable interest.

Despite that contention, however, plaintiff's Examination Before Trial (EBT)² reveals that, while she admits that she should have received the October 2003 premium notices, she does not ever testify that she did receive them. See Plaintiff's EBT at 139-140, 150-159. Additionally, she has proffered evidence that the January 2004 notifications that she received from defendant regarding the policies were for premiums due, not for reinstatement. See Notice of Cross Motion, Exh. A.

Defendant further asserts that the disability waiver provisions in the policies were inapplicable to plaintiff's claims because she gave no notice of Ngai's disability. Although one of the policies at issue does not contain a disability waiver, two of the policies (#917 213 833 PR, and #927 216 498 PR) contain riders which allow for the suspension of premium payments should the insured be disabled. However, for this benefit to be activated and a waiver in force, plaintiff was obligated to apply for it, which she admits that she never did. See Plaintiff's EBT at 68-70. Therefore, as to any claims of entitlement to recovery under the policy due to a disability waiver, that claim is dismissed.

² See Defendant's Notice of Motion, Exh. 1.

Finally, defendant asserts that it is entitled to dismissal of plaintiff's second cause of action for violation of General Business Law § 349. Under Section 349 (a), "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service ... are ... unlawful." Practices or acts must be "consumer oriented" to satisfy the statute. See *Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330 (1999). Although private disputes between insurers and insureds do not fall within the ambit of Section 349 (see *Myers, Smith & Granady, Inc. v New York Property Ins. Underwriting Ass'n*, 201 AD2d 312 [1st Dept 1994]; see also *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]), if, in fact, the policies had already lapsed when defendant sent out its January 2004 premium due notices to plaintiff, and does so regularly, it is a question of fact whether "such action [constituted] a representation or omission 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Karlin v IVF America, Inc.*, 93 NY2d 282, 294 (1999), quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d at 26.³

³Additionally, by inordinately delaying its disclaimer, as well as basing the disclaimer upon facts that defendant knew or should have known were false, plaintiff's allegation may fall within that of an "allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference to its viability." *Acquista v New York Life Ins. Co.*,

Therefore, that portion of defendant's motion that seeks to dismiss plaintiff's claim for violation of General Business Law § 349 is denied.

For the same reasons, plaintiff's cross motion is denied.

Discovery of Documents

This court has reviewed all documents submitted to in camera inspection and finds that all documents prior to January 9, 2007 were created in the ordinary course of business, and for the reasons specified in this court's Decision and Order of May 7, 2008 are not privileged.⁴ This includes all documents contained in the "Supplemental Privilege Log," dated July 10, 2008.

Order

Accordingly, it is hereby

ORDERED that this Courts decision and order dated October 7, 2008 is hereby vacated; and it is further

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiff's motion and cross motion are granted, only to the extent of ordering defendant to turn over

285 AD2d 73, 82 (1st Dept 2001).


⁴This does not include the undated Deposition Prep Outline denominated as Document No. 1, or any other document included in the Third Revised Privilege Log.

all documents dated prior to January 9, 2007 that were previously claimed as privileged, and is otherwise denied.

Counsel are directed to contact the Court to schedule a status conference in this matter.

Dated: 11/15/09

ENTER:



WALTER B. TOLUB J.S.C.

FILED
NOV 16 2009
NEW YORK
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