UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERMAN BRETTLER, Trustee of the Zupnick Family Trust 2008A,

Plaintiff,

-against-

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

MEMORANDUM & ORDER

1:16-cv-6855 (ENV) (ST)

VITALIANO, D.J.

Plaintiff Herman Brettler, as trustee of the Zupnick Family Trust 2008A, commenced this action for declaratory relief in Kings County Supreme Court on September 19, 2016. (Compl., ECF No. 1-1). Defendant Allianz Life Insurance Company of North America ("Allianz") removed the action to this Court on December 12, 2016. (Notice of Removal, ECF No. 1). Allianz now moves to dismiss the case for lack of subject matter jurisdiction and failure to state a claim. (Mot. to Dismiss, ECF No. 16 ("Mot.")). For the reasons that follow, the motion to dismiss is granted.

Background

Plaintiff alleges that defendant issued a life insurance policy on the life of Dora Zupnick, with a face value of $8,000,000 and a policy date of April 7, 2008. (Compl. ¶ 4). The Trust purportedly owned the policy. (*Id.* ¶ 5). According to the complaint, Allianz sent plaintiff a notice, dated May 4, 2013, seeking $117,810.90 in premium payments. (*Id.* ¶ 10). The notice contained a due date of June 8, 2013, (*id.* ¶ 11), and indicated that payment must reach Allianz by the due date, (*id.* ¶ 12). Brettler claims that, on or about June 7, 2013, the Trust, by its former trustee, sent Allianz payment by check. (*Id.* ¶ 13). On or about June 25, 2013, Allianz notified

the Trust, by notice to its former trustee, that the check was not honored for payment by the bank. (*Id.* ¶ 14). Although, plaintiff contends, the bank informed Allianz that failure to honor the check was a bank error, (*id.* ¶ 15), Allianz considers the policy lapsed for failure to pay premiums, (*id.* ¶ 16).

Plaintiff, of course, considers the policy to be in full force and effect. (*Id.* at 6). Brettler alleges that Allianz was obligated to give the Trust timely notice when the policy was in danger of lapsing, (*id.* ¶ 20), which, he claims, Allianz failed to do, (*id.* ¶ 21). Central to this contention is the argument that the May notice was defective because it was untimely, (*id.* ¶¶ 23-26), demanded that payment reach Allianz by the due date, in violation of state law, (*id.* ¶ 28), failed to identify the correct due date, (*id.* ¶ 29), and miscalculated the premiums due, (*id.* ¶ 32-38).

Allianz seeks dismissal, alternatively, on three independent theories: that the Court lacks subject matter jurisdiction because plaintiff does not own the subject policy and, therefore, lacks standing to sue; that the action is time-barred; and, if the trust does own the policy and the claim is not time-barred, that the complaint does not state a plausible claim to relief. (Def.'s Mem. of Law in Supp. of Its Mot. to Dismiss, ECF No. 18, at 1).

Standard of Review

The burden of establishing federal subject matter jurisdiction rests on the shoulders of the party invoking jurisdiction, not the party challenging it. The party invoking jurisdiction must prove that it exists by a preponderance of the evidence. *See, e.g.*, *Augienello v. FDIC*, 310 F. Supp. 2d 582, 587-88 (S.D.N.Y. 2004). Although a court "must accept as true all material factual allegations in the complaint," it need not draw inferences favorable to the party asserting jurisdiction, *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004), and it "may resolve disputed factual issues by reference to evidence outside the pleadings," *Augienello*, 310

F. Supp. 2d at 588. Moreover, "no presumptive truthfulness attaches to the complaint's jurisdictional allegations." *Id.* (quoting *Guadagno v. Wallack Ader Levithan Assocs.*, 932 F. Supp. 94, 95 (S.D.N.Y. 1996)).

In contrast, when deciding a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the district court must (1) accept as true all of the plaintiff's factual allegations and (2) draw all reasonable inferences in his favor. *See Teichmann v. New York*, 769 F.3d 821, 825 (2d Cir. 2014). Courts must nevertheless ensure that complaints plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Although "detailed factual allegations" are not required, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Similarly, a complaint fails to state a claim "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 557).

Discussion

I. Choice of Law

Overlooked in the briefing, the first question presented is whether New York or New Jersey law governs the insurance policy. Allianz, presuming that New York law applies, relies exclusively on it, while plaintiff, in less clear fashion, places some reliance on New Jersey law. The starting point for decision is clear: "Where jurisdiction is predicated on diversity of citizenship, a federal court must apply the choice-of-law rules of the forum state." *Thea v. Kleinhandler*, 807 F.3d 492, 497 (2d Cir. 2015) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 433 (2d Cir. 2012)). The first step in New York's choice-of-law analysis "is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co.* (*Stolarz*), 81 N.Y.2d 219, 222, 613 N.E.2d 936, 597 N.Y.S.2d 904 (1993). If "there is no conflict, for practical reasons, that is, for ease of administrating the case, New York, as the forum state, would apply its law." *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 422-23 (2d Cir. 2006) (citing *Excess Ins. Co. v. Factory Mut. Ins. Co.*, 2 A.D.3d 150, 150, 769 N.Y.S.2d 487 (1st Dep't 2003)). Contrarily, "[i]f an actual conflict exists, New York applies the 'center of gravity' or 'grouping of contacts' choice of law theory." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 822 F.3d 620, 641 (2d Cir. 2016) (internal quotation marks omitted) (quoting *Stolarz*, 81 N.Y.2d at 226).

In cases involving insurance policies, if "the insured risk is scattered throughout multiple states, [New York] courts . . . deem the risk to be located principally in one state" and use "the state of the *insured's domicile* . . . as a proxy for the principal location of the insured risk." *Id.* at 642 (first and second alterations in original) (quoting *Certain Underwriters at Lloyd's v. Foster*

Wheeler Corp., 36 A.D.3d 17, 24, 822 N.Y.S.2d 30 (1st Dep't 2006)). New York courts reason that "[t]he state of the insured's domicile is a fact known to the parties at the time of contracting, and . . . application of the law of that state is most likely to conform to their expectations." *Id.* (alterations in original) (citing *Lloyd's*, 36 A.D.3d at 23). Here, "[t]he insured, Dora Zupnick, resides in Brooklyn, New York." (Compl. ¶ 7). Consequently, regardless of whether there is a conflict between New York and New Jersey law, New York law applies. Therefore, in line with fresh and correct precedent, the Court "applies New York law to every issue in this case, without needing to analyze whether there are any relevant differences between New York and New Jersey law," *Blau v. Allianz Life Ins. Co. of N. Am.*, No. 14-cv-3202 (NGG) (VMS), 2018 WL 949222, at *3 (E.D.N.Y. Feb. 15, 2018).[1]

II. "Standing"

Allianz argues that the Trust lacks standing because it is neither the owner nor the beneficiary of the subject insurance policy. Article III of the Constitution "limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Supreme Court precedent thus requires that a plaintiff have standing to sue and that the requirements of standing continue to be satisfied throughout the litigation. Article III standing has three elements, the first of which is that "the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual

[1] Plaintiff argues for the application of New Jersey law on the ground that "in a pleading submitted in the related Blau action, Allianz set forth the facts necessary to establish the application of New Jersey Law." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss, ECF No. 22, at 7). However, this argument is unpersuasive in light of the resulting decision, in *Blau*, to apply New York law.

or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and internal quotation marks omitted); *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-50, 194 L. Ed. 2d 635 (2016) (clarifying the concreteness requirement). "Second, there must be a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560 (citation omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). If a plaintiff cannot establish standing by this measure, the action must be dismissed. *See, e.g.*, *HealthNow N.Y. Inc. v. New York*, 448 F. App'x 79, 82 (2d Cir. 2011) (summary order).

In advancing its jurisdictional argument that Brettler lacks Article III standing to have this action heard in federal court, Allianz relies primarily on New York law, which, in and of itself, cannot and does not define the jurisdiction of the federal courts. New York courts do not have occasion to interpret Article III's standing requirement because they are not subject to it. Indeed, the cases cited by defendant may use the term "standing," but they refer to contractual, common law standing rather than constitutional standing. Allianz's briefing, therefore, does not present a constitutional objection to jurisdiction. Its contention that it will be successful on the basis of *contractual* standing does not establish the absence of *constitutional* standing or implicate an Article III jurisdictional defect. Consequently, it must be analyzed under Rule 12(b)(6), rather than Rule 12(b)(1). *See Diverse Partners, LP v. AgriBank, FCB*, No. 16-cv-9526 (VEC), 2017 WL 4119649, at *2 n.3 (S.D.N.Y. Sept. 14, 2017) (noting that when a party conflates contractual standing with Article III standing, its arguments do not relate to subject matter jurisdiction).

Presumably, Allianz also hopes the Court will ignore the fact that the action is here

because it, not Brettler, invoked the Court's jurisdiction. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89-90, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005) (noting that a defendant who removes an action from state court is the party invoking federal jurisdiction). The argument, to some extent, is an exercise in sophistry. On defendant's view, to the extent a complaint cannot survive a Rule 12(b)(6) motion for failure to state a claim, the plaintiff has not pleaded a case or controversy. However, if that were so, a separate subsection of Rule 12(b), addressing subject matter jurisdiction, would be unnecessary. Rule 12(b)(1) is meant to capture something more than, as reflected here, a successful argument that, under the applicable substantive law, the plaintiff has no plausible claim. Rule 12(b)(6), therefore, is the appropriate framework under which to consider Allianz's argument.

Although the briefs include matter outside the pleadings, the relevant materials are policy documents transmitted between Allianz and Brettler. They are "documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit," and, therefore, may be considered on a Rule 12(b)(6) motion. *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (citation omitted); *accord Van Praagh v. Gratton*, 993 F. Supp. 2d 293, 298 (E.D.N.Y. 2014) (quoting *id.*).

Cutting to the chase, regardless of which rule is applicable, the decisive issue is whether plaintiff owns the subject insurance policy because, under New York law, "[o]nly the policy owner has standing to sue based on an insurance policy," *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1049 (2d Dep't 2010). A "non-party to a contract governed by New York law lacks standing to enforce the agreement in the absence of terms that 'clearly evidence[] an intent to permit enforcement by the third party' in question." *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (alteration in original) (quoting *Fourth Ocean Putnam Corp. v.*

Interstate Wrecking Co., 66 N.Y.2d 38, 45, 495 N.Y.S.2d 1, 485 N.E.2d 208 (1985)). It is undisputed that no such terms are present in the subject insurance policy.

III. Failure to State a Claim

Substantively, Brettler says the policy owner is precisely what he is. He avers that he is the trustee of the Zupnick Family Trust 2008 A, (Compl. ¶ 1), and that the Trust is the owner of the policy, (*id.* ¶ 5). In rebuttal, Allianz has submitted a service request form, dated April 27, 2012, by which plaintiff transferred the Trust's ownership of the policy to Miryam Muschel. (Decl. of Roland Goss, Ex. 1, ECF No. 17-1). Attempting to salvage this action, Brettler contends that Muschel has transferred ownership back to the Trust, and attaches to his opposition papers the agreement that supposedly transferred ownership as he claims, (Decl. of Herman Brettler, Ex. A, ECF No. 20 ("Brettler Decl.")). Allianz, in turn, argues that the transfer of ownership from Muschel to the Trust was defective because notice was not given to the insurer. The terms of the policy include a provision that "[a]n assignment will be effective upon Notice," which is, in turn, defined as "receipt [by Allianz] of a satisfactory written request." (Decl. of Roland Goss, Ex. 2, ECF No. 17-2, at 0042, 0052); *see Jakobovitz v. Allianz Life Ins. Co. of N. Am.*, No. 15-cv-9977, 2017 WL 3049538, at *4-5 (S.D.N.Y. July 18, 2017) (holding that the notice requirement does not prohibit assignments but, rather, explains the procedure for making assignments). On the motion here, there is no evidence that such a request was made, much less received by Allianz.

Specifically, that record shows that, along with the agreement transferring ownership back to the Trust, plaintiff's opposition papers did include an Allianz form entitled "Request to Transfer Ownership and/or Change Beneficiaries," which was completed and signed by Muschel and Brettler. (Brettler Decl., Ex. A). Nonetheless, when the Court directed Brettler "to submit

admissible proof . . . as to whether notice was given to defendant of the purported transfer of policy ownership," (Order to Show Cause, Oct. 10, 2018), he submitted only a letter from counsel, which conceded that Brettler "did not notify Allianz that the policy was transferred back from Miryam Muschel to the Zupnick Family Trust 2008A . . . until the filing of the complaint in this matter," (Letter, ECF No. 26). In other words, regardless of whether Brettler completed the proper form, he never transmitted the request to Allianz.

Proffering a substitute for what the contract of insurance required, plaintiff notes that Allianz did receive and retain premium payments from the Trust, rather than Muschel, which, he seems to argue, put Allianz on notice of the transfer. But, assuming without deciding that the checks provided notice of transferred ownership in the colloquial sense of the term, the checks in isolation clearly did not provide notice in accordance with the plain language of the policy. On this score, there is absolutely no indication that the checks were anything but in isolation or in any way requested reassignment of the policy. *Cf. In re Frigitemp Corp.*, 34 B.R. 1000, 1017 (S.D.N.Y. 1983) ("A check drawn on the bank is an instruction *to the bank* to pay the holder a portion of its debt to the depositor." (emphasis added)). The checks, consequently, failed to provide actual, much less contractually adequate, notice. Therefore, as of the commencement of this action, the Trust did not own the policy and lacked a right to sue under New York law.

Brettler, as a result, lacking contractual standing, has not pleaded a plausible claim as agent acting on behalf of the Trust. Plaintiff's response to the Court's order to show cause is fatal, and the complaint must be dismissed.

Conclusion

For the foregoing reasons, defendant's motion is granted, and the case is dismissed for failure to state a claim.

The Clerk of Court is directed to enter judgment accordingly and to close this case.

So Ordered.

Dated: Brooklyn, New York
November 22, 2018

/s/ USDJ ERIC N. VITALIANO

ERIC N. VITALIANO
United States District Judge