UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

GAIL EDWARDS a/k/a
GAIL RAFIANI,

Chapter 13
Case No.: 02-12708

Debtor.

GAIL EDWARDS a/k/a
GAIL RAFFIANI,

Plaintiff,

v.

Adversary No. 03-90005

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY and
CHASE MANHATTAN MORTGAGE CORP., f/k/a CHEMICAL BANK, a successor by merger to The Chase Manhattan Bank, N.A. successor by merger to Chase Lincoln Bank, N.A.,

Defendants.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Currently before the court is the adversary proceeding commenced by Gail

Edwards (the "Debtor"), a/k/a Gail Raffiani, seeking payment from New York Central Mutual Fire Insurance Company ("New York Central") under an insurance policy it issued to the Debtor.

Jurisdiction

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Facts

Having reviewed the parties' pleadings, memoranda, submitted documents, and stipulation of facts ("Stip. of Facts") (Doc. No. 37), and having taken judicial notice of certain other facts already in the record, this court makes the following findings. The Debtor filed a Chapter 13 bankruptcy petition on April 25, 2002. New York Central, as insurer, issued a homeowner's insurance policy to the Debtor, as insured, for her residence at 1458 Palenville Road, Saugerites, New York, with coverage for the period May 7, 1998 through May 7, 1999 (the "Policy"). (Stip. of Facts ¶ 3.) Defendant Chase Manhattan Mortgage Group ("Chase") held a mortgage against the Debtor's residence. The Policy between New York Central and the Debtor contained the following clause establishing a two-year limitation period for commencement of an action against the insurer for claims specified in the Policy:

> **Suit Against Us.** No action can be brought unless the policy provisions have been complied with and the action is started within two years after the date of loss.

(Stip. of Facts Ex. C at 10.)

The Policy also contains a "Loss Payment" provision which provides:

> Loss will be payable 60 days after we receive your proof of loss and a. reach an agreement with you.

Id.

The Debtor claims fire damaged her residence on November 5, 1998. (Stip. of Facts ¶ 5.) On July 7, 1999, and again on March 30, 2000, the Debtor submitted Sworn Statements in Proof of Loss to New York Central along with statements as to the full cost of repair and replacement. (Stip. of Facts ¶ 6.) New York Central settled the Debtor's claim in full. (Stip. of Facts ¶ 8.) On July 15, 1999, New York Central issued a check to Debtor and Chase in the amount of $48,625. *Id*. On May 23, 2000, New York Central issued a second check to Debtor and Chase in the amount of $48,625 as a replacement for the settlement check issued on July 15, 1999. *Id.* Both checks are clearly marked that they are "VALID 6 MONTHS ONLY." (Compl. Ex. A.). The Debtor alleged Chase failed or refused to endorse either check from New York Central. New York Central has refused to issue a third check to the Debtor to replace the check issued on May 23, 2000, claiming the amount is no longer due.

The Debtor commenced this adversary proceeding against defendants Chase and New York Central on January 6, 2003, after the two-year limitation period in the Policy expired.[1] The Debtor seeks $48,625, the agreed upon settlement amount, from New York Central. New York Central filed an answer on or about March 3, 2003. New York Central moved for summary judgment seeking dismissal of the adversary proceeding on the basis that the action is barred by the two-year statute of limitations for the commencement of suits contained in the Policy. The Debtor did not cross move for summary judgement. By order dated November 25, 2003, New York Central's motion for summary judgment was denied (Doc. No. 39). At the time of trial, the parties consented to the proceeding being submitted to the court for a decision without a hearing.

[1]The court's docket indicates an order was entered on October 12, 2005 discontinuing the adversary proceeding with prejudice against Chase Manhattan Mortgage Corporation.

Arguments

New York Central asserts that both of the Debtor's causes of action are based upon breach of contract and argues that the Debtor has not established how New York Central failed to perform under the Policy. New York Central contends it received the Sworn Statements in Proof of Loss from the Debtor on July 7, 1999 and March 30, 2000 asserting a claim for $48,625. New York Central also admits receiving a document from the Debtor entitled "Statement as to Full Cost of Repair or Replacement Under the Replacement Cost Coverage Subject to the Terms and Conditions of this Policy." Pursuant to this document, the Debtor's full cost of repair or replacement was $48,625. New York Central admits it issued two settlement checks to the Debtor, each in the amount of $48,625 in full settlement of its claim. New York Central points out that the checks it issued were in the exact amount of the Debtor's claim, were issued within 60 days of receipt of the Statements in Proof of Loss, and were in the form of good and legal tender. Thus, New York Central avers that it fully complied with the terms of the Policy and discharged all of its obligations thereunder.

Even assuming, arguendo, that the Debtor could establish the elements necessary for her prima facie case for breach of contract, New York Central contends the Debtor's action is barred by the two-year limitation period specified in the Policy. The Debtor counters that in issuing the settlement checks well before the expiration of the two-year period, New York Central lulled her into believing it would not invoke the contractual limitation defense, thereby triggering estoppel or waiver. It is the Debtor's position that "there can be no action that will prevent the insured from suing the claim more completely then handing over a check for what he has agreed is the

full amount." (Debtor's Responsive Mem. 2.) New York Central asserts that reliance on these checks is misplaced, since each represents New York Central's full and complete discharge of its obligations under the Policy and nothing about the checks could be construed as a waiver of its rights under the Policy. New York Central argues that the Debtor's waiver argument lacks both factual and legal justification as a "waiver requires the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. *See New Medico Assocs*., 267 A.D.2d at 759." (New York Central's Sup. Trial Br. 4.)

The Debtor also contends that New York Central knew the Debtor was not represented by an attorney or an adjuster at the time she negotiated her claim with New York Central and even if she had read the Policy, she probably would not have understood it. Thus, the Debtor asserts New York Central was under some duty when it handed out the second check to notify the Debtor that the two-year limitation period under the Policy was about to expire, and she had a limited time to get the proper endorsements on the check and negotiate it.

New York Central counters that whether the Debtor read the Policy and understood its two-year limitation period is irrelevant as "an insured is bound by the terms of the contract whether read or not." *Blitman Construction Corp. v. Insurance Company of North America*, 66 N.Y.2d 820, 498 N.Y.S.2d 349 (1985). (New York Central's Responsive Trial Brief 1.)

Discussion

New York Central asserts it did everything required of it under the Policy and, thus, the Debtor has not met her burden in establishing a breach of contract. It appears clear that New York Central complied with the terms of the Policy by accepting the Debtor's required documentation and issuing a settlement check for the full amount of the Debtor's claim within 60

days of receipt of the proofs of loss. Later, New York Central issued a replacement check at the Debtor's request. However, despite the foregoing, New York Central never paid the Debtor's claim. Under New York law, a check is not considered absolute payment until it is honored by the drawee bank. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 909 (3d Cir. 1994), citing, *Demerritt v. Levitt*, 71 A.D.2d 757, 419 N.Y.S.2d 319, 320, *appeal denied* 48 N.Y.2d 607, 423 N.Y.S.2d 1025, 399 N.E.2d 955 (1979). Thus, the court finds that although New York Central tendered the settlement checks to the Debtor, it failed to pay the Debtor's claim as it had agreed.

The parties do not dispute that the statutory period designated in the Policy had already expired when the Debtor commenced this adversary proceeding on January 6, 2003. New York Central continues to argue the adversary proceeding should be dismissed because it was not commenced within the contractual limitation period despite the court's denial of its motion for summary judgment based upon its contractual limitations defense.

New York Central asserts that the court found the reissued settlement check was evidence of New York Central's waiver of the Policy's limitation period. The court, however, did not find that the reissued settlement check in and of itself constituted a waiver. Rather, the court's prior decision was based upon its finding that the Debtor was lulled into believing that the time limitation under the Policy would not be invoked based upon New York Central's settlement of her claim in full prior to the expiration of the contractual period and, thus, New York Central was estopped from raising the limitation provision as a defense. This finding was based in part on language contained on the reissued settlement check, namely that it was valid for 6 months and, thus, it would be honored after the expiration of the Policy's limitation period. In order to clarify its findings and prior decision, the court will address New York Central's

arguments in support of its contractual limitation defense.

New York Central claims the facts of this case are almost identical to those in *Kraft v. Colonial Cooperative Insurance Company*, 197 A.D.2d 870, 602 N.Y.S.2d 281 (4th Dep't 1993). The appellate court in *Kraft* dismissed plaintiff's action commenced more than two years after the loss and beyond the policy's two year limitation period, after it reversed the lower court's denial of defendant's motion for leave to amend its answer to add a contractual limitations defense. The rendition of the facts, however, is scant. It appears the insurance proceeds check was issued 18 months after the loss, but was not cashed. The plaintiff's underlying breach of contract action was based on the insurer's issuance of the check to copayees not named in the policy. It cannot, however, be ascertained from the decision that the insurance company refused to honor the check when presented by the copayees, nor do we know if Plaintiff asserted a waiver and/or estoppel argument.

New York Central relies upon *Gilbert Frank Corp. v. Federal Insurance Co.*, 70 N.Y.2d 966 (1988), *Affordable Auto Repair, Inc. v. Travelers Indem. Co.*, 292 A.D.2d 477, 739 N.Y.S.2d 271 (2d Dep't 2002), and *McGivney v. Liberty Mut. Fire Ins. Co.*, 305 A.D.2d 559, 759 N.Y.S.2d 379 (2d Dep't 2003), for the proposition that to find a waiver, there must be evidence of a clear manifestation of intent. In each of these cases the courts found that evidence of settlement negotiations or communications between an insured and its insurer, without more, is insufficient to prove waiver. *Id*. The courts also pointed out that the plaintiffs offered no evidence of other conduct by the defendants which misled or lulled the plaintiffs into sleeping on their rights under the policies in question. *Id*. More specifically, the court in *Gilbert Frank Corp*. did not find waiver applicable to the facts before it, because an investigation and

negotiations continued between the plaintiff and defendant *after* the expiration of the contractual limitations period. *Gilbert Frank Corp.*, 70 N.Y.2d at 968. As such, the court concluded that because the conduct of the defendant occurred *after* the time limit had passed, the plaintiff could not possibly have relied on that conduct in its failure to commence an action before the time period expired. *Id.*

In contrast, in *Ilic, et. al. v. Peerless Insurance Co., et. al.*, 175 Misc.2d 947, 670 N.Y.S.2d 1006 (1998), the court denied the defendant's motion for summary judgment because it found an issue of fact existed as to whether the defendant waived its right to assert a statute of limitations defense after issuing two payments on the claim with a note stating "SUBJECT TO FINAL REVIEW AND SETTLEMENT." *Ilic*, 175 N.Y.S.2d at 1008. The court held that the insinuation of settlement by the defendant *before* the expiration of the limitations period was sufficient to create an issue of fact as to whether the defendant had "lulled the Plaintiffs into sleeping on their right to commence an action." *Id*.

Other courts have made it clear that when a defendant's conduct misleads a plaintiff into believing that the defendant will not invoke the time limitation in a policy, the defendant is estopped from later asserting the defense. *See, e.g., Carat Diamond Corp., v. Underwriters at Lloyd's of London, et. al.*, 123 A.D.2d 544, 506 N.Y.S.2d 708 (1st Dep't 1986), *Fotochrome, Inc. v. American Insurance Co.*, 26 A.D.2d 634, 272 N.Y.S.2d 446 (2d Dep't 1966); *Burg v. City of New York*, 108 Misc.2d 357, 437 N.Y.S.2d 593 (1981). "An estoppel rests upon the word or deed of one party upon which another rightfully relies, and, so relying, changes his position to his injury." *Triple Cities Constr. Co. v. Maryland Cas.Co.*, 4 N.Y.2d 443, 448 (1958) (citations omitted).

In this case, the contractual limitations period expired November 5, 2000. Unlike the defendant in *Gilbert Frank Corp.*, New York Central issued the second settlement check on May 23, 2000, *before* the contractual limitation period had passed, and it was valid until November 23, 2000. Since the check issued by New York Central explicitly states "VALID 6 MONTHS ONLY," it is only reasonable that Debtor, knowing the check would be valid for six months from the date of issue, relied on the inference that New York Central did not intend to avail itself of the contractual limitations defense. This is logical since as of November 5, 2000, the Debtor had no cause of action against New York Central because it had settled the Debtor's claim in full and tendered a check for the full settlement amount that on its face was valid after the expiration of the limitations period. In addition, there is no prejudice to New York Central. This is not a case where evidence of the loss, witnesses, etc. may no longer be available to New York Central's detriment. New York Central investigated the Debtor's claim and agreed to pay it in full. The settlement funds were assumably earmarked and in New York Central's account when it issued the two settlement checks to the Debtor.

Conclusion

Based upon all the foregoing, the court finds that New York Central failed to pay the Debtor's claim as agreed pursuant to her home owners policy and judgment shall be entered in the amount $48,625 in favor of the Debtor and against New York Central.

It is so ORDERED.

Dated: 7/25/06

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge