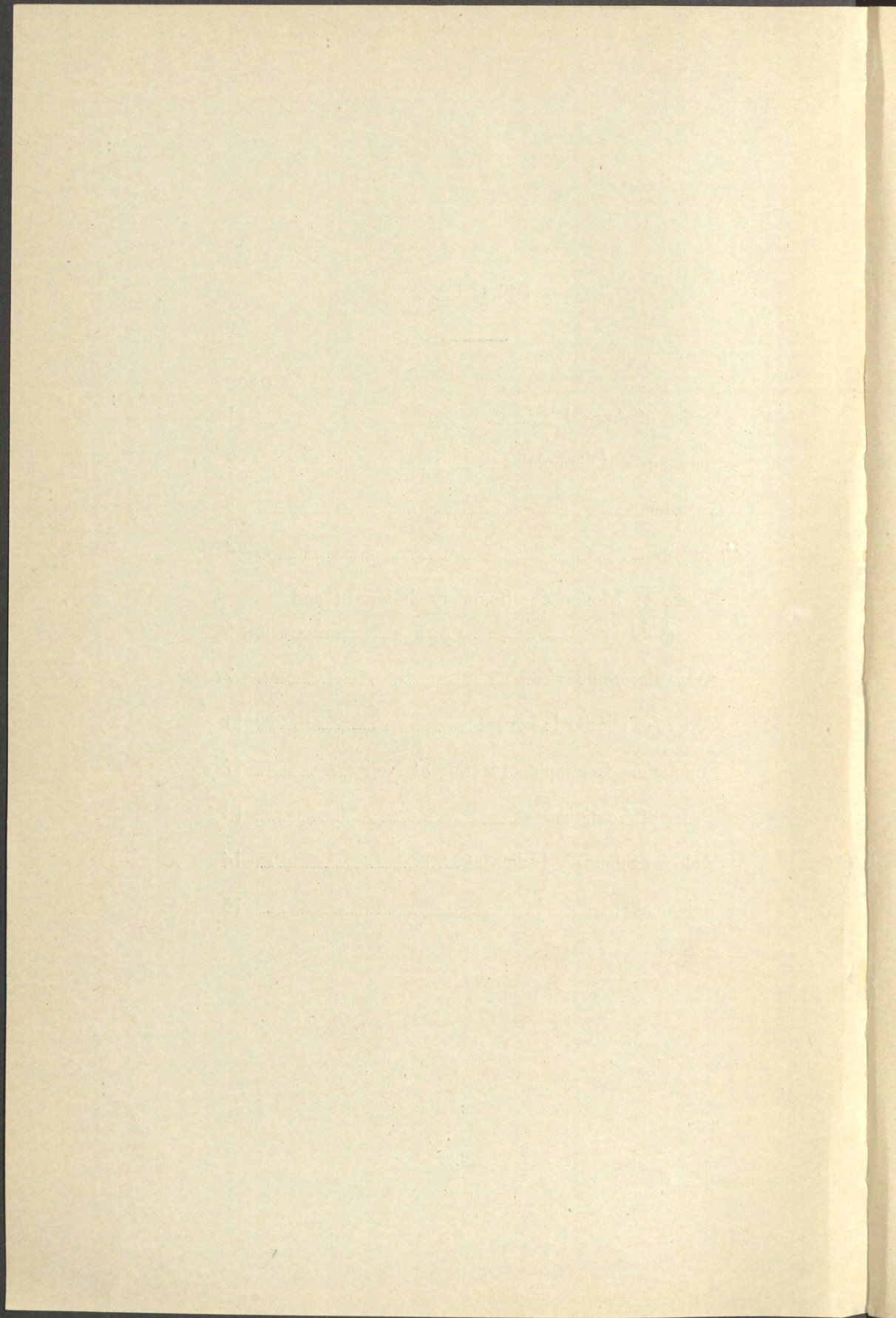


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New Jersey Supreme Court

MORRIS SKOLNIK,
Plaintiff,

vs.

THE COLUMBIAN NATIONAL
LIFE INSURANCE COMPANY,
Defendant.

} Action at Law.

10

NOTICE OF APPEAL

(Filed October 23, 1928)

TAKE NOTICE, that the defendant, The Columbian National Life Insurance Company, hereby appeals 20 from the judgment of the New Jersey Supreme Court, entered in the above entitled cause on October 9, 1928, in the amount of \$1,198.07 damages and costs, to the New Jersey Court of Errors and Appeals and Last Resort in all Causes, upon the following grounds:

1. That the entry of the rule made by the Honorable William S. Gummere, Chief Justice, striking out defendant's answer, filed in said cause, on the ground that said answer and the defense set up thereby is sham, and that the defendant had failed to show such facts as entitled it 30 to defend, and the entry of the said judgment, are erroneous and constitute an abuse of judicial discretion, because the said defendant had, by affidavits produced on the argument of the motion for said rule and filed in this Court, shown such facts as in law constitute a proper de-

2

Summons and Complaint

fense to said cause of action, and as entitle it, in law, to defend said cause of action.

CHARLES DEF. BESORE,
Attorney of Defendant.

Dated October 18, 1928.

TO HARRY CASTELBAUM, ESQ.,
Attorney of Plaintiff.

10

SUMMONS AND COMPLAINT

(Filed June 13, 1928)

THE STATE OF NEW JERSEY

TO

(SEAL) THE COLUMBIAN NATIONAL LIFE
INSURANCE COMPANY, a corporation
of Massachusetts

20

YOU ARE SUMMONED, to answer the
annexed complaint of

MORRIS SKOLNIK

30 in an action at law in the Supreme Court, and TAKE
NOTICE, that unless you file your answer to said com-
plaint with the Clerk of the Supreme Court at Trenton,
within twenty days after service upon you of this writ, and
the annexed complaint, the plaintiff may proceed in the
suit, and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the
Supreme Court, at Trenton, this 25th day of May, 1928.

FRED L. BLOODGOOD,
Clerk.

HARRY CASTELBAUM,
Attorney.

NEW JERSEY SUPREME COURT
COUNTY OF ESSEX

<p>MORRIS SKOLNIK, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p>THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A corpora- tion of Massachusetts, <i>Defendant.</i></p>	}	<p>Action at Law. 10</p>
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COMPLAINT

The plaintiff, Morris Skolnik, residing in the City of Newark, County of Essex and State of New Jersey, says: 20

1. On or about January 20th, 1921, Selig Skolnik entered into a contract of Life Insurance with defendant, under term of which contract of insurance the defendant agreed to pay the sum of One Thousand (\$1,000) Dollars to the beneficiary therein upon the death of said Selig Skolnik.

2. On or about August 18th, 1922, Selig Skolnik entered into a contract of Life Insurance with defendant, under term of which contract of insurance the defendant agreed to pay the sum of Fifteen Hundred (\$1,500) Dol- 30
lars to the beneficiary therein upon the death of said Selig Skolnik.

3. The said contract of insurance was in force, and premiums were paid up to and including January 13th, 1928, on which date the said Selig Skolnik departed this life, and upon which date the plaintiff herein was the

beneficiary under both of the contracts of insurance as hereinabove set forth.

4. Plaintiff has made due proof of the death of said Selig Skolnik, and filed his claim in accordance with the terms of the said contracts with the defendant and demanded payment of the sum of Twenty-five Hundred (\$2,500) Dollars from the defendant, being the amount due under the policies, but the defendant has refused and still refuses to pay the same.

10 Plaintiff demands as damages the sum of Twenty-Five Hundred (\$2,500) Dollars, plus interest and costs of suit to be taved.

HARRY CASTELBAUM,
Attorney for Plaintiff.

ANSWER

(Filed June 22, 1928)

20

The defendant, The Columbian National Life Insurance Company, a corporation of Massachusetts, answering the complaint of Morris Skolnik, says that:

1. It admits the allegations of paragraph 1 of the complaint;

2. It admits the allegations of paragraph 2 of the complaint;

3. It admits the allegations of paragraph 3 of the complaint;

30 4. It admits the allegations of paragraph 4 of the complaint;

FIRST DEFENSE

5. Each of said policies contain the following provision:—"This policy shall be incontestable after one year from date of issue except for non-payment of premium,

Notice of Motion for Summary Judgment and 5
Affidavit

subject, however, in case of misstatement of age to an adjustment of the insurance proportionate to the premium at the true age";

6. Each of said policies was issued on an application in writing made to the defendant and signed by the assured, a true copy whereof is annexed to each of said policies;

7. In said application for policy No. 99795, the said assured stated his age, at his nearest birthday, to be 53 years, whereas, at the time of making said application said assured was actually of the age of 63 years at his nearest birthday; 10

8. In said application for policy No. 113607, the said assured stated his age, at his nearest birthday, to be 55 years, whereas, at the time of making said application said assured was actually of the age of 65 years at his nearest birthday:

10. By reason of the foregoing provision of said policies, the defendant is obligated to make payment to the plaintiff in the sum of \$582.81 under said policy No. 99795 and \$822.64 under said policy No. 113607, which amounts have been tendered by the defendant to the said plaintiff, and the tender thereof refused. 20

CHARLES DEF. BESORE,
Attorney of Defendant.

NOTICE OF MOTION FOR SUMMARY 30
JUDGMENT AND AFFIDAVIT

(Filed October 9, 1928)

To CHARLES DEF. BESORE, ESQ., *Attorney of Defendant:*

TAKE NOTICE that on Saturday the 7th day of July, 1928, at ten o'clock in the forenoon or as soon

6 *Notice of Motion for Summary Judgment and Affidavit*

thereafter as counsel can be heard, at the Court House in Newark, I will move before his Honor the Chief Justice on behalf of the plaintiff for an order striking out the answer of the defendant and for judgment final or in the alternative for final judgment in the sum of Fourteen Hundred and Five Dollars and Forty-Five Cents (\$1,405.45) being the sum admitted to be due by the defendant on the following grounds.

- 10 1. That the allegations in the answer set up in the first defense are sham and frivolous as appears from the annexed affidavit.

HARRY CASTELBAUM,
Attorney of Plaintiff.

Dated June 30, 1928.

STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

- 20 I, Morris Skolnik, of full age, being duly sworn on my oath according to law depose any say:
I am the plaintiff in the above cause; that the assured's statement of his age as fifty-three (53) years and fifty-five (55) years in the respective application for policy was assured's correct age; that the defendant herein did sometime in 1923 apply to me for the return of the policies herein sued upon, upon the ground that such defendant claimed that they had information that the age of the assured was not the age stated in such applications;
30 that at that time a representative of the defendant, one Max Harmelin, did visit my place of business, such Max Harmelin being at that time and still being the State Agent for the defendant, and requested the return of such policies stating to me that the reason the defendant desired the return of such policies was as hereinbefore stated, that they had information that the age of the assured was misstated; that I denied that such was the fact and refused to return such policy; I further state that

from and after said visit in 1923 I continued to pay the premiums upon the policies sued upon up to and including January 13th, 1928, which is admitted by the defendant, and that at no time after such visit in 1923 did defendant refuse to accept such premiums or notify me that such premiums were credited on such contracts of insurance in any other manner than in the manner specified in such policies of insurance; I further say that all the information that the defendants had with reference to the age of such assured was in their possession at the time that they visited my place of business, to wit in 1923; I do further say that there is due and owing to me the sum of Twenty-five Hundred (\$2,500) Dollars with interest from January 13th, 1928, and am informed and do believe that there is no defense to the action. 10

MORRIS SKOLNIK,

Sworn and subscribed to before me this 29th day of June, 1928.

THOMAS R. GRIMM,

An Attorney at Law of N. J. 20

ANSWERING AFFIDAVITS

(Filed October 9, 1928)

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

30

I, Frederick H. Nash, of full age, being duly sworn on my oath according to law, depose and say:

I am the General Counsel of the defendant charged with the duties of advising the defendant as to settlements and defending cases. In 1923 the defendant had information tending to show that the insured, Selig Skolnik, was about ten years older than his applications for said

policies had stated and accordingly through its agent, Max Harmelin, the defendant offered the plaintiff in behalf of his father, the said insured, to return the premium and take back the policies, but the plaintiff asserted that his father's age was truly stated in the applications and refused to return the policies. At that time one of the policies had become incontestable except for non-payment of premium and shortly thereafter the second policy became thus incontestable. Until after both policies had
10 become incontestable the defendant did not have information sufficiently definite to base a suit for rescission on the ground of misstatement of age.

After both policies had become incontestable "subject, however, in case of misstatement of age to an adjustment of insurance proportionate to the premium at the proper age," the defendant obtained further information justifying its belief that the insured was at least ten years older than he would have been if he had been born October 16, 1867, as stated in the applications.

20 This information was definite and certain and consisted in part of a statement made in writing by the plaintiff and signed by him wherein the plaintiff certified that his father was 70 years old in 1925.

After the defendant had received this information it no longer had the right to sue for rescission of either of the policies and received the premiums thereunder as it was legally required to do. Accordingly both policies at the death of the insured were in force subject to an adjustment of the insurance proportionate to the premiums at
30 the true age.

The defendant acting under my advice offered to settle both policies on the basis that the insured was born in 1857 instead of 1867. On that basis the amount of insurance which the premium under policy No. 99795 would have brought was \$582.81 and the amount of insurance which the premium under policy No. 113607 would have brought was \$822.64. Accordingly, the

defendant delivered its checks for said amounts but they have been returned by the plaintiff's attorney and are held by the defendant subject to the request of the beneficiary.

And the defendant says that it is willing that final judgment may be entered in behalf of the plaintiff in the sum of Fourteen Hundred Five Dollars and Forty-five Cents (\$1,405.45).

FREDERICK H. NASH.

Subscribed and sworn to before me this twelfth day of July, 1928.

10

SUMNER H. BABCOCK,
Notary Public.
(Notarial Seal)

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.;

Charles DeF. Besore, of full age, being duly sworn 20
on his oath according to law says:

I am the attorney for the defendant in the above entitled cause by whom the answer affected by this motion was drafted and filed;

I filed the same on information received from the Home Office of the defendant Company to the effect that certain information had been received from one of the examining physicians of the Company, who had examined the assured for other insurance, that from the appearance of the assured he was of the opinion that the assured was 30
actually ten years older than the age given by the assured in the application for the policies, upon which this suit is founded, and further information to the effect that the plaintiff in this cause had, in applications made to other Insurance Companies for insurance upon his own life, stated that his father, the assured in this cause, was 65 years old on or about June 11, 1924, that he was 65

years old on December 28, 1918 and that he was 60 years old on January 21, 1921 and that he was 70 years old on November 5, 1925;

10 Since I have received notice of this motion, I personally have inspected three written applications made by the plaintiff for insurance on his own life to an Insurance Company, whose records are subject to the subpoena of this Court, and I have found that annexed to the application for insurance made by the plaintiff, under
20 date of November 2, 1925, there appears a memorandum, over a signature purporting to be that of this plaintiff, upon which he made a statement in the declarations to the medical examiner, dated November 5, 1926, that plaintiff's father, the assured in this cause, was 70 years old on that date; that annexed to the application for insurance made by the plaintiff, under date of January 12, 1921, there appears a memorandum, over a signature purporting to be that of this plaintiff, upon which he made a statement in the declarations to the medical examiner,
30 dated January 21, 1921, that plaintiff's father, the assured in this cause, was 60 years old on that date; and that annexed to the application for insurance made by the plaintiff, under date of December 16, 1918, there appears a memorandum, over a signature purporting to be that of this plaintiff, upon which he made a statement in the declarations to the medical examiner, dated December 28, 1918, that plaintiff's father, the assured in this cause, was 65 years old on that date;

30 I have had an investigation made of the records in the office of the Commissioner of Immigration at Ellis Island, New York Harbor, New York, and I am informed that said records show that one Haim Dooline arrived in the United States on October 18, 1920, on the S. S. "Caroline", of the French Line, from Bordeaux, France, and I am informed by the Assistant Commissioner of Immigration at Ellis Island that the records of said office show that his age was given as 61 years when he arrived

on that date, and that this person, with two other persons, was turned over to M. Skolnik, described as his son, of 31 Prince Street, New York City;

In the applications for the policies of insurance, upon which this suit is brought, the assured stated his residence as 31 Prince Street, Newark, N. J., and in the application for change of beneficiary, annexed to said policies of insurance, the residence of the plaintiff, Morris Skolnik, is given as 31 Prince Street, Newark, N. J. The death certificate filed in the office of the City Clerk of the City of Newark shows that assured's full name was Chaim Zelig Skolnik, and I am informed and expect to be able to prove that the name "Haim" used in the record at Ellis Island is a phonetic spelling of the word "Chaim", and that the family at one time used the name "Dooline";

I further expect to show that the said Haim Dooline was the assured and that his age on October 18, 1920 was 61 years, whereas, the age given by him in his applications for the insurance upon which this cause is based was 53 years on January 12, 1921 and 54 years on July 28, 1922.

CHARLES DEF. BESORE.

Sworn and subscribed before me this 20th day of September, A D., 1928.

ANNA S. MAYERS,
Notary Public of New Jersey

ORDER FOR PARTIAL JUDGMENT

(Filed October 9, 1928)

It appearing by the answer of the defendant filed in the cause that admits part of the claim to the extent of Fourteen Hundred and Five Dollars and Forty-five Cents (\$1,405.45),

12 *Stipulations Continuing Hearing of Notice*

IT IS ORDERED that final judgment on that part of plaintiff's claim admitted to be due by defendant be entered in favor of the plaintiff and against the defendant for the sum of Fourteen Hundred and Five Dollars and Forty-five Cents (\$1,405.45) together with interest on the same from January 13, 1928, amounting to Forty-two Dollars (\$42.00);

10 IS IS FURTHER ORDERED that the plaintiff's right to proceed with the cause as to the balance of his claim and the defendant's right to defend same are expressly reserved.

Let this rule be entered in the minutes.

Dated—July 28th, 1928.

WM. S. GUMMERE,
Chief Justice.

On motion of
HARRY CASTELBAUM,
Attorney of Plaintiff.

20 I do hereby consent to the entry of the above rule.
CHARLES DEF. BESORE,
Attorney for Defendant.

STIPULATIONS CONTINUING HEARING
OF NOTICE

(Filed September 13, 1928)

30 IT IS HEREBY STIPULATED AND AGREED, between the plaintiff by his attorney, Harry Castelbaum, and the defendant by its attorney, Charles DeF. Besore, that the hearing of plaintiff's motion to strike out the defendant's answer and for final judgment, noticed to be argued on the seventh day of July, 1928, and subsequently continued to September eighth, 1928, be continued to September twenty-ninth, 1928, at ten o'clock in

the forenoon (daylight saving time), or as soon thereafter as counsel can be heard thereon, at the Court House, in the City of Newark, and that no further notice of the hearing of said motion need be given.

Stipulated and agreed this eleventh day of September, 1928.

HARRY CASTELBAUM,
Attorney of Plaintiff.
CHARLES DEF. BESORE,
Attorney of Defendant. 10

ORDER OF CONTINUANCE

(Filed October 9, 1928)

It appearing that motion to strike out answer and for summary judgment has been made by Harry Castelbaum, Esq., Attorney for Plaintiff, on the 21st day of July, 1928 and such motion having been continued until the 28th day of July, 1928 and upon the annexed consent of Charles DeF. Besore, Esq., Attorney for Defendant; 20

IT IS ORDERED that such motion to strike out answer and for summary judgment be and the same is hereby continued until the 8th day of September, 1928.

We hereby consent to the above order of continuance.

HARRY CASTELBAUM,
Attorney for Plaintiff. 30
CHARLES DEF. BESORE,
Attorney for Defendant.

making a total of Eleven Hundred Forty-two Dollars and Forty-five Cents (\$1,142.45) together with costs.

Let this rule be entered in the minutes.

Dated—October 6th, 1928.

WM. S. GUMMERE,
Chief Justice.

On Motion of

HARRY CASTELBAUM,

Attorney of Plaintiff.

Rule actually entered October , 1928. 10

JUDGMENT

(Entered October 9, 1928)

Afterwards upon proceedings duly had according to the statute, the Court ordered the said answer to be struck out as sham as to the balance of the plaintiff's claim, to wit: the sum of \$1,142.45. 20

Whereupon it is adjudged that the plaintiff, Morris Skolnik do recover of the said defendant The Columbian National Life Insurance Company the sum of Eleven Hundred Forty-two Dollars and Forty-five Cents, damages, being the balance of the plaintiff's claim, together with his costs which have been taxed at the sum of Fifty-five Dollars and Sixty-two Cents making in the whole the sum of Eleven Hundred Ninety-eight Dollars and Seven Cents.

Damages—\$1,142.45 30
Costs— 55.62

\$1,198.07

WILLIAM S. GUMMERE,
Chief Justice.

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[Faint, illegible text]

[Faint, illegible text]

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

<p>MORRIS SKOLNIK, <i>Plaintiff- Respondent,</i> <i>vs.</i> THE COLUMBIA NATIONAL LIFE INSURANCE COMPANY, <i>Defendant-Appellant.</i></p>	}	<p><i>On Appeal from the Supreme Court.</i></p>
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BRIEF OF THE PLAINTIFF-RESPONDENT.

Facts.

The plaintiff in this cause sued the defendant on two policies of life insurance issued on the life of Selig Skolnik and under which said policies the plaintiff was the beneficiary; plaintiff's allegations in the said complaint setting forth the making of the two contracts of life insurance with the defendant, that the contracts of insurance were in force and the premiums paid up to and including the date of death of the insured and that due proof of the death of the said insured had been made and claim filed by the plaintiff in accordance with the terms of said contracts of insurance and payment of the full amount of the policies of Twenty-five Hundred Dollars (\$2500) demanded and refused by the defendant.

The defendant filed its answer by which it admitted each and every allegation of the complaint and in and by the same answer set up what defendant called a first defense, alleging in substance that the age of the applicant set forth in said contracts of insurance was not the true age and that the liability of the defend-

ant under the terms of contract of insurance was in a less amount than the face of the said policies, to wit, that the liability was Fourteen Hundred and Five Dollars and Forty-five Cents (\$1,405.45).

The plaintiff thereupon moved for an order striking out the answer of the defendant and for judgment final on the full amount of the claim or in the alternative for final judgment in the sum of Fourteen Hundred and Five Dollars and Forty-five Cents (\$1405.45) being the sum that was admitted to be due by the defendant to the plaintiff. On this motion the plaintiff was first granted his motion for partial judgment for the amount admitted to be due by the defendant with the reservation of the motion to a future date on the balance of his claim and on October 6, 1928 the entire answer of the defendant was struck out and final judgment rendered for the plaintiff and against the defendant on the balance of his claim.

The defendant now appeals to this Court from the judgment so entered in the New Jersey Supreme Court in the above-entitled cause on October 9, 1928 in the sum of Eleven Hundred Ninety-eight Dollars and Seven Cents (\$1198.07).

POINT ONE.

The answer filed by the defendant was sham and defendant failed to show such facts as entitled it to defend.

As we understand the law an application to strike out an answer and for summary judgment based upon affidavits in accordance with the rules of the Supreme Court is addressed to the discretion of the Court and the ruling of the Court as

in all judgments founded upon a finding on facts is not reviewable on appeal unless it appears that there was a gross abuse of discretion on the part of the court below or else that no facts appeared in the court below which would justify the finding of such court.

The only defense attempted to be made by the defendant in this cause was the defense that the insured was older than he had stated in his application. By the motion the defendant was called upon to produce what proof they had of the truth of this assertion. We contend that the state of the case shows that they had no proof whatsoever.

We call attention to those facts which we contend makes the answer sham. In their main answer they admit each and every allegation of the complaint which should entitled plaintiff to a judgment. In contradiction of their own answer they then set up their defense of misstatement of age. Plaintiff by his affidavit and in support of his right to summary judgment set forth in substance in such affidavit, first, that the statement of the assured's age in the application for the policy was correct; further, that in 1923, which was two years after the first contract and one year after the second contract the defendant herein did apply for the return of the policies claiming at that time that they had information that the assured's age had been misstated and that at that time, which incidentally was in the lifetime of the assured, the defendant was informed that they were in error and that the age of the assured as stated in the policy was correct and the plaintiff refused to return the policies. That thereupon the defendant apparently acceded to the plaintiff's position and collected premiums for approximately a

period of five years without notifying plaintiff that such premiums were credited on the contracts of insurance in any other manner than in the manner specified in such policy of insurance.

This to us makes out a clear and distinct proof of such facts as would entitle plaintiff to a judgment unless the defendant had produced by its affidavit sufficient proof to offset plaintiff's right to the judgment final.

Defendant's only answer is contained in two affidavits, one made by the general counsel of the defendant in Massachusetts setting forth that in 1923 the defendant had information *tending to show* that the insured was older than his application stated and affiant then proceeded to corroborate plaintiff's case by admitting that defendant requested the return of the policies in 1923 and that the plaintiff at that time asserted that the assured's age was truly stated and refused to return the policies. The affiant further stated that after both policies had become incontestible the defendant obtained further information justifying its belief that the insured was at least ten years older than the age stated in its applications and that such information was definite and certain and consisted in part of a statement made in writing by the plaintiff and signed by him wherein the plaintiff certified that his father was a different age.

This in substance is the entire contention of the defendants. The recital of the contents of the affidavit makes it self-apparent that nothing contained in that was of any evidential value, for in the first place it was an affidavit entirely hearsay; in the second place nothing definite was set forth except that they had information tending to show that the insured was older, and

in the third place that it had referred to a statement in writing which if in existence should have been produced in resistance to the motion for summary judgment; and in the fourth place that even if everything is taken for its face value in the affidavit it still would not be proof on the part of the defendant that they had proper evidence admissible in a court of law which would prove that the defendant was of a different age than set forth in the application.

The defendant then attempted to remedy the lack of proof by producing another affidavit made by the attorney of record for the defendant in the cause in which in substance he sets forth that he received information from the office of defendant to the effect that they had information from one of the physicians that from the appearance of the assured the physician thought that assured was ten years older than the age given by the assured in his application for the policy. That statement is clearly hearsay and of no evidential value and the affiant could not of course hope that any court would give such statement any weight as being evidence of a defense to this cause.

Affiant further said that they had information that the plaintiff in this cause in making applications for an insurance upon his own life stated that his father, the assured, in the cause, was various ages, to wit: was sixty-five years old in 1924, sixty-five years old in 1918, sixty years old in 1921 and seventy years old in 1925. Stopping to analyze this statement of the affiant, even if there was any proof of it, this statement likewise is in the same category as the previous statement, for if there were such a statement made it might prove that this particular plaintiff had no knowledge of the age of his father, it cer-

tainly would not be proof that the real age of his father was other than that given by the father in his application for insurance. The statement of the affiant carries no weight because the affiant says that he has personally inspected three written applications made by plaintiff for insurance on his own life and that he found a memorandum of a signature purporting to be that of this plaintiff in which said statements in the declarations to the medical examiner appear setting forth the age of the plaintiff's father, the assured in this cause, and proceeds to set forth in detail that by such memorandum that the plaintiff appears to have made these various statements as to his father's age.

Bearing in mind as we always must that what is attempted to be set forth as evidence of a good defense must be evidence which is admissible in a court of law and must be such evidence as would be admissible on the trial of this cause, we readily see that the entire allegations set forth by the defendant fall far short of being competent and proper proof of admissions by the plaintiff.

In this connection we call attention to the case of *Kiely v. MacMurray*, 139 Atl. 343, in which our Supreme Court having before it a question as to the age of Kiely, such age being a vital issue in the cause by reason of the attempt to retire Kiely as Chief of Police, and took up in detail various offers of evidence having a bearing on the age of Kiely among which were, one, a certificate of the bureau of vital statistics certifying to the birth of the daughter of Kiely which said certificate contained an item that the daughter's father, Kiely, was of a certain age, and the Court said there was no testimony that Kiely had anything to do with

furnishing the information contained in the birth certificate and it was therefore not evidential as to his age. Then there was a certificate of marriage of Kiely and the Court again said that there was no evidence that Kiely had given the information for this certificate. Then there was an application for a driver's license and the Court said that wasn't evidential. Then there was a certificate of the State Librarian showing the result of an examination of the census records which gave Kiely's age, and the Court said there was nothing to show the source of this information and that it was not evidential. A baptismal certificate was also introduced and that was held insufficient in that there was no proof in the identity of the person named in the certificate as the prosecutor.

Applying the rule laid down in the Kiely case to what is offered as proof by the defendant that they have any meritorious proof that they can use at the trial must follow that this is no evidence affiant himself admits that he has no knowledge that the signature appearing in the memorandum referred to by him is the signature of the plaintiff nor further that the information contained in such memorandum was information supplied to whoever made the memorandum by the plaintiff. What we mean is that if defendant came into court on the trial of this cause and attempted on the witness-stand to enter a defense by saying that he saw a paper which purports to be signed by the plaintiff and which purports to contain certain statements but that such witness had no knowledge whether such memorandum was actually signed by the plaintiff nor had any knowledge that the information contained in the statements were furnished by the plaintiff the Court without question would

refuse to let such testimony in. No greater weight can be given to this attempted testimony because of the fact that it appears in an affidavit in resistance to this motion.

This was in its entirety the proof submitted by the defense in answer to the claim of the plaintiff that he was entitled to a summary judgment. We can only say that not only was the action of the Court in entering such final judgment not an abuse of discretion but was the only proper disposition of the motion under the proof presented.

We therefore respectfully submit that the judgment below should be affirmed.

HARRY CASTELBAUM,
Attorney for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

MORRIS SKOLNIK,
Plaintiff-Respondent,

vs.

THE COLUMBIAN NATIONAL
LIFE INSURANCE COMPANY,
Defendant-Appellant.

On Appeal from the
Supreme Court.

10

BRIEF OF THE COLUMBIAN NATIONAL
LIFE INSURANCE COMPANY,

Defendant-Appellant.

20

This is an appeal from an order entered by the Chief Justice, striking out the defendant's answer, and from the entry of summary judgment in favor of the plaintiff.

The suit was brought in the Supreme Court upon two policies of life insurance, by the plaintiff, the beneficiary under the policies, who is the son of the assured.

The defense interposed by the answer was that the assured had stated his age in the application for one policy, issued on January 20, 1921, as fifty-three years, whereas he was at that time actually of the age of sixty-three years, and that he had stated his age in the application for the second policy, issued on August 18, 1922, as fifty-five years, whereas he was at the time of making said application actually of the age of sixty-five years. By the terms of the policy this misstatement of age worked a reduction of the amount of insurance from \$2,500.00 to

30

\$1,405.45, that being the amount of insurance which the premium paid would have bought at the true age.

The motion was made first to enter judgment for the amount admitted to be due; second, to strike out the Answer as sham and frivolous; third, for summary judgment for the disputed balance. (See notice of motion, State of Case, page 5).

10 Entry of judgment for the amount admitted to be due was not opposed, and an order for partial judgment was entered accordingly.

The motion to strike out the Answer and to enter summary judgment was founded upon the affidavit of the plaintiff, which alleged that the ages stated by plaintiff's father, the assured in the respective applications, were his correct ages at the respective times the applications were made, and that the full amount of the face value of the policies was actually due, and that plaintiff was informed and believed that defendant had no defense to the actions. There were certain other allegations as to
20 claims made by the defendant at various times, as to a misstatement of age, which had no bearing on the result of the motion. (This affidavit will be found on page 6 of the State of Case).

The defendant filed two affidavits, one made by its General Counsel, reciting generally the investigation made by the defendant, as a result of which the answer was filed (See State of Case, p. 7), and the other by defendant's counsel of record, setting up among other facts that affiant had personally examined three written applications, made by a person bearing the same name as
30 plaintiff, for insurance upon his own life, to another insurance company, in which said person gave as his father's name, the name of the assured in this case, and stated that he resided at the same address given by the assured in this case, as his residence, in his own applications, and that in said applications for insurance, the applicant gave his father's age as seventy years on November 5, 1926,

sixty years on January 21, 1921, and sixty-five years on December 28, 1918.

The affidavit further states that the records inspected by the affiant are within the jurisdiction and subject to the subpoena of the Supreme Court, and, therefore, capable of being produced at the trial.

In addition, the affidavit shows that an investigation had been made of the records in the office of the Commissioner of Immigration, at Ellis Island, New York, and that these records showed that a person of the same name as the assured, who had a son of the same name as the plaintiff in this case, arrived in the United States on the Steamship Caroline, of the French line, from Bordeaux, France, on October 18, 1920, and that his age was then given as sixty-one years, and that he was turned over to the son, whose residence was at 31 Prince Street, New York City. It is not denied that at the time the application for the insurance sued upon was made, the assured stated his residence therein as 31 Prince Street, Newark, New Jersey. 10

The Chief Justice struck out the Answer as sham on the ground that the defendant had produced no legal proof of the facts alleged in its Answer (no opinion being filed), and summary judgment was thereupon entered, from which determination the defendant now appeals. 20

THE STATUTE, ETC., GOVERNING THE STRIKING OUT OF ANSWERS

The statute which governs the striking out of answers, is an amendment to the 1912 Practice Act, passed in 1928, which will be found in P. L. 1928, page 306. 30

It reads as follows:

"15. Summary Judgment. (a) Subject to rules, any frivolous or sham defense to the whole or to part of the complaint may be struck out; or, if it appear probable that the defense is frivolous

or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section.

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(b) Subject to rules, any frivolous or sham complaint, or any frivolous or sham counterclaim heretofore filed, or which may hereafter be filed, or any portion or count of any such complaint or counterclaim, may be struck out; or if it appear probable that the complaint or counterclaim is frivolous or sham, the plaintiff or counterclaimant may be allowed to proceed therewith on terms. A plaintiff whose complaint, or a counterclaimant whose counterclaim, has in part only been struck out, may, after final judgment, appeal from such order. Whether the striking out of any such complaint or counterclaim, or any part or count thereof, shall be with or without prejudice to the institution of another proceeding at law, based on the same cause or causes of action as were set forth in such complaint or counterclaim, or in the portion or count thereof so stricken out, shall be in the discretion of the Court. Such discretion shall be exercised by the Court and indicated in the order striking out such complaint or counterclaim or portion or count thereof.

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16. Summary Judgment. (a) If the Answer as filed, or after any part thereof shall be struck out, leaves a part of the plaintiff's claim uncontested, judgment interlocutory or final may be entered for such part as is not contested and the cause may proceed to trial as to the residue.

(b) If a portion or count of a complaint or counterclaim shall be struck out, the plaintiff or counterclaimant may proceed with the case to trial as to the residue."

Section 3 of the statute, provides that it shall apply to suits then pending.

The Supreme Court rules applicable, are Rules 80 and 81 (Supreme Court rules, page 29), which read as follows:

“80. When an Answer is filed in an action brought to recover a debt or liquidated demand arising—

(a) Upon contract express or implied, sealed or not sealed; or, 10

(b) Upon a judgment for a stated sum; or

(c) Upon a statute;

the Answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. (Rule 57, Pr. Act 1912).

81. The motion to strike out shall be made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and stating the amount claimed and his belief that there is no defense to the action. (Rule 58, Pr. Act 1912).” 20

THE DISTINCTION BETWEEN FRIVOLOUS AND SHAM ANSWERS

The distinction between a frivolous answer and a sham answer is pointed out by this Court in *Milburg v. Keuthe*, 98 New Jersey Law, p. 779, at p. 781, in the following language: 30

“A sham answer is one good on its face, but false in fact; a frivolous answer is one which on its face sets up no defense, although it may be true in fact. A frivolous answer is always assumed to be true, while a sham answer must be

admittedly false or conclusively proved to be so; the character of the former is determined by mere inspection, while that of the latter is usually determined by proof aliunde."

The same distinction is made in *Fidelity Mutual Ins. Co. v. Wilkes Barre & Hazelton Railroad Co.*, 98 New Jersey Law, p. 507, at p. 510, as follows:

10 "At common law a plea was considered sham when it was palpably or inherently false, and from the plain and conceded facts in the case must have been known to the party interposing it to be false. Such plea, says Chitty "has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs." 1. Chit. pl. 542; Tidd. pr. 611; 2 Bouv. 680.

20 A frivolous plea need not be false, but is palpably insufficient as a legal defense to the action; and hence legally unsubstantial or frivolous, and therefore, presumably interposed for the purpose of delay. 2 Bouv. 853."

THE RULE AS TO STRIKING OUT SHAM ANSWERS

The rule to be applied on a motion to strike out an answer as sham, is stated in *Taylor v. Hutchinson*, 61 New Jersey Law, p. 440, as follows:

30 "A motion to strike out pleadings as sham should prevail only when the pleadings are clearly without merit."

In *Muhlenbeck v. Town of West Hoboken*, 2 New Jersey Misc. Rpts., p. 7, at p. 8, Justice Minturn stated the rule to be as follows:

"To warrant the Court in striking out a plea as false or sham, it must be so palpably false or

insufficient in law as to enable the Court to conclude that the defendant is seeking delay or trifling with the process of the law." *Fidelity Ins. Co. v. Wilkes Barre Railroad Co.*, 120 Atl. Rep. 734.

When to decide the question it becomes necessary to take testimony to enable the Court to determine the relative merits of the controversy, or the justice or injustice of the defense, the defendant's constitutional right to a jury trial requires that a motion to deprive him of his defense be denied." 10

ARGUMENT

The defense of a fraudulent misrepresentation, made in an application for a policy of life insurance, is difficult of proof at all times. Proof of the true facts usually has to be made by indirect evidence, and usually by the testimony of hostile witnesses. 20

Plaintiff's motion was founded upon his own affidavit, affirming the representations as to age made by his father, the applicant, while defendant's affidavits showed that in certain records, which could be produced at the trial, the plaintiff (or a person who could reasonably be identified as the plaintiff), had stated his father's age to be greater than the age set out in the application for the insurance sued for.

It is respectfully submitted that the test of an alleged sham answer, is the honesty and sincerity of its allegations and of the defense set up, and not whether or not these allegations will be difficult to prove; that on a motion to strike out an answer as sham, defendant is required to show by proofs merely that it has an honest defense, and is in possession of sufficient information to warrant the filing of an answer, and to afford a reasonable probability of maintaining the defense at the trial. 30

It is respectfully submitted that the defendant in this case made such a showing, and was entitled to be given an opportunity to attempt to prove its defense at the trial by plaintiff's testimony alone, if it had no other witnesses, either on cross-examination or by making him its own witness, and to use the records described in its answering affidavits, to search the plaintiff's conscience and ascertain the truth from him if possible.

10 Tested by the rules laid down in the cases cited above, it is respectfully submitted that plaintiff did not show on the hearing of the motion to strike out, that defendant's answer was false, much less palpably or inherently false, or clearly without merit.

It is, therefore, respectfully submitted that the defendant should have been permitted to defend the action on the answer filed, and that the order striking out the answer, and the entry of summary judgment, should be reversed.

20 Respectfully submitted,
 CHARLES DEF. BESORE,
*Of Counsel with The Columbian
 National Life Insurance
 Company, Defendant-Appellant.*

