SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 39
NASSAU COUNTY

DAVID HOROWITZ.

Plaintiff.

Index No.: 029246/99
Sequence No.: 2

- against -

RELISTAR LIFE INSURANCE CO. OF NEW YORK.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Motion by defendant ReliStar Life Insurance Company of New York (ReliStar) for summary judgment pursuant to CPLR 3212 is granted, and the complaint is dismissed.

Plaintiff brings this action to recover upon a Flexible Premium Adjustable Life Insurance Policy which lapsed for nonpayment of premium on August 16, 1998. Defendant ReliStar is the successor to Lincoln Security Life Insurance Company, which issued the Policy to plaintiff and his then partner Barry Benson, on December 15, 1992 in the face amount of $300,000.00. The Policy included a $300,000. 00 accidental death benefit. In September of 1999, over one year after the Policy's lapse, Benson was killed in a car accident. Had the Policy not lapsed, plaintiff, as beneficiary, would have been entitled to the face value as well as the accidental death benefit, for a total of $600,000. Plaintiff here relies upon a theory of estoppel to assert his claim.

Plaintiff David Horowitz and Barry Benson were partners in a business known as Barid Printing Corporation d/b/a Minutemen Press. In December of 1996 Benson resigned from the business. As of January 1997 the surrender cash value of the subject Policy was $2,198.61. In April of 1997 plaintiff wrote Lincoln requesting a cancellation of the Policy and payment of the cash surrender value to him. He asserted that the partnership agreement terms governed the

Policy term, and that the Policy ceased to operate as of December 19, 1996 when Benson retired. However, the Policy did not reflect the partnership terms, and reflected co-ownership by Horowitz and Benson. Lincoln refused to cancel and pay the surrender value of the Policy without a joint application from both policy holders, Horowitz and Benson. In January of 1998, defendant ReliStar acquired Lincoln and notified policyholders. On June 15, 1998 Horowitz lodged a complaint against ReliStar with the New York State Insurance Department.

At all times subsequent to Benson's retirement, neither former partner paid the premium on the Policy. Accordingly, pursuant to the Policy terms, the cash surrender value was used to pay premiums as they came due, and became depleted as of June 15, 1998. Defendant sent a warning notice on July 15, 1998 and, after a 61 day grace period, final notice that the Policy had in fact lapsed on August 16, 1998. Both notices were sent to the business address on file with ReliStar and returned by the post office as undeliverable and not subject to forwarding.

Benson was killed in a car accident on September 2, 1999. Horowitz submitted a claim for proceeds on September 7, 1999. The claim was denied and this action followed.

ReliStar avers that the Policy lapsed for non payment of premium, and that even if the Notices were sent to an invalid address, the Policy automatically lapses for non payment of premium after one year, regardless of notice (Insurance Law § 3211). Insurance Law § 3211 states in relevant part:

> (a)(1) No policy of life insurance ... delivered in this state or issued for delivery in this state ... shall terminate or lapse by reason of default in payment of any premium ... in less than one year after such default, unless 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.
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> ...
>
> (b) The notice required by paragraph one of subsection (a) hereof shall:
> (1) be duly mailed to the *last known address* of the person insured or if any other person shall have been designated in writing to receive such notice, then to such other person;
>
> ...
>
> (c) ... The statement by any officer, employee or agent of such insurer ... subscribed and affirmed by him as true under the penalties of perjury, stating facts which show that the notice required by this section has been *duly addressed and mailed* shall be presumptive evidence that such notice has been duly given. (emphasis supplied).

Plaintiff alleges that he did not receive either a warning notice or a notice that the Policy had lapsed for nonpayment of premiums, and that defendant should be estopped from relying upon the lapse of the Policy because it sent the required notices to Barid's closed post office box. Plaintiff avers that defendant had knowledge that the notices had not been received, as it was advised by the post office that Barid's mail could not be forwarded, and avers that

defendant should have mailed the notices to his home address which defendant had on file.

Defendant counters that plaintiff closed Barid's post office box and directed the post office not to forward mail, and that he failed to provide defendant with a new address for Barid. Defendant properly mailed the notices to the address in the Policy to which all premium notices had been mailed, that of Barid's post office box.

Insurance Law § 3211 does not require receipt of the required notices. "An insurance carrier 'may effectively cancel its policy by mailing a notice of cancellation to the address shown in the policy, provided that it submits sufficient proof of mailing, regardless of whether the notice is actually received by the insured" (Pressman v. Warwick Ins. Co., 213 AD2d 386, 387). If an insured does not request an address change, notice to the address provided by the insured is sufficient, even if other documentation submitted to the insurer contains a different address (Lerner v. Travelers Ins. Co., 27 Misc.2d 815 [Supreme Court, New York County] [Insured unsuccessfully argued that insurer's actual knowledge of new address should have alerted these representatives to the necessity of changing his address for premium purposes]). Accordingly, nonreceipt of the notices mailed by defendant is not an issue. It is undisputed that defendant duly mailed such notices, as defendant's files indicate they were returned by the post office.

Plaintiff also avers that defendant "should be estopped" from relying upon Insurance Law § 3211(a)(1) as a ground for declaring the Policy lapsed. Plaintiff avers that "acts and conduct which are insufficient to constitute a technical estoppel, may be sufficient to effect a waiver." Plaintiff thus acknowledging that estoppel is not applicable, argues that where the insurer's acts or omissions cause the insured to justly believe, and to act on the belief, that the Policy continued in effect, a waiver is established rely upon Matter of Preston. (Matter of Preston (29 NY2d 364). Plaintiff avers that defendant would not honor his unilateral efforts to cancel the joint policy, and led him to believe that the Policy remained in effect. He avers that defendant did not give notice when the cash surrender value paying the premiums was exhausted, never billed plaintiff for the premiums after the cash surrender was exhausted, and gave plaintiff no notice of the premium default. He avers that he had "every reason to believe at the time of Benson's death, that premiums were still being paid by the Policy's surrender value".

Waiver is not applicable under these circumstances. An insurer may waive a defense when it changes its position with respect to a defense under a policy, but waiver cannot be used to expand coverage (Schiff Assoc., v. Flack, 51 NY2d 692). " 'Extension of coverage' cannot be attained by waiver which is a 'voluntary and intentional relinquishment of a known right' " (Schiff Assoc., v. Flack, supra). Only where there is direct or circumstantial evidence that the insurer "intended to abandon" a defense will waiver be found to prevent a forfeiture (Schiff Assoc., v. Flack, supra). Here, ReliStar never took any position with regard to policy defenses which could operate as a waiver of the defense of non payment of premium.

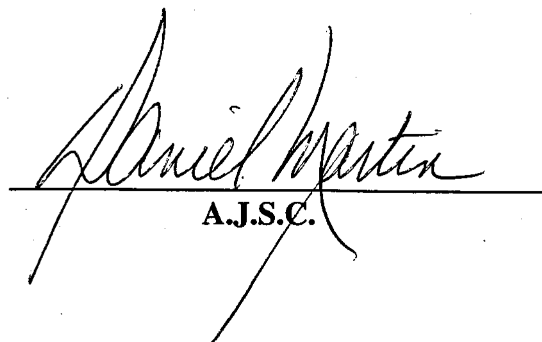
Plaintiff's reliance on Preston is further misplaced. In Preston the insurer attempted to rescind a policy on the grounds of material misrepresentation, and when that argument was rejected by the court, it then argued non payment of premiums. The court held that the insurer

induced the nonpayment of premiums by declaring the policy void, which declaration was tantamount to a refusal to accept premiums. Therefore, under the familiar principle that "he who prevents a thing being done cannot avail himself of the non-performance he has occasioned" (Matter of Preston, supra, at p 371), the court held that the insurer waived nonpayment as a defense.

Here defendant did nothing to induce plaintiff not to pay premiums. Horowitz had independent reason for refusing to pay premiums and could have done so at any time during the one and a half years before exhaustion of the cash surrender value. Defendant merely refused to cancel the policy due to the unilateral request of a joint policy holder; it did not provide reason to believe that premiums would be rejected, indeed it maintained the policy from the cash surrender value according to the policy terms upon the joint owners default in payment. Only upon exhaustion of the cash surrender value did defendant take the position that the policy lapsed, and gave the appropriate notices. And, as noted, even were the notices deficient, plaintiff would only have gained coverage for one extra year, an insufficient time to cover for the claim he now asserts.

It is noted that plaintiff was on notice of amount of the cash surrender value of the Policy, as he sought to recover that amount from defendant by his unilateral attempt to cancel the policy. Moreover, he presumably knew the cost of premiums having purchased the Policy, and by simple calculation could have determined an approximate time when the cash surrender value would be exhausted, had he wished to continue the policy. Here plaintiff has indicated his intent to allow the Policy to lapse. He indicated that he no longer wanted or needed joint life coverage with his former partner, with whom relations had deteriorated to the point where he could not even secure joint consent to cancel the policy. He attempted to cancel unilaterally. He refused to pay premiums. He changed the address to which premium notices were mailed and refused to provide a forwarding address. And, finally, he did not provide a new mailing address to defendant. Plaintiff here cannot complain that the policy lapsed, nor establish grounds for a waiver of defendant's right to assert lapse for non payment of premium as a defense in this action. Accordingly, as there are no issues of fact, defendant is awarded summary judgment.

Settle judgment on notice.



A.J.S.C.

Dated: July 19, 2000