19-87

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

HERNAN BRETTLER, TRUSTEE OF THE ZUPNICK FAMILY TRUST 2008 A,

Plaintiff-Appellant,

-against-

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT WITH APPENDIX

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant filed this action in the Supreme Court of the State of New York, Kings County, on September 19, 2016 [A-6]. Defendant-Appellee, Allianz Life Insurance Company of North America ("Allianz"), received the complaint on November 21, 2016 [A-2, ¶ 3] and removed the action from state court pursuant to 28 U.S.C. § 1331 and 9 U.S.C. § 201 *et seq* on December 12, 2016 [A-1].

Allianz is a resident of the State of Minnesota. Plaintiff is a resident of the State of New York. The amount in controversy exceeds $75,000 [A-2].

This is an appeal from a memorandum and order dated December 6, 2018 and judgment dated December 7, 2018 of the United States District Court for the Eastern District of New York. A final order was entered in this matter on December 7, 2018 [A-232]. This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

ISSUES FOR REVIEW

1) Whether a plaintiff who purchased a life insurance policy from the registered owner but did not register the change of the ownership with the insurance company has contractual standing to bring suit under the policy against the insurance company.
2) Whether the rights and obligations under a policy can be sold or assigned without registering the change of ownership with the insurance company.

FACTS

Plaintiff filed this action seeking a declaration that Allianz Policy No. 60029320 (the "Policy") with a face value of eight million ($8,000,000) dollars, owned by the plaintiff Trust is in good standing and did not lapse [A-20, Complaint ¶¶ 17, 55]. The insured, Dora Zupnick, was alive when the action was commenced, and is still living, and, naturally, this is not an action to recover benefits under the policy [A-20, Complaint ¶ 54].

Allianz issued the Policy to the Trust on or about April 7, 2008 [A-20, Complaint ¶ 4]. At that time, Allianz also issued two other identical policies upon the same insured in the same face amount to two other trusts. All three were eventually placed into litigation in this District Court for the Eastern District of New York. See, In *Halberstam v. Allianz*, 16-cv-06854, , *Blau v. Allianz*, 14-cv-3202. [A-151, BenHaim Affirmation ¶¶2, 3]. In all three actions, the Court ruled that New York law applies to the policies.

A. Ownership of the Policy

When the Policy was first issued to the Trust, the trustee of the trust was Abraham Zupnick [A-45]. Sometime thereafter, Herman Brettler became the trustee of the Trust and that change of trustee was recorded with Allianz. In April 2012, the Policy was sold and transferred to Miryam Muschel, who became the new owner of the Policy [A-31 to A-32]. Within the year that Ms. Muschel purchased the Policy,

she was no longer interested in owning the Policy or making the premium payments and the Trust resumed making the payments with the understanding that Ms. Muschel was going to assign the Policy back to the Trust [A-69]. In May of 2016, Ms. Muschel formally sold the Policy back to the Trust [A-70 to A-150]. The sale included an assignment to sue Allianz. The sale agreement provided [A-71, at (j):

> (j) Seller transfers and assigns to Purchaser all of its rights, powers, and privileges under the Policy or exercisable in connection therewith or incident to Seller's rights under any surrender or purchase agreement, or any foreclosure of the Policy, including, without limitations, the right to take any legal action or file suit in a court of law as Seller's assignee, any powers or rights granted by the Insured or any family members, heirs, successors or assigns, any powers of attorney or appointment, that may be exercised by Purchaser, it being understood and agreed that such exercise shall be solely for the benefit of Purchaser and any of its assignees or transferees; provided however, that Purchaser assumes no duties or obligations or liabilities of Seller with respect to Purchaser's acquisition of the Policy.

[A-69, Brettler Affirmation, ¶ 6, Exhibit A.]

B. The Alleged Lapse

In June 2013 Allianz notified the Policy's then owner that the Policy had lapsed for failure to pay premium [A-20, Complaint ¶¶ 14-16].

Prior to the alleged lapse, the Trust issued a check for payment to Allianz but due to a bank error, the check did not clear. The bank acknowledged its error in a letter submitted to Allianz. Ms. Muschel and the Trust wrote to Allianz advising Allianz of the bank error and offered to immediately pay any outstanding premium [A-20, Complaint ¶¶ 13-15.]. This action challenges the lapse.

The Policy contained the following relevant provision:

Grace Period	If the Policy Protection Test is not met, or any time after the Guaranteed Policy Protection Period shown on the Policy Schedule, a Grace Period of 61 days starts on the Monthly Anniversary Date when the Net Cash Value is less than the Monthly Deduction or when the Net Cash Value is zero or less. At least 30 days prior to Termination, we will send written notification to your last known address advising that the Grace Period has begun. A premium payment sufficient to keep this policy in force for three months is required and must be received prior to the last day of the Grace Period or this policy will Lapse. If the Insured dies during the Grace Period, premium necessary to keep this policy in effect to the date of death will be subtracted from the Death Benefit.

[A-58, Exhibit 2 to Goss Declaration]

Sometime after May 4, 2013, Allianz sent a "Grace Period Notice," which requested, under the threat of lapse, $117,810.90 by June 8, 2013 ("May Grace Notice") [A-20, Complaint ¶ 10]. The notice, however, was not only never received [A-20, Complaint ¶ 21], it contained a number of critical and fatal errors which, under applicable law, render the notice void and therefore, the lapse void. Most critical is that the wrong amount was requested [A-20, Complaint ¶¶ 41-52], which both the Blau court and Halberstam court ruled would make the notice void.

The notice overstated the amount due by over $35,000. This alone invalidates the notice. Against the backdrop of a strong public policy in New York against the forfeiture or lapse of life insurance coverage, the Trust is entitled to a declaration that the Policy had not lapsed and remains in good standing [A-20. Complaint ¶¶ 32-39]. As stated, in Blau and Halberstam, the Court held that the notice was invalid as a result of the overcharges in those notices and as a result, the policy at issue, did

not lapse when Allianz said they lapsed. The same is true here. The notice is invalid and the policy did not lapse.

Although both the Blau court and the Halberstam court found that the notice was invalid and the policy at issue did not lapse when Allianz claimed it did, the Court in Blau ultimately found for Allianz while the Court in Halberstam found for the plaintiff. Each Court applied the applicable statute to the facts before the Court. New York Insurance Law §3211(a)(1) codifies the insurer's obligation to send a grace notice and provides, in relevant part:

> (a)(1) No policy of life insurance…shall terminate or lapse by reason of default in payment of any premium…**in less than one year after such default**, unless, for scheduled premium policies, a notice shall have been duly mailed…

(emphasis supplied)

In Blau, after Allianz informed the owner that the policy had lapsed, the policy owner never made any premium payments or attempted to pay premiums. The Blau court ruled that while the policy did not lapse when Allianz claimed that it did, it lapsed, automatically and without notice, one year later. In Halberstam, after Allianz informed the policy owner that the policy had lapsed, the owner made numerous attempts to pay the premiums due, only to be thwarted by Allianz. Accordingly, judgment was entered in favor of the policy owner.

Here, the Trust issued a check for the payment of premiums in response to the May Grace Notice but as a result of the issuing bank's error, the check did not clear when Allianz attempted to deposit the check. The Trust immediately offered to replace the check and any outstanding amount [A-151, BenHaim Aff. ¶ 6 and Exhibit C, thereto]. It goes without saying that the Trust continues to stand ready to pay any outstanding premiums due [A-20, Complaint ¶¶ 13-15, 53]. Allianz refused to accept premium payment on the policy, citing the alleged lapse. Thus, factually, this matter resembles Halberstam and not Blau as the policy owner here attempted to pay and was rejected by Allianz.

On May 5, 2017, Allianz moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2), arguing that as owner documented in the policy was listed as Muschel, plaintiff lacked standing to bring suit [A-26]. On December 6, 2018, the Court converted the motion to one under Rule 12(b)(6) and dismissed the complaint on the grounds that plaintiff lacks contractual standing [A-221]. This appeal followed [A-232].

SUMMARY OF THE ARGUMENT

Essentially, Allianz argued and the District Court agreed that the only method by which a life insurance policy can be assigned is by following the steps set forth in the policy which controls the assignment. Since the Allianz policy stated that in order to assign a policy, the change of ownership must be recorded with the insurer,

the failure by the plaintiff to record the ownership change means that the assignment never happened. Intrinsic to this ruling is the District Court's understanding that it is the policy contract that created the right to assign and therefore, the policy terms control the method by which it can be assigned. In other words, the District Court reasoned that since the right of assignability is created by the contract, the contract can control the extent of that right. But over one hundred years ago in *Grigsby v. Russell*, 222 U.S. 149 (1911), the Supreme Court of the United States ruled otherwise and placed the ownership rights in a life insurance policy on the same legal footing as more traditional investment property such as stocks and bonds. As with these other types of property, a life insurance policy could be transferred to another person at the discretion of the policy owner. Since the assignability of a policy is an independent right of the owner, the insurer cannot insist on its own rules as to how that policy is transferred. This approach has been consistently applied by courts applying New York law. Accordingly, when Muschel assigned the policy to the plaintiff, the plaintiff became the owner, whether or not the insurer was notified, and has contractual standing to maintain this action.

ARGUMENT

I. STANDARD OF REVIEW

In conducting *de novo* review of the denial of a Rule 12(b)(1) motion to dismiss for lack of standing, the Court applies the Rule 12(b)(6) standard, construing

the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein. *Donoghue v. Bulldog Inv'rs Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012); See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *accord W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir.2008). While Allianz moved to dismiss under Rule 12(b)(1) for lack of Article III standing, the Court, *sua sponte*, converted the motion to a motion under Rule 12(b)(6) and decided the motion under Rule 12(b)(6).

While choice of law was argued before the District Court, there is no serious argument that New York law applies. Allianz has always argued that New York law should apply.[1] The Court found that New York law applies and Plaintiff-Appellant does not appeal that portion of the Court's finding.

II. PLAINTIFF HAS CONTRACTUAL STANDING TO BRING THIS DECLARATORY JUDGMENT ACTION

Plaintiff Trust sold the Policy to Muschel in April of 2012. Thereafter, Muschel was no longer interested in the asset and offered the asset back to the Trust. The Trust resumed making premium with the intention of regaining ownership. As part of this understanding that the Trust was reacquiring the Policy, the Trust made payments to Allianz, including that critical payment which was erroneously rejected

[1] While "standing in federal court is a question of federal law, not state law" *Hollingsworth v. Perry*, 570 U.S. 693, 715, 133 S. Ct. 2652, 2667, 186 L. Ed. 2d 768 (2013), at issue here is contractual standing.

by the bank in June of 2014. The understanding that the Trust was reacquiring the Policy was reduced to a written agreement in May of 2016 which included an assignment "to Purchaser all of its rights, powers, and privileges under the Policy or exercisable in connection therewith or incident to Seller's rights under any surrender or purchase agreement, or any foreclosure of the Policy, including, without limitations, the right to take any legal action or file suit in a court of law as Seller's assignee." The assignment confers standing upon the Trust to bring this suit. *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 108 (2d Cir. 2008) citing, *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285, 128 S. Ct. 2531, 2542, 171 L. Ed. 2d 424 (2008).

Moreover, the Trust is more than an assignee as it has actually purchased the Policy from Muschel. It has long been the law that life insurance policies are property of their owners and can be freely sold or assigned like any other property. See *Grigsby v. Russell*, 222 U.S. 149, 156 (1911) ("To deny the right to sell … is to diminish appreciably the value of the contract in the owner's hands."). The fact that Allianz would not record the sale in its own records should not be of any consequence.

In *Grigsby*, the Supreme Court of the United States considered an insurance company's internal requirement that a life insurance policy can only be transferred to someone with an insurable interest in the life of the insured and not a stranger.

Over one hundred years ago, the Supreme Court found that "life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property." *Grigsby*, 222 U.S. at 156. The Court, therefore, rejected the attempt by the insurer to restrict the assignment of policies to strangers. The Supreme Court ruled, "[t]o deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands." *Grigsby*, 222 U.S. at 156. Similarly, to deny the right to sell except by filing a change of ownership with the insurer is to diminish appreciably the value of the contract in the owner's hand.

There is but one published decision analyzing the *Grigsby* decision from the perspective of standing. In *Carton v. B & B Equities Grp., LLC*, 827 F. Supp. 2d 1235, 1241 (D. Nev. 2011), the Cartons were a husband and wife who invested in two life insurance policies. Ownership of the policy was placed with a trust and the insured was named the trustee. Like Allianz here, in *Carton*, "[t]he Insurers argue the Cartons lack standing to bring the claims against them because they were not parties to the insurance contracts, they are not the third–party beneficiaries of the contracts, and the contracts have lapsed." The Cartons claimed standing as assignees under *Grigsby* and also "that the Policies were void ab initio because they violated public policy (Opp'n to Mot. to Dismiss (# 113) at 11–14). As the Policies never

really existed, the Insurers now hold $700,000 in premium payments from the Cartons without providing coverage in return. The Cartons thus assert they have suffered an injury in fact because they paid the premiums on nonexistent policies." *Carton*, 827 F. Supp. 2d at 1243.

The Court found that the policies were, in fact, void *ab initio* and as the policies never legally existed in the first instance, the assignment of the policy also is invalid. Implicit in the ruling is that if the policies were not void *ab inito*, the *Grigsby* standard would allow the Cartons to have standing to bring suit against the insurers even though the assignment was not recorded with the insurers. In the present matter, there is no claim that the Policy is void *ab initio* and therefore, the assignee, the Trust, has standing under *Grigsby*.

As an additional matter, the Court in *Carton* found that the Cartons in fact, have standing as the payors of the premiums. The same would be true here.

District Courts in this Circuit have recognized that under New York law, restrictions on the assignment of life insurance policies are frowned upon. See, *Pro Cardiaco Pronto Socorro Cardiologica S.A. v. Trussell*, 863 F. Supp. 135, 137-38 (S.D.N.Y. 1994) (holding that assignment of policy "made in contravention of the [policy] Certificate's terms" was not void because the policy did not state that such "an assignment is void" or contain any other "clear language" to that effect). In *Pro Cardiaco*, the policy owner assigned the life insurance policy to a hospital. The

insurer refused to recognize the assignment which was not made in accordance with the policy terms. The Court, applying New York law, rejected the attempt and recognized the assignment.

Outside the insurance context, New York courts have maintained a balance to, on the one hand, uphold freedom of assignability of contracts, while at the same time, recognize the concept of freedom to contract which includes freedom to limit assignability of contracts. Even still, it is only assignments of money due under contracts that may be prohibited. *Allhusen v. Caristo Const. Corp*., 303 N.Y. 446, 452 (1952). At issue here is whether the assignment of the ownership of the Policy, not the beneficiary assignment, is valid even though Allianz was not notified. As we are not dealing with an assignment of money due, any restriction, no matter how worded, is invalid – including the restriction that Allianz must be notified.

Even with respect to the assignment of money due, "a basic rule of construction of nonassignability clauses is that in the absence of language explicitly barring assignment of a contract right so as to provide that any assignment of it shall be void, a clause prohibiting assignment will be interpreted as a personal covenant not to assign." *Beige v. Aetna Cas. & Sur. Co*., 39 A.D.2d 295, 297 (4th Dep't 1972). Even if the personal covenant is broken, the assignment is valid. Here, it can hardly be said that the restriction imposed by Allianz is an explicit bar on assignments.

Neither Allianz nor the District Court considered or addressed the Supreme Court's decision in *Grigsby*. Allianz relied primarily on *Pike v. N.Y. Life Ins. Co*., 72 A.D.3d 1043, 1049, 901 N.Y.S.2d 76 (2d Dept. 2010), where it was undisputed that the policies at issue were owned by in legal trust for the plaintiffs who were beneficiaries of the trust. The Court held that the beneficiaries of the trust did not have standing to sue as they were not parties to the contract. Here, plaintiff commenced suit in his capacity as trustee of the trust which owns the policy, not the beneficiary of the trust. *Pike* is entirely inapplicable as it did not, at all, deal with the assignability of a life insurance policy.

Allianz also cited *Gupta v. Nat'l Life Ins. Co*., No. 04-CV-0252E(SC), 2006 WL 2000118,at *3 (W.D.N.Y. July 17, 2006). In *Gupta*, the plaintiff assigned ownership of the policies some twenty years before bringing suit claiming standing to sue as the beneficiary of the policies. The Court reaffirmed the well-known doctrine that a beneficiary cannot sue while the insured is alive. Unlike the plaintiff in *Gupta* who did not reacquire the policies before bringing suit, the Trust did just that and therefore has contractual standing.

As the Policy was assigned from Muschel to the Trust, the Trust has contractual standing to sue Allianz for a declaration that the Policy has not lapsed. As such, the District Court decision, which dismissed the complaint, should be reversed so that this matter can be decided on the merits.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the District Court's decision should be reversed in its entirety.

Dated: Kew Gardens, New York
March 14, 2019

Respectfully submitted,

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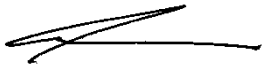
CERTIFICATE OF COMPLIANCE

1. This brief complied with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains approximately 3298 words, excluding the parties of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complied with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Ed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, font-size 14.



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