SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

BRUCE ZWELSKY AND RICHARD ZWELSKY,

Plaintiffs,

- against -

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE OF NEW YORK,

Defendant.

WILTON REASSURANCE LIFE COMPANY OF NEW YORK, successor to NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE OF NEW YORK,

Counter-Plaintiff,

- against -

BRUCE ZWELSKY AND RICHARD ZWELSKY,

Counter-Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.:12542/09
Motion Seq. Nos.: 05, 06
Motion Dates: 02/24/11
04/28/11

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 05), Affirmation and Exhibits and Memorandum of Law	1
Notice of Cross-Motion (Seq. No. 06), Affirmation, Affidavit and Exhibits	2
Reply Affirmation and Affirmation in Opposition and Exhibits	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant/third-party plaintiff Wilton Reassurance Life Company of New York, as successor to North American Company For Life And Health Insurance of New York

("NACOLAH") moves (Seq. No. 05), pursuant to CPLR § 3212, for an order granting it summary judgment declaring it has no obligations under the insurance policy at issue. Plaintiffs/third-party defendants Bruce Zwelsky and Richard Zwelsky (collectively the "Zwelskys") oppose the motion and cross-move (Seq. No. 06), pursuant to CPLR § 3126, for an order striking defendant/third-party plaintiff NACOLAH's Answer and, pursuant to 22 NYCRR 130-1.1, for an order imposing sanctions on defendant/third-party plaintiff NACOLAH and/or its attorneys. Defendant/third-party plaintiff NACOLAH oppose the cross-motion.

Plaintiffs/third-party defendants Zwelskys brought the instant action seeking to recover on their father, Frank Zwelsky's, life insurance policy. The policy was procured by Frank Zwelsky's son, plaintiff/third-party defendant Bruce Zwelsky, in 1993. It is not disputed that the policy lapsed in 2006 due to unpaid premiums. Frank Zwelsky died on April 12, 2006, and plaintiffs/third-party defendants Zwelskys' claim under the policy was denied on the ground that the policy had lapsed. The action was commenced on June 26, 2009.

Defendant/third-party plaintiff NACOLAH seeks summary judgment dismissing the complaint.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v. King*, 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept. 2004), *aff'd. as mod.*, 4 N.Y.3d 627, 797 N.Y.S.2d 403 (2005), *citing Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the

sufficiency of the opposing papers." *Sheppard-Mobley v. King*, *supra* at 74; *Alvarez v. Prospect Hospital*, *supra*; *Winegrad v. New York University Medical Center*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *See Alvarez v. Prospect Hospital*, *supra* at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518, 824 N.Y.S.2d 166 (2d Dept. 2006) *citing Secof v. Greens Condominium*, 158 A.D.2d 591, 551 N.Y.S.2d 563 (2d Dept. 1990).

"Forfeiture for nonpayment of premiums is not favored in law and will not be enforced absent a clear intention to claim that right. . . ." *In re Preston's Will*, 29 N.Y.2d 364, 328 N.Y.S.2d 405 (1972). "Insurance Law § 3211 provides that a life insurance policy cannot be terminated for nonpayment of a premium until the insurer has mailed written notice of cancellation, in a form specified by statute to the insured at his or her last known address." *Tracy v. William Penn Life Ins. Co. of New York*, 234 A.D.2d 745, 650 N.Y.S.2d 907 (3d Dept. 1996). A life insurance policy in New York State may not "terminate or lapse by reason of default in payment of any premium . . . in less than one year after such default, unless, for scheduled premium policies, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due. . . ." *See* New York Insurance Law § 3211(a)(1). The notice must be mailed to the last known address of the policy owner or any other person designated in writing to receive such notice; state the amount and date due; where and to whom payment is payable; and, that unless such payment is made on or before the date when due or within the specified grace period thereafter, the policy shall

terminate or lapse. *See* New York Insurance Law §§ 3211(b)(1) and (2). An insurance company which relies on the cancellation of a life insurance policy bears the burden of establishing its cancellation before the insured's death. *See Tracy v. William Penn Life Ins. Co. of New York, supra* at 747. "In meeting this burden, an insurance company may create a presumption that the insured received a notice of cancellation by describing the standard operating procedure used by the insurance company to ensure that such notices are properly mailed or [it] can provide proof of actual mailing . . . ." *Tracy v. William Penn Life Ins. Co. of New York, supra* at 747, *citing Pardo v. Central Co-op. Ins. Co.*, 223 A.D.2d 832, 636 N.Y.S.2d 184 (3d Dept. 1996). *See also Colon v. Nationwide Mut. Fire Ins. Co.*, 211 A.D.2d 579, 621 N.Y.S.2d 608 (1st Dept. 1995); *Freidman v. Allcity Ins. Co.*, 118 A.D.2d 517, 500 N.Y.S.2d 124 (1st Dept. 1986); *Hantman v. Helsmoortel-Thornton Agency Inc.*, 224 A.D.2d 752, 636 N.Y.S.2d 934 (3d Dept. 1996), *lv den.*, 88 N.Y.2d 804, 645 N.Y.S.2d 446 (1996). "Where . . . the proof exhibits 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 v. Murray*, 46 N.Y.2d 828, 414 N.Y.S.2d 117 (1978) *citing News Syndicate Co. v. Gatti Paper Stock Corporation*, 250 N.Y. 211 (1928). *See also William Gardam & Son v. Batterson*, 198 N.Y. 175 (1910); RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE (11th ed. 1995). "The fundamental, neutral precept of contract interpretation is that arguments are construed in accord with the parties' intent." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 750 N.Y.S.2d 565 (2002) *citing Slatt v. Slatt*, 64 N.Y.2d 966, 488 N.Y.S.2d (1985), *rearg. den.*, 65 N.Y.2d 785, 492 N.Y.S.2d 1026 (1985). *See also Hooper Associated, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 549 N.Y.S.2d

365 (1989). "Where . . . the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence." *Rainbow v. Swisher*, 72 N.Y.2d 106, 531 N.Y.S.2d 775 (1988) *citing Nichols v. Nichols*, 306 N.Y. 490 (1954). *See also Chimart Associates v. Paul*, 66 N.Y.2d 570, 498 N.Y.S.2d 344 (1986). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plaint meaning of its terms." *Greenfield v. Philles Records, Inc.*, *supra* at 569. *See also W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 565 N.Y.S.2d 440 (1990). "Absent proof of mailing (by certificate or by affidavit of one with personal knowledge) or proof of the office practice in place with regard to mailing notices of cancellation, [the] plaintiff's denial of receipt raises a question of fact about the effectiveness of defendant's purported notice of cancellation that must await determination at trial. . . ." *Tracy v. William Penn Life Ins. Co. of New York*, *supra* at 747 *citing Freidman v. Allcity Ins. Co.*, *supra* at 519.

While the affidavit of Jennifer Ruckelshausen, the Manager of defendant/third-party plaintiff NACOLAH's Policy Services Department and former Manager and Assistant Manager of defendant/third-party plaintiff NACOLAH's Policy Accounting Department, has established the manner in which premium due notices, lapse and easy reinstatement notices and lapse notices were generated, printed, reviewed, forwarded to the mail room, assembled in the mail room, enveloped and posted, she has failed to establish their mailing. Her statement that "Qualified Pre-Sort which is an outside vendor hired by NACOLAH, picks up the addressed and stamped envelopes the same day they are processed by the sorting machine and delivers them to the United State Post Office to be mailed" does not establish mailing either actually or as a

matter of office routine. All that defendant/third-party plaintiff NACOLAH has established is its office practice or procedure which effectuates delivery of these notices to a third party, Qualified Pre-Sort, not the post office, which is required to establish mailing. *See* CPLR § 2103(f). "Mailing is the deposit of a paper enclosed in a first-class postpaid wrapper [duly addressed] . . ., in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State." *See City of New York v. Broadway and Canal Realty Corp.*, 24 Misc.3d 1250(A), 889 N.Y.S.2d 58 (Supreme Court New York County 2009).

In view of defendant/third-party plaintiff NACOLAH's failure to establish that the decedent's life insurance policy was cancelled, whether it was properly reinstated needn't be addressed.

Similarly, again, in view of defendant/third-party plaintiff NACOLAH's failure to establish that the policy lapsed, defendant/third-party plaintiff NACOLAH's reliance on the two year Statute of Limitations (*see* New York Insurance Law § 3211[d]) cannot be determined at this time.

Plaintiffs/third-party defendants Zwelskys' cross-motion to strike defendant/third-party plaintiff NACOLAH's Answer pursuant to CPLR § 3126 is denied. Not only did plaintiffs/third-party defendants Zwelskys fail to move to compel the deposition they seek (*Diel v. Rosenfeld*, 12 A.D.3d 558, 784 N.Y.S.2d 379 (2d Dept. 2004)), the Note of Issue and Certificate of Readiness, which were executed on August 31, 2010, indicated that discovery was complete. *See JAF Partners, Inc. v. Rondout Sav. Bank*, 72 A.D.3d 898, 898 N.Y.S.2d 496 (2d Dept. 2010); *Iscowitz v. County of Suffolk*, 54 A.D.3d 725, 864 N.Y.S.2d 78 (2d Dept. 2008). In any event, plaintiffs/third-party defendants Zwelskys have not demonstrated that

defendant/third-party plaintiff NACOLAH has engaged in willful and contumacious conduct which would warrant striking defendant/third-party plaintiff NACOLAH's Answer or the imposition of sanctions.

Accordingly, the motion (Seq. No. 05) by defendant/third-party plaintiff NACOLAH, for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint against it is hereby **DENIED**. The motion by plaintiffs/third-party defendants Zwelskys for an order pursuant to CPLR § 3126 striking defendant/third-party plaintiff NACOLAH's Answer and for an order pursuant to 22 NYCRR 130-1.1 imposing sanctions on defendant/third-party plaintiff NACOLAH and/or its attorneys is also hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 31, 2011