SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

ANDRE LUTFY and ANTOINE LUTFY, JR., as co-trustees of The Lutfy Preservation Trust Dated December 12, 2012 and LORETTA LUTFY,	**DCM Part 6**
	Present:
	HON. PHILIP G. MINARDO
Plaintiffs,	
-against-	
	DECISION AND ORDER
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK,	**Index No. 150195/2015**
Defendant.	**Motion No. 1641-009 -010**

The following papers numbered 1 to 3 were fully submitted on the 2nd day of June, 2016:

	Papers Numbered
Notice of Motion for Summary Judgment of Defendant (Affirmation, Affidavit and Memorandum of Law in Support (Dated: April 18, 2016)	1
Notice of Cross Motion for Summary Judgment of Plaintiffs (Affirmation, Affidavits and Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment and in Support of Plaintiffs' Cross-Motion (Dated: May 12, 2016)	2
Reply Affidavit and Memorandum of Law in Further Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion (Dated: May 31, 2016)	3

Upon the foregoing papers, the motion (Seq. No. 009) and cross motion (Seq. No. 010) for summary judgment are denied.

This matter arises out of plaintiffs' claim for $1,100,000.00 in death benefits pursuant to a universal life insurance policy issued by defendant, The United States Life Insurance Company in the

City of New York (hereinafter "US Life"), which plaintiffs' deceased, Antoine Lutfy, Sr. (hereinafter "Lutfy") purchased on June 14, 1984. Insofar as it appears, the insured passed away after a brief illness on November 25, 2013.

It is undisputed that for 30 years Lutfy regularly tendered the quarterly premiums due on this policy, a sum which totaled $388,142.28[1] as of November of 2013. It is likewise undisputed that Lutfy's August 2013 check for that month's premium was returned by his bank for insufficient funds. The balance of the facts and the parties' actions from this point forward are strenuously contested.

When the co-trustees and Lutfy's widow (hereinafter, plaintiffs) made a claim for death benefits as Lutfy's beneficiaries, they were informed by the insurer that the policy had lapsed on October 14, 2013, presumably for nonpayment of the August 2013 premium. In response, plaintiffs commenced this action for damages in March of 2015, claiming that US Life had breached its contract of insurance, and for a declaratory judgment that its policy was in full force and effect when its insured passed away.[2]

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[1] The policy apparently had a loan balance as of the date of death of $170,953.29 (*see* February 28, 2014 letter from AIG's Nikki Clayton, Consumer Affairs Analyst).

[2] On November 24, 2015, this Court executed an Order granting US Life's motion for partial summary judgment dismissing plaintiff's fourth and fifth causes of action for (1) punitive damages for "bad faith" (Plaintiffs' Fourth Cause of Action) and (2) negligent infliction of emotional distress (Plaintiffs' Fifth Cause of Action).

For its part, US Life claims that it sent Lutfy a "Notice of Pending Termination," dated September 15, 2013 (*see* Defendant's April 12, 2016 Affidavit of Kelley Howard, Exhibit 1), advising him that the policy "will terminate unless [a] payment [in the amount of $10,749.57 was] received by October 14, 2013."[3] Plaintiffs deny that Lutfy received any such notice (*see* May 12, 2016 Affidavit of Andre Lutfy, para 8), although his widow acknowledged the receipt of a letter from US Life dated September 16, 2013 (*see* Defendant's Exhibit C) advising Lutfy that it had changed its manner of collecting premiums from an electronic transfer of funds to direct billing.

In her May 12, 2016 Affidavit (as well as at her deposition on July 9, 2015), Mrs. Lutfy claimed that on October 14, 2013, she spoke with a representative of US Life, who instructed her to mail a check in the amount of $10,749.57 by October 24, 2013 (*i.e.*, the end of the policy's 61-day "grace period"), in order to prevent the policy from lapsing.

On or about the date indicated, *i.e.*, October 24, 2013, Mrs. Lutfy maintains that she sent a check in the amount of $10,749.57 to defendant (*see* Defendant's Exhibit D), along with a letter asking US Life to withhold negotiation of the check until November 2, 2013, and requesting that she be notified "if there [was] a problem" (*id*). This letter was apparently lost or disregarded by the insurer, which

[3] Said notification is required pursuant to Insurance Law §3211(b)(2).

appears to have negotiated the check prior to the requested date, as a result of which the check "bounced." Subsequently, under date of November 8, 2013, US Life purportedly mailed plaintiffs a reinstatement application[4] (*see* Plaintiffs' Exhibit 6) requiring that they complete same and return it along with the $10,749.57 premium payment that was claimed to be outstanding, by November 22, 2013, in order to reinstate the policy.

In response, plaintiffs claim that they returned the reinstatement application along with a check payable to US Life in the required amount by overnight mail. The insurer acknowledges that the documents were received on November 15, 2013, and that "[t]he premium payment was deposited into a Company suspense account". However, it then went on to explain that "due to an oversight the reinstatement forms were not timely disbursed to the business area for processing", and that the reinstatement application was subsequently lost (*see* February 28, 2014 correspondence of AIG's Consumer Affairs Analyst, Nikki Clayton). As a result, US Life sent plaintiffs another letter, dated November 22, 2013 (*see* Plaintiffs' Exhibit 7), requesting plaintiffs to complete another reinstatement

[4]According to the deposition of defendant's witness, Cynthia Crompton, "automatic reinstatement" was provided as long as the insured sent in a payment within ten days of the date the policy lapsed (*see* August 20, 2015 EBT, Plaintiff's Exhibit 8, pp 158-159).

application and to include a HIPPA authorization from Lutfy.[5] In addition, the insurer now claimed for the first time, that since plaintiffs' payment of $10,749.57 had not been received until "after the end of the [61 day] grace period," it could not be applied to automatically reinstate the life insurance contract.

In moving for summary judgment dismissing the complaint, US Life maintains that the policy had lapsed, and that reinstatement would have been denied even if plaintiffs' check and the reinstatement application had not become lost. This last argument is based on US Life's underwriting guidelines as compared with Lutfy's medical records.

In opposition to the motion, and in support of their cross motion for summary judgment, plaintiffs argue, *inter alia*, that notwithstanding the return of the August, 2013 payment, defendant has failed to introduce any evidence demonstrating that the insured's $4,000.00 credit on the policy dating from November 4, 2009 was insufficient to maintain coverage (*see* Plaintiff's Exhibit 9; March 8, 2013 letter from defendant notifying Lutfy that he has a credit of $4,000.00).

In response, the insurer denied having received any written instruction from Lutfy (which plaintiffs allege appeared at the

[5]At this point, Mr. Lutfy was still alive.

bottom of his March 8, 2013 letter), advising US Life to apply the above credit to his premium.

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material issues of fact (*see* Alvarez v. Prospect Hosp, 68 NY2d 320, 324; Bennett v. Knipfing, 262 AD2d 260), since issue-finding, rather than issue-determination, is the key to the procedure (*see* Vega v. Restani Constr. Corp., 18 NY3d 499, 505). Moreover, it is not the function of the court on such a motion to assess the parties' credibility or their probability of success on the merits (*see* Grahm v. Columbia Presbyt Med Ctr., 185 AD2d 753, 755-756).

Accordingly, a motion for summary judgment should not be granted where conflicting inferences may reasonably be drawn from the evidence submitted to the court(*see* Disa Realty, Inc. v. Rao,137 AD3d 740, 741; Gusek v. Compass Transp. Corp., 266 AD2d 923; McShane v. Foster, 235 AD2d 462; Morris v. Lenox Hill Hosp., 232 AD2d 184, 185, *affd* 90 NY2d 953), in which case, as here, the court's determination is not restricted to the question of whether or not the pleading **states** a cause of action, but whether, based on the proof before it, the pleader **has** a cause of action. In reaching its determination, the court is required to view the facts in the light most favorable to the party opposing the motion (Jastrzebski v. North Shore School

Dist., 223 AD2d 677, 678), and unless it has been shown that a material fact claimed by the pleader is not one at all, and that no significant dispute exists regarding it, the motion must be denied (*see* Guggenheimer v. Ginzburg, 43 NY2d 268, 275; *see also* McIntrye v. State of New York, 142 AD2d 856, 858). Of course, it is incontrovertible that on any such motion, the burden is on the moving party to make a *prima facie* showing of its entitlement to judgment as a matter of law by the tender of legally sufficient evidence (*see* Winegrad v. New York Univ Med Ctr., 64 NY2d 851, 853; Zuckerman v. City of New York, 49 NY2d 557, 562), and it is only if he or she succeeds, that the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of one or more material issues of fact which require a trial (Zuckerman v. City of New York, 49 NY2d at 559).

Here, the Court is unable to determine, *inter alia*: (1) whether, *e.g.*, Lutfy's 2009 credit with US Life was sufficient to satisfy his purported debt to the insurer; (2) whether, on these facts, plaintiffs had acted effectively to reinstate the policy; (3) the effect, if any, on reinstatement attributable to the insurer's errors in the processing of plaintiffs' November 2013 reinstatement application and premium payment; and (4) in any event, whether the insurer's

"guidelines" would have precluded the reinstatement of Lutfy's policy.

It has never been a policy of this Court to deny a trial where the issues of credibility are as numerous and substantial as those in the case at bar (*see e.g.* Plaintiffs' Exhibits 12 and 13). To the contrary, the prevalence of triable issues of fact require that both the motion and cross motion for summary judgment be denied.

This constitutes the Decision and Order of the Court.

E N T E R,

/s/ Philip G. Minardo
J.S.C.

Dated: Aug. 3, 2016