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86 Civ 24(2)

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. KELLY O'NEILL LEVY **PART** 19

*Justice*

Index Number : 113159/2010
FEINBERG, SANDI
vs
UNITY MUTUAL LIFE
Sequence Number : 001
SUMMARY JUDGMENT

**INDEX NO.** _____

**MOTION DATE** _____

**MOTION SEQ. NO.** _____

**The following papers, numbered 1 to** _____, **were read on this motion to/for** _____

**Notice of Motion/Order to Show Cause — Affidavits — Exhibits** _____ **No(s).** _____

**Answering Affidavits — Exhibits** _____ **No(s).** _____

**Replying Affidavits** _____ **No(s).** _____

**Upon the foregoing papers, it is ordered that this motion is** decided in accordance with the annexed order.

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

RECEIVED
AUG 04 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED
AUG -5 2015
COUNTY CLERK'S OFFICE
NEW YORK

**Dated:** 7-17-15

Kelly O'Neill Levy, J.S.C.
HON. KELLY O'NEILL LEVY

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 19**

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SANDI FEINBERG, individually and as assignee of I.A. ALLIANCE, FTD f/k/a I.APPEL CORP.,

Plaintiff,

- against -

UNITY MUTUAL LIFE INSURANCE COMPANY,

Defendant.

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Index No: 113159/2010

**DECISION/ORDER**
**MOT. SEQ. 001**



**HON. KELLY O'NEILL LEVY:**

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendant's motion for summary judgment and Plaintiff's cross-motion to add or replace Columbian Life Insurance Company as a co-defendant and for sanctions against Defendant:

| Papers | Numbered |
|---|---|
| Defendant's Notice of Motion, Affirmation, Affidavits, Exhibits, and Memorandum of Law | 1 |
| Plaintiff's Notice of Cross-Motion, Affirmation, Affidavits, Exhibits, and Memorandum of Law | 2 |
| Defendant's Reply Affirmation, Affidavit, Exhibits, and Reply Memorandum of Law | 3 |
| Plaintiff's Reply Affirmation, Exhibit, and Reply Memorandum of Law | 4 |

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Plaintiff commenced this action against Unity Mutual Life Insurance Company ("Unity Mutual" or "Unity") seeking damages for breach of contract and damages and reimbursements for overpayments made on a lapsed life insurance policy. At issue is the $500,000 life insurance plan for Herbert Feinberg, husband of policy beneficiary, Plaintiff Sandi Feinberg, first issued in 1987,[1] which lapsed due to insufficient value as of November 9, 2008. The Feinbergs' efforts to

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[1] Ownership of the policy transferred from I. Appel Corporation, of which Mr. Feinberg was founder and Board Chairman, to Mr. Feinberg's wife, Sandi, in 2005. While the policy was with I. Appel, the corporation took a loan against the policy in the amount of $48,384.27,

have the policy reinstated failed when Unity Mutual found Mr. Feinberg, then 82 years old, ineligible for coverage after review of his medical records.

Defendant moves for summary judgment pursuant to CPLR § 3212. Plaintiff filed opposition with cross-motion to add or replace Columbian Mutual Life Insurance Company as a co-defendant pursuant to CPLR 1003 and for sanctions against Unity Mutual for spoliation of evidence and/or potential evidence. The court issues this decision/order after consideration of the papers and oral argument.

***Motion for Summary Judgment***

On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the Petitioner makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997).

Plaintiff makes claims for breach of contract, for reimbursement for overpayments made on the policy at issue, and for damages. To make out a cause of action for breach of contract, a plaintiff must show "the existence of a contract, the plaintiff's performance thereunder, the

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resulting in an increase in the planned periodic premium on the policy (Aff. of Jeanne Clarke, at 6-7). Also while it was held by I. Appel, the policy lapsed in March 2004 due to insufficient value and was subsequently reinstated.

defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010)(internal citation omitted). Here defendant Unity Mutual has established prima facie entitlement to judgment as a matter of law on the breach of contract claim with proof that the life insurance policy at issue lapsed under its own terms when Plaintiff failed to heed warnings in properly-mailed pre-grace period and grace period notices that coverage would lapse if minimum premiums were not paid. Plaintiff had a "flexible premium universal life insurance policy" with Unity Mutual wherein premiums charged are interest-sensitive and payments must be sufficient to maintain a large enough balance in the policy's accumulation fund to keep the policy in force. Plaintiff was required to pay the monthly cost of the insurance, the monthly cost of any benefits provided by riders, and the monthly expense charge. The proofs submitted establish that Plaintiff failed to fulfill its obligations under the policy. Defendant persuasively argues, supported by the affidavit of Jeanne Clarke, Vice President, Planning & Projects for Columbian Life Insurance,[2] and the deposition testimony of Julie Davis, underwriter for Columbian Financial (formerly Unity Mutual Life Insurance Company), that the policy lapsed and Mr. Feinberg's reinstatement application was denied in accordance with the terms of the policy and the standards of Unity Mutual.

Plaintiff fails to raise a genuine triable issue of fact in opposition. Plaintiff, supported by the affidavit and deposition testimony of her husband, Herbert Feinberg, argues that she never received the notices at issue and thus never had the opportunity to cure. Defendant counters that

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[2] According to Ms. Clarke's affidavit, Unity Mutual Life Insurance Company merged with Columbian Mutual Life Insurance Company on July 1, 2011.

the notices were duly issued, addressed, and mailed to Plaintiff's home address in accordance with New York Insurance Law § 3211(a)(1) and § 3203 and Unity Mutual's office practice and procedures. It is undisputed that Plaintiff paid the minimum amount due ($1,782.98) on the July statement which contained a warning that if the minimum was not paid, Plaintiff would enter a grace period and that Plaintiff and her husband were traveling in the summer of 2008. Unity Mutual states that a pre-grace period notice was sent to Plaintiff on August 11, 2008 stating that if payment of the minimum of $2,266.46 was not received on or before September 9, 2008, the policy would enter its grace period. When that payment was not received, Unity issued a grace period notice on September 9, 2008 notifying Plaintiff that in order to not lose the policy, a payment of $6,471.57 was due by November 9, 2008. However, Plaintiff failed to make payments in August, September, and October 2008.

The grace period notices were mailed by Immediate Mailing Services, Inc. ("IMS") pursuant to Unity Mutual's routine office practice and procedure.[3] IMS sent email verifications to Unity Mutual confirming that the notices were sent and subsequently deleted pursuant to company policy. Plaintiff states that she only received a termination notice in November of 2008 notifying her that the policy lapsed and that on or about November 20, 2008, Plaintiff mailed Unity Mutual a check in the amount of $6,571.98 to cover the net premium amount allegedly due by November 9, 2008. The check was deposited into a lockbox but on or about December 5, 2008, Unity Mutual sent the Feinbergs a check refunding the same amount due to cancellation of the policy. Mr. Feinberg subsequently sent the refund check back to Unity, which Unity rejected,

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[3] According to the affidavit of Chris Rousseau, IMS provided mail services to Unity from January 2004 to January 2011.

stating that it could not accept further premium payments. Mr. Feinberg then began the process for reinstatement of the policy.[4]

Defendant has met its burden of showing that the pre-grace period and grace period notices were duly addressed and mailed in accordance with New York Insurance Law § 3211(a)(1) and § 3203 and their office practice and procedure and Plaintiff has not rebutted the presumption of receipt of the two notices. Presumption of receipt may be created "by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed." *Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679, 680 (2d Dep't 2001). When relying on office practice and procedure for presumption of receipt, the office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed. *See Badio v. Liberty Mut. Fire Ins. Co.*, 12 A.D.3d 229, 229 (1st Dep't 2004), *Nassau Ins. Co. v. Murray*, 26 N.Y.2d 828, 829-30 (1978). If a defendant is able to meet its burden of proof and establish that its office practice is routine and reasonable, the burden shifts to the plaintiff who must prove that the routine office practice was not followed or was so careless that it would be unreasonable to assume that notice was mailed. *See id* at 230.

Here Defendant has provided an affidavit from Ms. Clarke, who at the time the notices were allegedly issued was the head of Unity's Policy Administration System, the department which provided the information upon which the notices were issued, and IMS employee Chris

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[4] The court notes that Mr. Feinberg did not characterize the application as one for "reinstatement" but rather as one for continuation of the policy in light of Unity's initial deposit of the November check.

Rousseau, attesting to personal knowledge of specific procedures used by Defendant and IMS to ensure that the notices were properly addressed and mailed. After Unity's IT department accessed the information from the Policy Administration System-generated reports, the information was transmitted to IMS and the notices were generated by IMS. IMS tri-folded the notices and inserted them into Unity Mutual envelopes with windows so that the recipients' addresses were displayed. While neither Ms. Clarke nor Mr. Rousseau was personally involved in the mailing of the subject grace period notices, because here there is adequate evidence from individuals with personal knowledge of the regular course of business, it is not necessary to elicit testimony from the actual employee in charge of the mailing. *See Preferred Mut. Ins. Co. v. Donnelly*, 111 A.D.3d 1242, 1244 (4th Dep't 2013).

Plaintiff does not challenge that routine practice and procedure was followed or as careless but asserts that notices were not mailed. Here there is no mailing list for IMS to check as there was in *Clark v. Columbian Mut. Life Ins. Co.*, 221 A.D.2d 227 (1st Dep't 1995) cited by Plaintiff, and Defendant has established that the practice and procedure it employed was routine and reasonable enough to ensure that the name and address on the grace period notices were accurate. Accordingly, in the absence of a triable issue of fact on the mailing or any other issue, Plaintiff's breach of contract claim is dismissed.

Defendant argues that Plaintiff's second claim, alleging overpayments made on the policy, is also based on breach of contract. Defendant correctly points out that under CPLR § 213(2), Plaintiff's breach of contract claim is subject to a six-year statute of limitations such that any overpayment of premiums would be premised on the assertion that Unity Mutual

overcharged Plaintiff for premiums during the six-year period before the instant action was commenced, or since October 7, 2004. Defendant has established that it in fact charged Plaintiff less than the guaranteed maximum monthly cost of insurance and Plaintiff has failed to come forward with documentation showing otherwise.

In its moving papers, Defendant argues that Plaintiff has not sustained damages in that the Plaintiff had the benefit of the policy while it was in place. In its reply memorandum of law, Defendant cites to *Topiwala v. New York Life Ins. Co.*, 95 A.D.2d 746 (1st Dep't 1983) for the proposition that "New York law does not permit a suit for money damages either in the amount of the present value of the policy or the face amount during the life of the insured." Plaintiff counters that Defendant improperly raised this "new material legal argument" issue in its reply for the first time. While Plaintiff is correct in that the court may not consider arguments made by the movant for the first time in reply, *see Azzopardi v. Amer. Blower Corp.*, 192 A.D.2d 453, 454 (1st Dep't 1993), the court finds that the argument propounded by Defendant in its reply supports the prior statement made in its initial papers that Plaintiff has not sustained damages.

***Plaintiff's Cross-Motion to Amend Caption and for Spoliation Sanctions***

In light of the dismissal, Plaintiff's cross-motion is denied as moot. Though the court need not reach the second branch of the cross-motion seeking sanctions for spoliation of evidence, it notes that Plaintiff did not make the requisite showing that Defendant had the obligation to preserve any evidence. A party seeking sanctions for spoliation of evidence must demonstrate: "(1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind'... and (3) the

destroyed evidence was relevant to the moving party's claim or defense." *Duluc v. AC & L Food Corp.*, 119 A.D.3d 450, 451 (1st Dep't 2014). When a party reasonably anticipates litigation, it must put in place a litigation hold, a suspension of routine document destruction policy in order to ensure preservation of relevant documents. *See VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 36, 48 (1st Dep't 2012). Reasonable anticipation of litigation is established "when a party is on notice of a credible probability that it will become involved in litigation." *Id.* at 43.

Plaintiff argues that her notice to Defendant informing them that she never received any grace period notices constitutes a notice of probable litigation and therefore the verification emails that IMS sent to Defendant should have been saved. Defendant states that the email verifications do not list what particular notice for what particular policyholder was mailed but that they simply state that the entire batch was mailed on a particular day. Thus, Defendant argues that it had no obligation to preserve the email verifications which were deleted three months after date of receipt.

When it comes to what constitutes "notice," the First Department in *VOOM* looked to the guidelines in *The Sedona Conference, Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conf J 265 [Fall 2010], in discussing the validity of the "reasonable anticipation of litigation" trigger. *See id.* at 43. As cited by Defendant, the guidelines state, "...an insurer's receipt of a claim from an insured often will not indicate the probability of litigation, as the insurer is in the business of paying claims often without litigation." *Sedona* at 271. If a claim by an insured is usually not enough to indicate probability of litigation, the

Plaintiff's act of informing the Defendant that it did not receive any grace period notices does not constitute a notice of reasonable anticipation of litigation. Since Plaintiff failed to demonstrate Defendant's obligation to preserve evidence, spoliation sanctions are not appropriate.

This constitutes the Decision and Order of the court.

ENTER:

Dated: July 17, 2015
New York, New York

Kelly O'Neill Levy
Hon. Kelly O'Neill Levy, A.S.C.J.

HON. KELLY O'NEILL LEVY

FILED
AUG -5 2015
COUNTY CLERK'S OFFICE
NEW YORK