

**Nocella v Fort Dearborn Life Ins. Co. of N.Y.**

2010 NY Slip Op 31311(U)

May 17, 2010

Supreme Court, New York County

Docket Number: 000437-08

Judge: Arthur M. Diamond

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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

-----x  
**BRIAN NOCELLA,**

**Plaintiff,**

**-against-**

**FORT DEARBORN LIFE INSURANCE COMPANY  
OF NEW YORK, NORTHSTAR LIFE INSURANCE  
COMPANY, UNION SECURITY LIFE INSURANCE  
COMPANY OF NEW YORK, BANKERS AMERICAN  
LIFE INSURANCE COMPANY, EMIGRANT MORTGAGE  
COMPANY INC.,**

**Defendants,**

-----x

**TRIAL PART: 16**

**NASSAU COUNTY**

**INDEX NO: 000437-08**

**MOTION SEQ. NO: 4**

**SUBMIT DATE: 04/09/10**

**The following papers having been read on this motion:**

- Notice of Motion .....1**
- Memorandum of Law.....2**
- Opposition.....3**
- Reply.....4**

Motion by defendants Union Security Life Insurance Company of New York and Bankers American Life Assurance Company for an order pursuant to CPLR 3212 awarding summary judgment and dismissing plaintiff's complaint is granted, and the complaint is dismissed as against defendants Union Security Life Insurance Company of New York and Bankers American Life Assurance Company.

This matter arises out of plaintiff Brian Nocella's claims for life insurance benefits following the death of his wife Kathleen Nocella on March 28, 2006. The moving defendants aver that the policy issued by Bankers American was cancelled effective April 1, 2000, six years before her death.

Plaintiff Brian Nocella and the decedent Kathleen E. Nocella were insured through defendant Emigrant Mortgage Company with defendant Bankers American Life Assurance Company (Bankers) for \$100,000 for "Accidental Death or Dismemberment." Union Security Life Insurance Company

of New York (Union) is a successor in interest to Bankers. The Nocella policy was effective October 1, 1998, and the premium was paid monthly in the sum of \$14.00 as part of the mortgage payments.

In early 2000, Emigrant notified Bankers insureds that “effective April 1, 2000 the accidental death insurance policy under which you were insured was cancelled by . . . Bankers American Life Assurance Company...” The Bankers insureds were advised that Northstar Life Insurance Company would “make available to you an alternative accidental death insurance plan similar to . . . previous coverage without any additional obligations.” Emigrant advised that as of the cancellation date it would collect premiums on behalf of Northstar and that in order to accept the insured need only make the ordinary mortgage payment which includes the “accidental death insurance premium.” The letter advised the insured to review “the enclosed certificate” verifying that it “correctly identifies the correct the person insured.” The letter requested the insured to complete an enclosed verification form, and to note “corrections” to the Certificate.

Kathleen E. Nocella died in 2006 from cancer and pyogenic infection, and Northstar ultimately denied coverage. This action ensued.

As noted, Bankers and Union seek summary judgment averring that the Bankers’ policy was cancelled effective April 1, 2000 at which time the Nocellas coverage was transferred to Northstar. In support of their claim they offer the cancellation letter as well as an affidavit by Susan Budelis, an employee of Minnesota Life Insurance Company. Budelis avers that she “reviewed documents maintained by Northstar and Minnesota in the ordinary course of business” and thus has knowledge of “the matters” stated.

Plaintiff Brian Nocella avers that he never received the notice and therefore is still covered by the Bankers’ policy.

Budelis states that Minnesota Life had a contractual relationship with Northstar “to provide it with certain business and regulatory support, including the processing and handling of any large mailing required for the transmission of notices . . . to policyholders or potential policy holders”.

With regard to the mailings on behalf of Northstar, Budelis contends that during January and February of 2000, Emigrant forwarded Minnesota Life, on behalf of Northstar, sample Bankers life insurance certificates and other data. Minnesota Life reviewed the information on behalf of

Northstar and as part of the company's "due diligence". On March 9, 2000 Emigrant provided data regarding the coverage purchased by insured Emigrant customers.

Budelis states that Minnesota Life and Northstar used the information to identify Emigrant insureds and to prepare a letter notifying them that Emigrant had cancelled its group accidental death insurance policy and that Northstar was offering similar coverage for the same premium. She states that Minnesota Life prepared the notice and mailed it to Emigrant customers on April 11, 2000, including 532 such customers in New York, including Kathleen Nocella.

Budelis describes in detail the standard operating procedure for preparing such mailings. Emigrant provides Minnesota Life with the names and current addresses of the individuals to receive the mailing. Minnesota takes the electronic data and creates a data base on its own computer and creates a mail merge. The mail merge uses a the form notice and the lender's data to accurately address each notice/letter to recipients. Minnesota Life employees confirm "by visual inspection" that listed individuals who should receive a mailing "have one addressed to them at the appropriate address." Minnesota Life personnel prepare envelopes addressed to the individuals who are to receive them and place them into the appropriate envelopes. The mailing is then delivered, in appropriately addressed envelopes to the United States Postal Service for mailing and Minnesota Life is charged the appropriate amount for postage. Any returned mail is recorded and Minnesota personnel use publicly available resources to locate the individuals's correct mailing address. A page from Minnesota's Life's spreadsheet mailing list, kept in the ordinary course of business, is submitted showing the Nocellas at the correct address.

Budelis avers that she confirmed that "these procedures were followed to send the Notice to the Insured Emigrant Customers, including Kathleen Nocella on April 11, 2000." Budelis also reviewed the customer service records, kept in the ordinary course of business, and identified an electronic entry "recording receipt of correspondence form Kathleen Nocella to Northstar, advising Northstar that the date of birth recorded on her Northstar Certificate of Insurance was inaccurate and should be amended to September 6, 1968". A copy of the image is produced, although it does not bear Kathleen Nocella's name, it does bear her correct birth date.

Where, as here, the evidence shows "an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have

been duly addressed and mailed, a presumption arises that those notices have been received by the insureds" (*Nassau Ins. Co. v. Murray*, 46 NY2d 828, 829 [1978]). An insured's denial of receipt, standing alone, "is insufficient to rebut the presumption" (*Nassau Ins. Co. v. Murray*, supra at p 830).

In opposition plaintiff avers that the Budelis affidavit is "incompetent" and cannot support defendants' motion because she is not employed by a party to this action. Plaintiff does not provide legal support for this novel contention that only a party may provide evidence in support of a summary judgment motion. Budelis provides a sworn statement that her employer provided mailing services to Northstar pursuant to contract, that Northstar gathered the necessary information from Bankers for the cancellation notice, and that the mail was appropriately brought to the United States Post Office. Her knowledge was based upon records kept in the ordinary course of her employer's business. Moreover, she provided a screen shot of an electronic record purporting to be a birth date correction from Kathleen Nocella which does bear her correct birth date, providing some evidence connecting the screenshot to Kathleen Nocella.

In order to obtain summary judgment the movant "must establish its defense . . . sufficiently to warrant a court's directing judgment in its favor as a matter of law . . . The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests" (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). As noted, plaintiff's bald claim of nonreceipt is insufficient to create an issue of fact (*Nassau Ins. Co. v. Murray*, 46 NY2d 828, 830 [1978]).

Defendants have made out a prima facie case as a matter of law and plaintiff has not raised a material question of fact. Accordingly, the motion is granted, and the complaint is dismissed as against the moving defendants Bankers and Union.

4/30/10

This constitutes the decision and order of this Court.

DATED: May 17, 2010

ENTER  
  
HON. ARTHUR J. MARTINEZ  
J. S.C. **ENTERED**

**MAY 19 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

To:

Attorney for Plaintiff  
**HAROLD M. KINGSLEY, ESQ.**  
KINGSLEY, KINGSLEY & CALKINS  
91 W. Cherry Street  
Hicksville, New York 11801

Attorney for Defendants  
**FRANCIS F. QUINN, ESQ.**  
LAVIN, O'NEIL, RICCI, CEDRONE &  
DISIPIO  
420 Lexington Avenue, Suite 2900  
New York, New York 10170