SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ROBERT GASSMAN and MARTIN SILVER as Executors, of the Estate of STANLEY G. SILVER, deceased,

Plaintiffs,

-against-

METROPOLITAN LIFE INSURANCE COMPANY, THE UNITED STATES LIFE INSURANCE COMPANY, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, ARTHUR ROTHLEIN, individually and conducting business under the names, A R AGENCY and ARTHUR ROTHLEIN AGENCY; ARTHUR ROTHLEIN AGENCY, INC., JOAN SANTINI, ETHEL J. GRIFFIN, Public Administrator of New York County, as Administrator of the ESTATE OF GIAN CARLO SANTINI, Deceased, ALAN M. HABERMAN, STEVEN C. KLEINMAN,

Defendants.

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ALAN M. HABERMAN,

Third-Party Plaintiff,

-against-

PIKEN and PIKEN, ROBERT W. PIKEN,

Third-Party Defendant.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 12
Index No.: 18130/02
Motion Seq. Nos.:18, 19 & 20

DECISION AND ORDER

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In motion sequence number 18, Arthur Rothlein, individually and conducting business under the names AR Agency and Arthur Rothlein Agency ("Rothlein") moves for an order granting summary judgment in favor or Rothlein on Third-Party Plaintiff Alan M. Haberman's ("Haberman") cross-claims as well as summary judgment in favor of third-party Defendants Piken

& Piken and Robert W. Piken as to Haberman's Third-Party complaint. Haberman cross-moves for an order granting him summary judgment as to Piken and Rothlein.

The Plaintiff cross-moves for an order seeking summary judgment on the fourth cause of action of their verified amended complaint (see Ex. A, pgs. 13-17 annexed to Plaintiffs' cross-motion).

The court will attempt to summarize the relevant facts of the case.

Plaintiffs brought this action to seek additional sums in connection with a life insurance policy (the "Policy") that insured the life of Gian Carlo Santini (the "Insured") of which they, as executors of the Estate of Stanley Silver (a previously deceased owner and prior beneficiary), owned a one-fourth interest. The Policy was issued by Executive Life Insurance Company of New York ("ELNY") on August 27, 1985. At the time of issuance, the owners of the Policy and designated beneficiaries were Joan Santini, Arthur Rothlein, ("Rothlein"), Stanley G. Silver ("Silver") and Alan M. Haberman ("Haberman"). The face amount of the Policy was $902,000. MetLife assumed certain ELNY fire insurance policies, including the Policy at issue in this action, on March 25, 1992, pursuant to an Assumption and Exchange Agreement with the Superintendent of Insurance for the State of New York.

The Insured died on November 12, 1996 and the Policy proceeds thus became payable. Silver, an owner and beneficiary of the Policy, had died in 1989. MetLife paid the full amount of the Policy Proceeds as follows: Joan Santini: 25% as one of four beneficiaries, plus 6.2% (one-fourth of the predeceased beneficiary's, Stanley Silver's one-fourth share), for a total of 31.2%; Arthur Rothlein: 25% as one of our beneficiaries, plus 6.2% (one-fourth of the predeceased beneficiary's, Stanley Silver's, one-fourth share), for a total of 31.2% and the Estate of Stanley Silver: 6.4% (one-fourth of the predeceased beneficiary's, Stanley Silver's, one-fourth share).

MetLife made this determination because it reasoned Silver predeceased the Insured, and therefore MetLife found Silver's 25% ownership interest passed to Silver's Estate, and Silver's 25% beneficiary share passed to four others (including Silver's estate), pursuant to MetLife's interpretation of the terms of the policy.

In the Verified Amended Complaint, Plaintiffs asserted six causes of action. The fifth and sixth causes of action were dismissed in April 2007.

The fourth cause of action is asserted against MetLife, Arthur Rothlein Agency, Inc. and Arthur Rothlein, individually. This cause of action seeks a portion of the Policy proceeds, but on the alternative theory that the proceeds should have been distributed, not pursuant to the terms of the Policy, but pursuant to the amount of shares owned by each beneficiary in the Insured's restaurant, Via Otto, at the time of the Insured's death. The Verified Amended Complaint alleges that only the Estate of Stanley Silver and Arthur Rothlein owned shares at the time of the Insured's death and the proceeds should have been distributed to them in accordance with the percentage of shares each owned. Under this theory, the Plaintiffs' Verified Amended Complaint alleges that the Defendants are liable to them in the total amount of $325,097.05.

Previously, this court, by an order dated December 2, 2004, had denied the motion of Plaintiffs and the cross-motion of MetLife, both seeking summary judgment. The court found that there were issues of fact in how the MetLife policy had been distributed. In August, 2005, the court denied Plaintiffs' and MetLife's request for reargument. The December, 2004 and the August, 2005 orders were appealed. The Appellate Division, Second Department, by a decision dated February 13, 2007 granted summary judgment in favor of the Plaintiffs and against MetLife on the first cause of action that Plaintiffs, as executors of the Silver estate, were entitled to one-quarter of the policy proceeds instead of a smaller interest. The Second Department, in its

February 13, 2007 decision, found the remaining contentions of the parties were without merit.

The Appellate Division, Second Department, has determined the amount that is owed to the Plaintiffs under the policy is 25% of the face amount of $902,000.

The Appellate Division, in its ruling, determined that MetLife's calculation that the Plaintiffs were entitled to only 6.4% of the proceeds of the policy was incorrect and that Plaintiffs, as executors of Silver's Estate, were to receive 25% of the $902,000 ($225,500) instead of 6.4% (or $57,728).

This court had dismissed the Plaintiffs' third and fourth causes of action (see Ex. L annexed to Plaintiffs' cross-motion). The Appellate Division, Second Department reinstated the third and fourth causes of action (see Ex. Q annexed to Plaintiffs' cross-motion).

Plaintiffs contend Rothlein deliberately withheld information from MetLife as to the location of Silver estate executors, the Plaintiffs. Based on the shares held in Via Otto at the time of Gian Carlo Santini's death (a total of 39 claim the Plaintiffs), Plaintiffs had fourteen (14) and Rothlein had twenty five (25). Based on this, Plaintiffs contend they are owed $325,000 plus, minus $57,922.44 or $267, 174.

Plaintiffs alleged Rothlein received the lion's share or $750,000 of the $902,000 on Gian Carlo Santini's policy proceeds.

Plaintiffs note the February 13, 2007 Appellate Division ruling gave Plaintiffs 25% of the Gian Carlo Santini's policy of $225,500 based on the insurance contract. Plaintiffs insist the total amount they contend they are due under the Stock Purchase Agreement is $325,000 plus/minus what they have received and they allege Rothlein and Piken Defendants deprived them of same.

Haberman's Third-Party Complaint (see Ex. C annexed to the Rothlein motion) against Piken & Piken and Robert W. Piken was commenced in June 2003.

In his Third-Party Complaint, Haberman contends MetLife made out a check to Haberman for $283,700 and Piken or Rothlein's agent and, as per Rothlein's instructions, had MetLife send the check to Piken. Piken allegedly deposited the check in the escrow account and sent a check to Haberman for $51,420. Haberman alleges he is owed the difference between $283,700 and $51,420 or $232,280 plus interest.

Rothlein/Piken states Haberman admitted selling his shares in Via Otto (see Ex. G, p. 9 annexed to Rothlein's motion) and he, Haberman, agreed to accept the $51,420 as provided for in the Gian Carlo Santini insurance policy (see Ex. G. pgs. 15-18).

Haberman notes a letter was sent to Piken indicating that he, Haberman, was entitled to 31.2% of the policy proceeds or $280,524 and Haberman was not aware nor told of this letter (see Ex. G. pgs. 19-20).

Haberman contends that Rothlein made a determination that he, Haberman, was not entitled to anything other than the $51,000 plus since he, Haberman, had only been a shareholder in Via Otto for a few weeks or months, contributed nothing to Via Otto, and Haberman did not pay for the Gian Carlo Santini policy premiums (Rothlein allegedly did) and rescue the policy from cancellation.

Haberman argues Rothlein and his agent/attorney, Piken, prevented Haberman from getting his full 31.2% share of the policy.

Haberman alleges MetLife cut a check in his, Haberman's name, for $283, 700 (or 31.2% of the Silver policy) but he alleges the check went to Piken and Piken sent Haberman a check for $51,400 (or 6% of the proceeds of the Silver policy). Haberman states he, Haberman, is owed the difference of $232,280 plus interest.

Haberman's answer with cross-claim (see Ex. B annexed to the Rothlein's motion) as to

Haberman, alleges Rothlein as a general agent for MetLife fraudulently and negligently and using collusion deprived Haberman of his rightful share of the insurance policy in issue.

There are no new facts presented herein by the respective movants. Plaintiffs urge this court, pursuant to their allegations in their fourth cause of action, to insure that amount based on the number of shares held by its various parties in the entity Via Otto at the time of the death of Silver as 14 shares of 39 for the Silver estate and 25 of 39 for Rothlein. Thus, Plaintiffs seek 14/39th of $902,000 or $324,800.

Did Haberman's alleged failure to adhere to the Via Otto contract provisions (alleged failure by Haberman to obtain life insurance, etc.) diminish his share of the Gian Carlo Santini insurance proceeds?

As to the Rothlein Defendants' role, the Appellate Division, Second Department, in its decision reversing this court's decision to dismiss the Plaintiffs' third and fourth causes of action (see Ex. Q annexed to Plaintiffs' cross-motion) indicated the issue of the Rothlein Defendants liability has not been determined. Thus, there are issues of fact as to the Rothlein Defendants liability, i.e., did they deprive Plaintiffs and Haberman of their true fair share of the Gian Carlo Santini life insurance policy proceeds?

What was Piken's role in the process? Did he assist Rothlein in depriving the Plaintiffs and Haberman from obtaining their respective rightful shares of the Gian Carlo Santini policy?

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]).

The standards for summary judgment are well settled. A court may grant summary

judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626 [2d Dept 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

The parties herein have not met their respective burdens.

At this point of the proceedings, the solutions sought herein are apparently beyond the realm of the two-dimensional arena of summary judgment. As such, the parties are directed to appear for a Certification conference on May 28, 2010 at 10:00 a.m. before the undersigned.

This constitutes the Decision and Order of the Court.

DATED: May 18, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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