*To be Argued by:*
DAVID BENHAIM
*(Time Requested: 30 Minutes)*

CTQ-2022-00004

# Court of Appeals

*of the*

# State of New York

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

*Plaintiff-Appellant*,

– against –

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

*Defendant-Respondent*.

QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT IN DOCKET NO. 19-87

## BRIEF FOR PLAINTIFF-APPELLANT

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## STATEMENT OF RELATED LITIGATION

The following two litigations are related and terminated as of the date of this filing:

1) Halberstam v. Allianz, 16-cv-06854 (E.D.N.Y.)

2) Blau v. Allianz, 14-cv-3202 (E.D.N.Y.)

# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**



**Statutes & Other Authorities:**

## Question Presented

Where a life insurance policy provides that "assignment will be effective upon Notice" in writing to the insurer, does the failure to provide such written notice void the assignment so that the purported assignee does not have contractual standing to bring a claim under the Policy?

## Point Headings

This Court should find that a plaintiff who purchased a life insurance policy from the registered owner and under the contract received an assignment of all rights 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.

## Jurisdictional Statement

This Court has jurisdiction over this matter pursuant to New York State Constitution Article 6, §3(b)(9) and Section 500.27(a) of the New York Court of Appeals Rules of Practice. This action was originally filed in the Supreme Court of the State of New York, Kings County. Defendant removed the action to the United States District Court for the Eastern District of New York upon diversity. The District Court dismissed the action ruling that plaintiff lacked standing. Upon appeal, the Second Circuit certified the question presented to the New York Court of Appeals. The New York Court of Appeals accepted the certified question.

## 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. [A-38, 43, Complaint ¶ 54].

Allianz issued the Policy to the Trust on or about April 7, 2008 [A-39, 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. Allianz wrongfully terminated all three and all three were eventually placed into litigation in the Eastern District of New York. See, In *Halberstam v. Allianz*, 16-cv-06854, *Blau v. Allianz*, 14-cv-3202. [A-181, BenHaim Affirmation ¶¶2, 3]. Ultimately, the Court restored the *Halberstam* policy, Docket Entry 55, 16-cv-6854, but did not restore the *Blau* policy [A-240].

### A. Ownership of the Policy

When the Policy was first issued to the Trust, the trustee of the trust was Abraham Zupnick [A-74]. 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-59]. 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-98]. In May of 2016, Ms. Muschel formally sold the Policy back to the Trust [A-100 to A-108]. The sale included a broad assignment of rights including the right to commenced litigation against Allianz. The sale agreement provided [A-103, 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.

**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-40, 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. [A-210] Ms. Muschel and the Trust wrote to Allianz advising Allianz of the bank error and offered to immediately pay any outstanding

premium [A-207]. This action challenged the lapse on a number of grounds, including on the basis that Allianz failed to provide legal notice before the lapse.

The Policy contained the following Grace Period provision:

> 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-87]

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-40, Complaint ¶ 10]. The notice, however, 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 Allianz demanded far more than the minimum necessary to keep the policy from lapsing [A-4, Complaint ¶ 38], which both the Blau court and Halberstam court ruled would render the notice void.

The notice overstated the amount due by over $35,000. [A-42] This alone invalidated 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-41. Complaint ¶¶ 32-39]. 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 there 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 each notice was invalid and that each policy did not lapse when Allianz claimed it did, the Court in Blau ultimately found in favor of Allianz while the Court in Halberstam found in favor of the plaintiff. Each Court applied New York Insurance Law §3211(a)(1), the applicable statute, to the facts before the Court. 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-207]. It goes without saying that the Trust continues to stand ready to pay any outstanding premiums due [A-41, 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 that Allianz's own records listed the policyowner as Muschel and therefore plaintiff lacked standing to bring suit [A-26].

The Zupnick Policy contained the following provision concerning assignments of the policy:

> You may assign or transfer all or specific ownership rights of this policy. An assignment will be effective upon Notice. We will record your assignment. We will not be responsible for its validity or effect, nor will we be liable for

> actions taken on payments made before we receive and record the assignment.

[A-134]

The Zupnick Policy further defined the term "Notice" as "[o]ur receipt of a satisfactory written request." [A-124]

Under the policy, the policy owner is "solely entitled to exercise all rights of this policy until the death of the Insured." *Id.*

Allianz maintained that as the Trust never notified Allianz of the purchase and assignment, the Trust never became the owner and lacked standing to sue.

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-53].

On April 9, 2021, the Second Circuit ruled:

> Allianz's assertion that failure to comply with a provision in a life insurance policy requiring written notice of an assignment renders the assignment ineffective is likely a question best answered by the New York Court of Appeals since there is no binding precedent on the issue. See CIT Bank N.A. v. Schiffman, 948 F.3d 529, 537 (2d Cir. 2020); see also N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a); LR 27.2(a). However, there are a number of issues, understandably left unresolved by the district court, that may dispose of this matter without the need for certification. We wish to avoid resolving this matter based on an unsettled area of state law unless necessary.

Simplified, the Circuit Court asked the District Court to determine, assuming standing was not a hinderance, whether Brettler was like *Halberstam* or like *Blau*.

On May 24, 2022, the District Court ruled that assuming standing would not be an issue, Brettler would be entitled to an order restoring the policy and negating Allianz's termination. On December 29, 2022 the Circuit Court certified the threshold standing question to this Court.

## 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. Over one hundred years ago in *Grigsby v. Russell*, 222 U.S. 149 (1911), the Supreme Court of the United States 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. As with these other securities, any attempt to restrict those rights must be contracted to by the parties in the simplest terms possible. In this contract, the simplest terms would resemble something close to, "assignment without notice to Allianz is void." Allianz did no such thing. Accordingly, when Muschel assigned the policy to the

plaintiff, the plaintiff became the owner, whether or not the insurer was notified, and the Trust has contractual standing to maintain this action.

## ARGUMENT

### I. 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 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.

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.

**II. The Policy does not clearly make the contract nonassignable**

Under New York law, "in the absence of language clearly indicating that a contractual right thereunder shall be nonassignable, a prohibitory clause [against

assignment] will be interpreted as a personal covenant not to assign." *Allhusen v. Caristo Constr. Corp.*, 303 N.Y. 446, 450 (1952). If a party breaches the covenant, the assignee has acquired an assignment and the non-breaching party's omnly remedy is against the breaching party om a suit for damages. *Citibank, N.A. v. Tele/Res., Inc.*, 724 F.2d 266, 268 (2d Cir. 1983).

The Policy itself states:

> Assignment of this Policy: You may assign or transfer all or specific ownership rights of this policy. An assignment will be effective upon Notice. We will record your assignment. We will not be responsible for its validity or effect, nor will we be liable for actions taken on payments made before we receive and record the assignment.

The first sentence states unequivocally that "you may assign or transfer all or specific ownership rights of this policy." While the provision also has a notice requirement ("An assignment will be effective upon Notice"), the last sentence of the provision explains that failure to notify does not invalidate the assignment only protects Allianz against liability on payment made before notice is received and recorded. This can hardly be understood as a prohibition against assignment. At most, Allianz may be able to assert some sort of damages claim against Muschel as contemplated in . *Citibank, N.A. v. Tele/Res., Inc.*, 724 F.2d 266, 268 (2d Cir. 1983).

In *Reliable Loan & Investment Co. v. Delgus Co*., 227 N.Y.S. 425 (1st Dep't 1928), the court considered an agreement in which the Delgus Company agreed to

buy stock of the Larvex Corporation from the Rosses. The agreement provided that "this agreement and the payments to be made thereunder may be assigned by the [sellers] upon condition, however, that [they] give notice in writing by registered mail" to Delgus. *Id*. at 426 (internal quotation marks omitted). The Rosses' interest in the agreement was subsequently assigned three times. *Id*. In a subsequent action brought by the third assignee to collect payments due under the agreement from Delgus, Delgus contended that the assignments were invalid because it did not receive written notice of the assignment in compliance with the stock sale agreement. Id. The court disagreed and upheld the assignment as valid on the basis that, under the general rule applicable to anti-assignment provisions, "[t]he covenant requiring notice in writing does not make the assignment void, but only makes the assignor liable for damages, if any," and the provision "was obviously intended to protect the buyer from making payments to the wrong party." *Id*. at 426-27. Here, too, the Policy makes it clear that the notice provision is only intended to protect Allianz in the case it pays the wrong party. It is not an anti-assignability provision. If Allianz felt damaged by the lack of notice it can pursue that claim.

Recognizing its fate if the provision is to be construed as an anti-assignment provision, Allianz instead argues that the provision is simply a guide that commands policyowners with the only method by which ownership can be assigned. Allianz convinced one Federal Court sitting in the Southern District of

New York of this distinction. *Jakobovits v. Allianz Life Ins. Co. of N. Am., No*. 15-cv-9977, 2017 U.S. Dist. LEXIS 111471, 2017 WL 3049538, at *4-5 (S.D.N.Y. July 18, 2017). A District Court in the Eastern District of New York did not understand the difference. In *Jakobovits v. PHL Variable Ins. Co*., No. 17-cv-3527-ARR-RER, 2018 U.S. Dist. LEXIS 83946, at *11 (E.D.N.Y. May 18, 2018) the Court ruled on a similar argument:

> Defendant states that the assignment provision at issue here "does not preclude or void assignments." Instead, "[i]t simply imposes an obligation to notify [defendant] of an assignment before [defendant] is bound by" it. In support, defendant cites a district court case that held that plaintiff lacked standing on substantially similar facts. Jakobovits v. Allianz... The *Allianz* court held that the assignment clause at issue there (which also required notice to the issuer of the policy) was "not an anti-assignment provision at all." 2017 U.S. Dist. LEXIS 111471, [WL] at *4. It did not "purport to void any invalid assignments"—it merely rendered assignments ineffective if they did not conform to the notice requirement. *Allianz* is unpersuasive, however. There is no meaningful difference between defendant's argument that the assignments are ineffective without notice and an argument that the assignments are void without notice. The latter argument is precluded by case law and so the former should be as well. The policies do not, in the "plainest words," make assignments without notice void and so the assignments are enforceable. Plaintiff therefore has an ownership interest in the policies, which is sufficient to confer standing. (Internal citations omitted).

Here, too, the Policy, does not, in “the plainest words” make assignments void. Rather, Allianz sought to protect itself from having to pay the death benefit more than once by absolving itself from liability if notice is not given. The assignment itself, however, is not void and plaintiff acquired standing to sue Allianz when the assignment was executed.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should answer the certified question in negative.

Dated: Kew Gardens, New York
April 4, 2023

Respectfully submitted,

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**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: April 4, 2023

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# ADDENDUM

## ADDENDUM TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| Shimon Halberstam, as Trustee of the Zupnick Family Trust 2008 B,<br><br>*Plaintiff*,<br><br>– against –<br><br>Allianz Life Insurance Company of North America,<br><br>*Defendant*. | **1:16-CV-6854 (ARR) (ST)**<br><br>**Opinion & Order** |

ROSS, United States District Judge:

In this case, the plaintiff is suing for a declaratory judgment that a certain life-insurance policy, issued by the defendant and owned by a trust of which the plaintiff is both trustee and beneficiary, remains in effect. Despite the variety of issues that the parties have briefed, the *material* facts are undisputed. The defendant insisted upon performance by the plaintiff that went beyond the terms of the policy. Accordingly, the defendant cannot rely on the plaintiff's subsequent failure to tender premiums to justify its termination of their contract. The plaintiff is entitled to summary judgment.

## BACKGROUND

The policy around which this case revolves was issued in April 2008 by the defendant, on the life of one Dora Zupnick. Def.'s 56.1 Statement ¶ 1, ECF No. 48-2; Pl.'s 56.1 Statement ¶ 1, ECF No. 52-2.[1] The policy was issued to Abraham Zupnick, her son, as trustee of the Zupnick Family Trust 2008 B, the owner and beneficiary of the policy. Def.'s 56.1 Statement ¶¶ 2–3; Pl.'s 56.1 Statement ¶¶ 2, 5. At some point, the plaintiff began

[1] All citations to the parties' Rule 56.1 statements pertain, unless otherwise noted, to facts that the parties do not dispute.

making premium payments on the policy. Pl.'s 56.1 Statement ¶ 11.[2] In 2010, the plaintiff and another man replaced Abraham Zupnick as trustee, and in 2011 the plaintiff became the sole trustee of the trust. Def.'s 56.1 Statement ¶ 3. The plaintiff also became the primary beneficiary of the trust. Pl.'s 56.1 Statement ¶ 10. The plaintiff is not related to the Zupnicks (Def.'s 56.1 Statement ¶ 5); rather, for him, the life-insurance policy is an investment (*id.* ¶ 16; Pl.'s 56.1 Statement ¶ 9). The plaintiff remains the sole trustee of the trust today. *See* Def.'s 56.1 Statement ¶ 4.

The policy does not simply require a fixed premium payment each month; instead, it "provides a policy owner flexibility to determine certain aspects of coverage, including the timing and amount of premiums it will submit to Allianz within limits set by the terms of the Policy." *Id.* ¶ 6; *see also* Pl.'s 56.1 Statement ¶ 12. Whether the policyholder has paid sufficient premium to keep the policy in force is determined by three different tests. Def.'s 56.1 Statement ¶ 8; Pl.'s 56.1 Statement ¶ 14. Under the policy, the defendant evaluates each of the three tests every month; if all three tests fail at once, the policy enters a grace period. Def.'s 56.1 Statement ¶ 8; Pl.'s 56.1 Statement ¶ 14. The grace period lasts sixty-one days, during which the policyholder may make "[a] premium payment sufficient to keep [the] policy in force for three months"; if the policyholder fails to do so "prior to the last day of the Grace Period," the policy lapses. Policy 4191, ECF No. 48-4; *accord* Def.'s 56.1 Statement ¶ 9.

Once the policy lapses, it may be reinstated upon notice made by the policyholder within three years, provided that the insured is still "insurable pursuant to [Allianz's] underwriting standards." Def.'s 56.1 Statement ¶ 30. Although it was not formally part of the contract, at all relevant times the defendant had a practice of accepting premium payments

[2] The exact date when the plaintiff first became financially involved with the policy is disputed and irrelevant.

from at least some policyholders within thirty days of when their policy would have lapsed without requiring a new underwriting of the insured. Def.'s Add'l 56.1 Statement ¶ 62, ECF No. 53-1. In February 2010, however, the defendant specifically instructed its underwriting staff not to "auto reinstate" certain policies, including the policy at issue here. Pl.'s 56.1 Statement ¶ 33.

The three tests under the policy all relate to how much premium has been paid: Under one test, the policy would remain in force as long as the policyholder made premium payments equal to at least $34,726.67 per month. *See* Policy 4165, 4191. That test, however, applied only for the first five years of the policy—that is, from April 2008 until April 2013. *See id.* Under a second test, the policy remains in force as long as the policyholder makes sufficient premium payments to maintain a positive balance after Allianz takes its monthly costs and fees. *See* Policy 4165–66, 4187–94. And under the third test, the policy remains in force as long as the policyholder makes sufficient premium payments to maintain a positive balance in a "side account" after Allianz recalculates the "Test Value"—a complex process that includes the subtraction of a "Monthly Test Premium," whose value changes every year according to a schedule set forth in the contract. *See* Policy 4168–69, 4185–86; Pl.'s 56.1 Statement ¶ 16. The policy at issue here failed all three tests on eight separate occasions between 2008 and 2012. Def.'s 56.1 Statement ¶ 22.

On July 7, 2012, the policy failed all three tests and entered the grace period. Pl.'s 56.1 Statement ¶ 17. On August 7, 2012, the defendant sent the plaintiff a grace notice, informing him that the policy would lapse unless a premium payment of $116,511.94 was paid by September 7, 2012. Def.'s 56.1 Statement ¶ 25; Pl.'s 56.1 Statement ¶ 18. Neither party has conclusively explained how this dollar amount was calculated, but it represented more than

enough premium for the policy to avoid failing at least one test until November 7 at the earliest. *See* Pl.'s 56.1 Statement ¶ 23.[3]

On August 20, 2012, the plaintiff called the defendant to ask why he had "to pay now so much." Call Trs. 4079, ECF No. 48-13. After some confusion, the defendant's representative repeatedly told the plaintiff—and the plaintiff's wife, Zissy Halberstam, who had joined the call—that the $116,511.94 represented sufficient premium to carry the policy until October 7. *Id.* at 4083–87.

On September 5, 2012, the plaintiff called the defendant to request a one-week extension of the payment deadline. Def.'s 56.1 Statement ¶ 28; Pl.'s 56.1 Statement ¶ 29. The defendant's representative told him that she "can't give [him] an extension but if the policy lapses, as long as [he] sen[t] the premium in within 30 days of the lapse date [the defendant would] auto-reinstate it, so [he] just need[ed] to get that money in as soon as possible." Call Trs. 4108. But then she corrected herself: "Or actually, for reinstatement we have to contact somebody else. I stand corrected on that one." *Id.* She then told him that "[a]s long as it's postmarked by [September 7] . . . it will be fine." *Id.* at 4109. Finally, after apparently discussing the issue with her manager (*see id.* at 4109–10), she told the plaintiff that, "upon further investigation, . . . [t]he premium actually needs to be in [the defendant's] office by the 7th." *Id.* at 4110.

On September 9, 2012, the defendant sent the plaintiff a notice stating that the policy had lapsed. Def.'s 56.1 Statement ¶ 29; Pl.'s 56.1 Statement ¶ 32.

On October 25, 2012, the Halberstams called the defendant to find out "what premiums [the plaintiff] need[ed] to pay up in order to keep [the] policy in force."

[3] The plaintiff asserts that $116,511.94 was enough premium for the policy to avoid failing at least one test until December 7 (*see* Pl.'s 56.1 Statement ¶ 20), but that is disputed (*see* Def.'s 56.1 Response ¶ 20, ECF No. 53-1).

Halberstam Aff., Ex. F, at 1, ECF No. 52-5. The defendant's representative informed them that because the policy had lapsed, the defendant would need to prepare a reinstatement application for the plaintiff to fill out. *Id.* And—evidently incorrectly (*see* BenHaim Aff., Ex. A, at 49, ECF No. 52-3)—she told them that the amount of premium that the trust owed wouldn't be known until after the defendant had received and processed the completed reinstatement application (Halberstam Aff., Ex. F, at 4). The Halberstams accordingly requested that an application be sent to them. *Id.* at 3–4.

The following day, the plaintiff again called the defendant, again seeking to find out the amount of premium that he would have to pay to reinstate the policy. Pl.'s 56.1 Statement ¶ 37. The plaintiff was told that that information was being calculated and would be sent to him with the reinstatement paperwork that he had requested. *Id.*

Sure enough, the plaintiff received a letter from the defendant dated November 1, 2012, enclosing the reinstatement application and stating that "[i]n order to reinstate [the] policy," he had to return the application and "a check for $181,260.46." *Id.* ¶ 38. The letter continued: "After we receive the check, we will review the application to determine whether you are still insurable by our standards. The premium received will be credited only upon approval of reinstatement. We may need additional information regarding your medical condition." *Id.* And it warned: "**This policy is not in effect and you do not have coverage under it until . . . you have been approved for reinstatement.**" *Id.*

At least two additional reinstatement applications, which also stated the amounts purportedly owed under the policy, were sent by the defendant—one to a representative of the plaintiff on December 19, 2012, and another to the trust on December 5, 2014. Def.'s 56.1 Statement ¶¶ 32–33. No reinstatement application was ever submitted, nor were any further premium payments made. *Id.* ¶¶ 34–35.

The plaintiff filed this action, seeking a declaratory judgment that the policy is still in effect, in New York Supreme Court, Kings County, on September 19, 2016. Summons & Compl. 6, ECF No. 1-1. The defendant removed it to this court on the basis of diversity jurisdiction on December 12, 2016. Notice of Removal 1, ECF No. 1. On June 9, 2017, on motion by the defendant, I dismissed most of the claims but allowed the case to proceed with respect to the claims that "the notice stated the incorrect amount due" and that "premiums were fully paid at the time of the [purported] lapse." Op. & Order 17, ECF No. 25. The parties then proceeded to discovery, and each now moves for summary judgment.

**DISCUSSION**

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material where it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[W]hen both parties move for summary judgment, . . . each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

The crux of the defendant's argument is that the plaintiff has not paid premium on the policy since 2012, and thus the policy has lapsed. Def.'s Br. 9, ECF No. 48-1. And the defendant argues that the amount stated on the grace notice that the plaintiff received in August 2012 is "irrelevant," because a grace notice is legally required only to terminate a life-insurance policy within one year of default, and here it has been several years since premiums were paid. *Id.* at 10.

In contrast, the plaintiff argues that the policy did not lapse in 2012 because the grace notice that the defendant sent him was "void on account of the inflated demand." Pl.'s Br. 2,

ECF No. 52-1. And because the defendant then wrongfully "informed [him] that [it] [would] not accept premiums or conditioned acceptance [of premiums] upon underwriting or refused to divulge the amount due," the plaintiff argues, he was excused from paying further premium. *Id.*

### A. The insurance policy remained in force throughout 2012, because the grace notice was legally insufficient.

Under New York law,[4] policyholders of life-insurance policies with variable premiums, like the policy in this case, are:

> entitled to a sixty-one day grace period, beginning on the day when the insurer determines that the policy's net cash surrender value is insufficient to pay the total charges necessary to keep the policy in force for one month from that day, within which to pay sufficient premium to keep the policy in force for three months from the date the insufficiency was determined.

N.Y. Ins. Law § 3203(a)(1); *see also* Policy 4191 ("If the [other tests also fail], a Grace Period of 61 days starts on the Monthly Anniversary Date when the Net Cash Value is less than the Monthly Deduction . . . ."); *id.* ("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.").

State law also provides that no life-insurance policy with variable premiums may:

> terminate or lapse by reason of default in payment of any premium . . . in less than one year after such default, unless . . . a notice shall have been duly mailed . . . no earlier than and within thirty days after the day when the insurer determines that the net cash surrender value under the policy is insufficient to pay the total charges that are necessary to keep the policy in force.

N.Y. Ins. Law § 3211(a)(1);[5] *see also* Policy 4191 ("At least 30 days prior to Termination, we

[4] The parties have agreed that New York law governs in this action. Joint Letter, ECF No. 38.

[5] Under the version of the statute in force when the policy here was issued, the notice was to be "mailed at least fifteen and not more than forty-five days prior to the day when [the] payment becomes due." § 3211(a)(1) (McKinney 1994). Which version of the statute applies is irrelevant to my decision.

will send written notification to your last known address advising that the Grace Period has begun."). This notice must "state the amount of such payment" due. § 3211(b)(2). "[T]he statute does not explicitly state that the amount given in the notice must be correct," but federal courts have predicted that the New York Court of Appeals "would invalidate a notice that misstated the premium due, as long as the misstatement was not de minimis." *Lebovits v. PHL Variable Ins. Co.*, 199 F. Supp. 3d 678, 680 (E.D.N.Y. 2016); *accord Blau v. Allianz Life Ins. Co. of N. Am.*, No. 14-CV-3202 (NGG) (VMS), 2018 WL 949222, at *4–5 (E.D.N.Y. Feb. 16, 2018), *appeal dismissed*, No. 18-699 (2d Cir. July 11, 2018).

Here, it is undisputed that the policy failed all three tests on July 7, 2012, triggering the beginning of the grace period, and that the defendant, on August 7, 2012, sent the plaintiff a notice informing him that the trust had to pay $116,511.94 by September 7, 2012. Pl.'s 56.1 Statement ¶¶ 17–18; Def.'s 56.1 Statement ¶ 25. And it is undisputed that $116,511.94 was enough to keep the policy in force until at least November 7, 2012. *See* Pl.'s 56.1 Statement ¶ 23. That is, the amount due was enough to satisfy the trust's July 7 shortfall and the trust's August 7, September 7, and October 7 obligations—keeping the policy in force for *four* months from July 7, the date that the policy's cash value was deemed insufficient.

Although the policy's language is not entirely clear, the statute is: the defendant demanded at least one month's premium more than it was entitled to. *See Lebovits*, 199 F. Supp. 3d at 681 ("[Section 3203's] requirements are deemed incorporated into the Policy."). Because an additional month's premium is not de minimis, the grace notice was legally invalid, and thus the policy did not lapse in September 2012. *Cf. id.* at 682 ("Because PHL's notices did not correctly state the amount due, it was not entitled to lapse the policy on August 22, 2010.").

The defendant argues that "the Policy itself does not contain a provision requiring grace notices to state the amount due" and that it is not "otherwise required to provide such information to the policy owner." Def.'s Br. 11. It's true that the defendant did not obligate itself to include the amount due in the grace notice, but section 3211(b)(2) of the state insurance law unambiguously requires it (*see Blau*, 2018 WL 949222, at *4; *Weiss v. Lincoln Nat'l Life Ins. Co.*, No. 14-CV-4944 (ERK) (JO), 2016 WL 4991533, at *4 (E.D.N.Y. Sept. 15, 2016); *Lebovits*, 199 F. Supp. 3d at 680). Thus, while the defendant may be correct that it was "not a breach of contract" for it to fail "to provide the correct amount in the grace notice" (Def.'s Opp'n 15, ECF No. 53), that failure meant that the grace notice was legally insufficient to trigger a lapse of the policy (*see Lebovits*, 199 F. Supp. 3d at 680–81).

Finally, the defendant opposes the plaintiff's motion on the ground that "[t]he undisputed facts do not indicate what amount should have been included on the grace notice." Def.'s Opp'n 8. It points to the "varying expert accounts regarding the correct amount" as evidence that "disputed factual issues . . . preclude summary judgment for plaintiff." *Id.* at 8–9. Whereas the plaintiff has retained an expert, who has reasonably attempted to calculate how much the trust owed on the policy (*see* BenHaim Aff., Ex. C),[6] the defendant neither asserts a different amount owed nor explains what, if anything, is incorrect about the plaintiff's expert's calculations. *Cf. Blau*, 2018 WL 949222, at *5 ("Neither Defendant nor Defendant's expert rebuts the premium payment amount offered by Plaintiff's expert, nor does either articulate how Defendant arrived at the [$116,511.94] figure."). The defendant appears content to leave the matter unsettled.

[6] I acknowledge that the plaintiff has endeavored to determine how much was owed on the policy when it entered the grace period, but I do not rely on any of the plaintiff's expert's conclusions.

But the defendant cannot evade summary judgment that easily. Although the exact amount that the trust was overcharged is unknown, it is undisputed that the trust was charged for *at least* three full months in addition to the month for which a balance was owing. *See* Pl.'s 56.1 Statement ¶ 23. As discussed above, that is enough to find a violation of section 3203(a)(1), and thus any dispute over how much more than that the trust was overcharged is immaterial for purposes of summary judgment.

### B. The defendant repudiated the contract by insisting on the reinstatement procedure, obviating any required tender of premium.

The defendant argues that none of the foregoing really matters, because section 3211 requires a legally valid notice only for the lapse of a life-insurance policy "in less than one year after [the] default." § 3211(a)(1); *see* Def.'s Opp'n 9. Thus, "even if no notice or an incorrect notice is provided, a life insurance policy will lapse within one year of the date of default in premium payments." Def.'s Opp'n 11; *see also Blau*, 2018 WL 949222, at *6 ("After a year of nonpayment, the insurer may lapse the policy without any notice."); *Lebovits*, 199 F. Supp. 3d at 681 ("Although noncompliance with § 3211 means that an insurer cannot lapse the policy within one year of the default, it may still lapse the policy after that period."). "Because plaintiff failed to tender premiums when due, or within one year thereafter," the defendant argues, "the Policy lapsed for nonpayment of premiums." Def.'s Br. 17.

The defendant is right on the law but wrong on the application. The invalid grace notice matters, because whether the policy lapsed in September 2012 is relevant to whether the defendant's subsequent conduct amounted to a repudiation of the contract. *See* Pl.'s Opp'n 14, ECF No. 49 (arguing that "Allianz prevented the Halberstams from paying premiums by advising the Halberstams that payment will not be accepted without new underwriting"); *cf. Jakobovits v. Alliance Life Ins. Co. of N. Am.*, No. 15cv9977, 2017 WL 3049538, at *6 (S.D.N.Y. July 18, 2017) ("Because Plaintiff . . . materially breached by failing

to pay any premiums, Allianz is entitled [to] summary judgment unless Allianz itself breached and thereby caused the policy owner[] to stop paying.").

1. *The defendant's insistence on a new underwriting and medical review went beyond the contract and amounted to a repudiation.*

"Under New York law, insistence upon terms which are not contained in a contract constitutes an anticipatory repudiation thereof." *REA Express, Inc. v. Interway Corp.*, 538 F.2d 953, 955 (2d Cir. 1976); *accord Created Gemstones, Inc. v. Union Carbide Corp.*, 391 N.E.2d 987, 990 n.5 (N.Y. 1979). "Repudiation 'can consist of . . . an indication that the renouncing party will perform only if certain "extracontractual" conditions are satisfied.'" *In re Best Payphones, Inc.*, 432 B.R. 46, 54 (S.D.N.Y. 2010) (quoting *Palazzetti Imp./Exp., Inc. v. Morson*, No. 98 Civ. 722(FM), 2001 WL 1568317, at *9 (S.D.N.Y. Dec. 6, 2001)), *aff'd*, 450 F. App'x 8 (2d Cir. 2011); *accord SPI Commc'ns, Inc. v. WTZA-TV Assocs. Ltd. P'ship*, 644 N.Y.S.2d 788, 790 (App. Div. 1996) ("An anticipatory repudiation . . . can be grounded upon a finding that the other party . . . has communicated its intent to perform only upon the satisfaction of extracontractual conditions . . . ."). "If a party to a contract demands of the other party a performance to which he has no right under the contract and states *definitively* that, unless his demand is complied with, he will not render his promised performance, an anticipatory repudiation has been committed." *In re Best Payphones*, 432 B.R. at 54 (quoting *Tex. Trading & Milling Co. v. H.I.T. Corp.*, No. 84 Civ. 3776 (LLS), 1986 WL 9792, at *9 (S.D.N.Y. Sept. 3, 1986)).

New York courts have long applied the doctrine of repudiation in the life-insurance context. *See, e.g.*, *Shaw v. Republic Life Ins. Co.*, 69 N.Y. 286, 292–93 (1877) ("Where one party to a contract declares to the other party to it, that he will not make the performance on the future day fixed by it therefor, and does not . . . withdraw his declaration, the other party is

excused from performance on his part . . . .").[7] When a life-insurance company repudiates its contract, either by terminating the policy outright or by insisting on extracontractual performance as a condition of continued coverage, the company cannot then rely on the policyholder's failure to tender premiums in arguing that the policy has lapsed. *See In re Preston's Will*, 278 N.E.2d 623, 625–26 (N.Y. 1972) ("[T]he cancellation of a policy, even if wrongful, is tantamount to a refusal to accept a premium even if tendered and thus there is a waiver of any claim of policy lapse."); *Kenyon v. Nat'l Life Ass'n of Hartford*, 57 N.Y.S. 60, 72 (App. Div. 1899) ("Payment or tender of payment of premiums is not necessary where the insurers have already declared the policy forfeited, or done any other act which is tantamount to a declaration on their part that they will not receive it if tendered." (quoting treatise)).

Here, the plaintiff argues that, "[i]n every communication with the Halberstams, . . . Allianz advised that . . . [it] [would] reject payment" and "conditioned acceptance of any premiums upon reapplication and approval by underwriting." Pl.'s Br. 19.[8] Because "the

[7] The defendant objects to citation to decisions issued before 1896, on the ground that they predate the rule, now found in section 3211, that a life-insurance company may terminate a policy without notice after one year of default. *See* Def.'s Opp'n 11. This objection is meritless insofar as the cases are cited for propositions unrelated to the notice statute. *See also* Pl.'s Reply Br. 2–3, ECF No. 54 ("The insurance law maxim that a policy owner is excused from tendering premiums in the face of certain conduct by the insurance company is completely independent of any of § 3211's grace notice considerations and therefore, it makes no difference [when] the decisions establishing the maxim were issued . . . ." (footnote omitted)).

[8] The plaintiff further urges that the defendant had "predetermined" not to accept any application for reinstatement that the plaintiff might submit. Pl.'s Br. 19. There is meager support for this theory in the record, and the defendant flatly denies it (*see* 2d Anderson Decl. ¶ 6, ECF No. 53-2). What the defendant would have done if the plaintiff had submitted a reinstatement application is disputed—but ultimately immaterial.

The plaintiff also argues, at length, that "Allianz prevented the Halberstams from paying premiums . . . by refusing to disclose the amount due." Pl.'s Opp'n 14; *accord* Pl.'s Br. 19–20 ("In fact, tender would have been impossible as the Halberstams had no way of knowing on their own how much to tender and were never told by Allianz despite point-blank requests."). This argument is squarely contradicted by the undisputed facts. *See, e.g.*, Pl.'s 56.1 Statement ¶ 38 (quoting letter from defendant informing plaintiff that trust owed $181,260.46

August grace notice was defective," however, "the policy [had] not lapse[d]," and thus, the plaintiff argues, "Allianz's insistence on new medical underwriting was an unwarranted condition excusing plaintiff's failure to tender." Pl.'s Reply Br. 6, ECF No. 54.

The plaintiff's argument finds support in the case law. In *Te Bow v. Washington Life Insurance Co.*, 59 A.D. 310 (1901), *aff'd mem.*, 65 N.E. 1123 (N.Y. 1902), the Appellate Division of the New York Supreme Court was confronted with a dispute in which a life-insurance company wrongfully claimed that an insurance policy had lapsed and demanded "a physician's certificate of good health as a condition to the company's receiving the premium due." *Id.* at 311. The insured, unable to obtain such a statement, subsequently tendered no premium, and later died. *Id.* at 311–12. His wife sued for the insurance benefits; in response, the insurance company argued that the policy had lapsed for lack of premium paid, pointing out that "there never was at any time a refusal to accept the premium." *Id.* at 313. The court rejected this argument as "hypercritical":

> A declaration that a policy had lapsed, and can be reinstated by furnishing a satisfactory medical certificate, imports of necessity a denial of the right to reinstatement except upon the condition named. With the unauthorized cancellation of the policy, and a refusal to accept the premium except upon a condition which was unauthorized, the authorities are uniform to the effect that the defendant is estopped from claiming as a defense to this action that the premium has not been paid.

*Id.*; *see also Whitehead v. N.Y. Life Ins. Co.*, 6 N.E. 267, 272 (N.Y. 1886) ("The company cannot

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on policy). The plaintiff argues that he couldn't believe the figures quoted in the reinstatement letters because he had been "told that the amounts cannot be calculated without going through reinstatement and that the amount [would] change after reinstatement." Pl.'s Reply Br. 11. It's true that he was told this. *See* Pl.'s 56.1 Statement ¶ 36. But it's also true that, apparently unconvinced by what he was told, he called the defendant back the very next day and was told the opposite—that the reinstatement application *would* tell him the amount of premium owed. *See id.* ¶ 37. Viewed in the light most favorable to the defendant, the record does not support the plaintiff's prevention argument.

depend upon a default to which its own wrongful act contributed, and but for which a lapse might not have occurred.").

The application of *Te Bow* to this case is straightforward. As in *Te Bow*, the defendant here asserted incorrectly that the policy had already lapsed. *See supra* Section A. And as in *Te Bow*, because the policy had purportedly lapsed, the defendant insisted that the policy would not be reinstated without a review of the insured's health. *See* Pl.'s 56.1 Statement ¶ 38. Indeed, the defendant was unequivocal that the "policy is not in effect and [the trust] do[es] not have coverage under it until . . . [it] ha[s] been approved for reinstatement." *Id.* (emphasis omitted); *cf. Kenyon*, 57 N.Y.S. at 70 ("The notice sent to the insured by the defendant was absolute and unequivocal, and . . . stated, in substance, that her policy had been canceled, and that all her rights thereunder had terminated . . . ."). And the defendant made clear that any premium tendered would "be credited only upon approval of reinstatement." Pl.'s 56.1 Statement ¶ 38. The plaintiff was thus absolved of any responsibility to tender premium. *See also Sullivan v. Indus. Benefit Ass'n*, 26 N.Y.S. 186, 190 (Gen. Term 1893) ("Ordinarily a tender is not necessary when the acts and conduct of the other party indicate that it will be futile.").

*2. The defendant's claimed good faith is immaterial.*

The defendant attempts to resist this conclusion by arguing that, "[c]ontrary to the facts in *Te Bow*, Allianz here did not impose any additional requirements as part of its reinstatement procedures, and as such, . . . Allianz's reliance upon the terms of the Policy [did not] constitute a repudiation." Def.'s Opp'n 25; *see also id.* at 24 (arguing that requiring plaintiff to go through "full underwriting" "obviously does not constitute a repudiation of the Policy" but rather "follow[s] the express terms of the Policy" (quoting Pl.'s Br. 15)). But that is sensible only if the policy had actually lapsed, thus requiring a reinstatement. As already explained, the policy remained in force throughout 2012 because the August 2012

grace notice was legally invalid, and thus the defendant's insistence in November 2012 that the policy go through the reinstatement process went beyond the parties' contract.

The defendant argues that "[a]n insurer does not repudiate a policy by relying upon and following its interpretation of provisions of the policy." Def.'s Br. 18. Because it was "endeavor[ing] to apply" the policy's terms, the defendant argues, I should not rule that it repudiated the contract. *Id.* at 19 (quoting *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 177–78 (2d Cir. 2012)). Although this argument has some force, I find that it ultimately fails.

"The test for an anticipatory repudiation is an objective one and good faith is immaterial." *Record Club of Am., Inc. v. United Artists Records, Inc.*, 643 F. Supp. 925, 939 (S.D.N.Y. 1986), *vacated on other grounds*, 890 F.2d 1264 (2d. Cir. 1989); *see also Roussalis v. Wyo. Med. Ctr.*, 4 P.3d 209, 255 (Wyo. 2000) ("[A] party's good faith will not prevent [a] statement from amounting to a repudiation." (quoting II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.21 (1990))).[9] "An anticipatory repudiation may be based upon an erroneous contract interpretation just as it may be based upon a refusal to perform for any other reason." *Record Club*, 643 F. Supp. at 939. "A party therefore acts at its peril if that party, insisting on what it mistakenly believes to be its rights, refuses to perform its duty." *Roussalis*, 4 P.3d at 255 (quoting Farnsworth, *supra*, § 8.21). Although this rule may seem harsh, there is good reason for it. "Whatever the breaching party's state of mind, the impact on the innocent party is the same—he faces total loss of the repudiator's performance, to which the contract entitled him." *Record Club*, 643 F. Supp. at 939.

[9] The plaintiff disputes that the defendant was acting in good faith. *See, e.g.*, Pl.'s Opp'n 23. For the present purpose, I assume *arguendo* that the defendant's insistence upon a reinstatement application was done in good faith.

Authority relied upon by the defendant is not to the contrary. In *New York Life Insurance Co. v. Viglas*, 297 U.S. 672 (1936), the Supreme Court rejected a claim that a life-insurance company had repudiated its policy, stating that, "[f]ar from repudiating [the contractual] provisions," the insurance company "appealed to their authority and endeavored to apply them." *Id.* at 676. And the Court noted that "[t]here is nothing to show that the insurer was not acting in good faith in giving notice of its contention that the disability was over." *Id.* Critically, however, that case involved the denial of an insurance *claim*, but not a repudiation of the entire policy. *See id.* at 675; *see also Mobley v. N.Y. Life Ins. Co.*, 295 U.S. 632, 638 (1935) ("Mere refusal . . . to pay a monthly benefit when due is sufficient to constitute a breach of that provision, but it does not amount to a renunciation or repudiation of the policy."). As the Second Circuit has explained, "[r]epudiating an insurance policy is not the same as denying that the claim presented is covered by the terms of that policy." *Jacobson*, 672 F.3d at 177 (citing *Viglas*, 297 U.S. at 676). The *Jacobson* court followed *Viglas* because the insurer in *Jacobson* "did not disavow the policy, nor contend that it was not bound by its terms." *Id.* at 177–78. But here the defendant's disavowal was explicit: "**This policy is not in effect and you do not have coverage under it . . . .**" Pl.'s 56.1 Statement ¶ 38.[10]

[10] The defendant also cites to *Lowenstein v. Federal Rubber Co.*, 85 F.2d 129 (8th Cir. 1936), for the proposition that there is "no repudiation where [a] party 'undert[akes] to perform in good faith according to its interpretation' of the contract." Def.'s Br. 19 (quoting *Lowenstein*, 85 F.2d at 131); Def.'s Opp'n 25 (same). To the extent that that decision conflicts with my analysis above, it is contrary to the weight of authority (*see United Cal. Bank v. Prudential Ins. Co. of Am.*, 681 P.2d 390, 430 (Ariz. Ct. App. 1983) ("The *Restatement*, *Corbin*, and *Williston*—the three leading authorities on American contract law—unanimously endorse the position that an anticipatory repudiation may be based upon an erroneous contract interpretation just as it may be based upon a refusal to perform for any other reason.")), and I do not believe that the New York Court of Appeals would find it persuasive.

### C. The defendant's statute-of-limitations argument fails.

In my previous opinion in this case, I rejected the defendant's arguments that the plaintiff's claims were brought too late, ruling that the six-year limitations period for declaratory-judgment actions applies. *See* Op. & Order 16–17. Based on that ruling, the defendant maintains that the action was still brought too late, because the defendant "sent plaintiff its first grace notice on November 7, 2008," more than six years before the plaintiff filed his complaint. Def.'s Br. 22. Although it does not explicitly say so, the defendant appears to be arguing now that *all* the grace notices that it sent the plaintiff (*see* Def.'s 56.1 Statement ¶ 22 (listing dates of notices sent)) demanded too much money. By overcharging the trust for years before the plaintiff caught on, the defendant supposes that it is now insulated from suit.

This argument has multiple flaws. First, I see nothing in the record to support a finding that any of the previous grace notices violated the statute, and neither the plaintiff nor the defendant have even alleged that those notices were invalid. Second, regardless of whether any of the previous grace notices were deficient, none of them precipitated the purported policy lapse that is at issue in this lawsuit.

The plaintiff's cause of action accrued in 2012, and the plaintiff's complaint was filed in 2016. It was timely.[11]

## CONCLUSION

For the foregoing reasons, the plaintiff's motion for summary judgment is granted, and the defendant's motion for summary judgment is accordingly denied. But before the

[11] The plaintiff also raises several new arguments, based on various provisions of the New York insurance law, in his brief in opposition to the defendant's motion. *See* Pl.'s Opp'n 5–9. Because these arguments were not raised previously, and because I grant summary judgment to the plaintiff in any event, I do not address them.

policy can be declared "in good standing and in effect" (Pl.'s Mot. 1, ECF No. 52), the trust must become current on its premium obligations. *See, e.g.*, *Lebovits*, 199 F. Supp. 3d at 682. Accordingly, the parties are directed to make a good-faith effort to determine the amount of premium now owed under the policy, and to inform the court of the amount within thirty days of this order.

So ordered.

___/s/_____
Allyne R. Ross
United States District Judge

Dated: October 2, 2018
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| Shimon Halberstam, as Trustee of the Zupnick Family Trust 2008 B,<br><br>*Plaintiff*,<br><br>– against –<br><br>Allianz Life Insurance Company of North America,<br><br>*Defendant.* | **1:16-CV-6854 (ARR) (ST)**<br><br>**Not for Publication**<br><br>**Opinion & Order** |

ROSS, United States District Judge:

The plaintiff in this case is suing for a declaratory judgment that a certain life-insurance policy, issued by the defendant and owned by a trust of which the plaintiff is both trustee and beneficiary, is in force. In a previous opinion, I found that the plaintiff was entitled to summary judgment, provided that "the trust . . . become current on its premium obligations." *Halberstam v. Allianz Life Ins. Co. of N. Am.*, No. 1:16-CV-6854 (ARR) (ST), 2018 WL 4762253, at *9 (E.D.N.Y. Oct. 2, 2018). And I ordered the parties "to determine the amount of premium now owed under the policy." *Id.* Having failed to agree on the methodology for doing so, the parties have returned to this court for further direction.

## BACKGROUND

The facts of this case are set forth in my previous opinion, and I will not dwell on them herein. It suffices for present purposes to explain that the life-insurance policy at issue "does not simply require a fixed premium payment each month" but instead "provides a policy owner flexibility to determine certain aspects of coverage, including the timing and amount of premiums it will submit to Allianz within limits set by the terms of the Policy." *Id.* at *1 (quoting Def.'s 56.1 Statement ¶ 6, ECF No. 48-2).

Under its terms, the policy remains in force as long as at least one of three different monthly tests, each based on the amount of premium paid by the policyholder, is met. *See id.* at *1–2. If all three tests ever fail at the same time, the policy enters a sixty-one-day grace period, during which the policyholder must make "[a] premium payment sufficient to keep [the] policy in force for three months" from the date that the tests all failed; otherwise, the policy lapses. Policy 28, ECF No. 61-1;[1] *see Halberstam*, 2018 WL 4762253, at *1, *4. The parties agree that only one of the three tests is at issue in the present dispute. *See* Pl.'s Br. 4, ECF No. 62; Petit Decl. ¶ 5, ECF No. 60.

Under that one test, "the policy remains in force as long as the policyholder . . . maintain[s] a positive balance in a 'side account,'" whose balance is recalculated monthly based on the previous month's balance, the premium paid that month, and a number of other variables that are defined in a policy rider. *Halberstam*, 2018 WL 4762253, at *2; *see* Policy 10–12, 22–23. Per the terms of the rider, the value of the side account grows at a high interest rate, which incentivizes the policyholder to make substantial premium payments early on rather than continually funding the policy with the least premium possible. *See* 2d Petit Decl. ¶ 10, ECF No. 64. Nevertheless, the specific policy at issue here entered a grace period eight different times between its issuance in 2008 and the purported lapse in 2012 that precipitated this lawsuit. *See Halberstam*, 2018 WL 4762253, at *2. The last such grace period began on July 7, 2012 (*see id.*), and no premium payments have been made since (*see* Policy History, ECF No. 61-2).

[1] Because this document is inconsistently paginated, I use the page numbers assigned by the ECF system.

## DISCUSSION

### A. The Amount of Premium Owed

The question now is how much premium the trust should have to pay in order to be deemed current on the life-insurance policy. The defendant argues that that question is readily answerable under the terms of the policy: the trust should have to pay as much premium as is currently needed for the side account to attain a positive balance. *See* Def.'s Opp'n 2–3, ECF No. 63. The plaintiff, by contrast, argues that the trust should only have to pay as much premium as would have been needed in 2012 to keep the side account in the black until the present. *See* Pl.'s Br. 6–7, 10. The logic of the plaintiff's argument is that the trust should not be penalized for failing to pay premiums since 2012 when "the only reason premiums were not paid since then was because Allianz wrongfully declared the Policy lapsed." Pl.'s Reply 1, ECF No. 67. But the defendant counters that the plaintiff should not receive the windfall of a fictional 2012 multimillion-dollar premium payment that would never have occurred in reality. *See* Def.'s Reply 4–5, ECF No. 68. Both parties' arguments are persuasive, so I look for a third, fairer option.

In doing so, I rely on basic principles of contract-law remedies. One such "'general principle' of contracts is that recovery for breach of contract should put the injured party 'in as good a position as he would have occupied had the contract been kept.'" *Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 424 (S.D.N.Y. 2004) (quoting *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969)). Under New York law, the court's object in remedying a breach of contract is typically to "return the plaintiff, as nearly as possible, to the position it would have been in had the wrongdoing not occurred—but do no more." *E.J. Brooks Co. v. Cambridge Sec. Seals*, 105 N.E.3d 301, 304 (N.Y. 2018); *see also Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 196 (2d Cir. 2003) ("Under New York law, damages for breach of

contract should put the plaintiff in the same economic position he would have occupied had the breaching party performed the contract."). As a result, "revenues due a plaintiff because of a breached contract must be offset by any amount plaintiff saved as a result of the breach." *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 495 (2d Cir. 1995).

Application of these principles to the facts at hand demonstrates why neither party's chief proposal can be accepted. Had the defendant not breached the contract, the trust would have continued to make sporadic premium payments, and the policy would have remained in force. Putting the plaintiff in the position that he would have occupied thus requires not only declaring that the policy is in force but also requiring the trust to hand over premium payments equivalent to the amount that the trust would have paid. Yet the defendant's proposal would certainly have the trust paying more now than it would have paid over the past six years, thus disadvantaging the plaintiff vis-à-vis where he would have found himself had the defendant not breached. *See* 2d Petit Decl. ¶¶ 5–7. And just the same, the plaintiff's proposal would unquestionably put the plaintiff in an even better position than he would have held absent the breach. *See* Pl.'s Br. 8; Pl.'s Opp'n 5, ECF No. 66.

The defendant argues that it would be "inappropriate" to issue an order "based upon the factually unsupportable assumption that the [trust] would have made premium payments in any discernable pattern." Def.'s Br. 2, ECF No. 59. While it's certainly true that the trust's payment history was erratic (*see* Policy History), there was pattern enough to the trust's payments for the court to estimate what would have been paid after 2012. *Cf. Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 110 (2d Cir. 2007) (""The plaintiff need only show a stable foundation for a reasonable estimate' of the damage incurred as a result of the breach." (internal quotation marks omitted) (quoting *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 926 (2d. Cir. 1977))). And the defendant does not dispute that my task is

to "place the parties in the position they would have been in, *as close as possible*, had Allianz not declared the Policy to have lapsed in September 2012." Def.'s Br. 3–4 (emphasis added).

Based on my review of the record, I find that the trust's payments roughly followed a particular pattern: the trust would make minimal payments until the policy entered a grace period, at which time the trust would make a sufficiently large payment to prevent the policy from lapsing. Indeed, despite suggesting that there was no "discernable pattern" of payments, the defendant's own briefing describes this pattern accurately and repeatedly. *See, e.g.*, Def.'s Br. 2 (arguing that it's "undisputed" that "the Policy's owner consistently paid the minimum amounts needed to keep the Policy in force"); *id.* at 3 ("[T]he Policy's owner consistently paid the minimum amount needed to keep the Policy in force, allowing the Policy to enter a grace period on eight separate occasions to delay the need to pay any premium for as long as possible."); Def.'s Opp'n 12 (noting trust's "pattern of never paying any premium amounts in advance of when they were needed to keep the Policy from lapsing"); *id.* at 15 ("It is apparent . . . that most if not all of the large premium payments were made only because they were necessary to avoid lapse . . . ."); *id.* at 16 ("[P]remium payments . . . were paid only when absolutely necessary to save the Policy from lapsing . . . ."). And the defendant's actuary agrees. *See* Petit Decl. ¶ 4 (stating that payment history "demonstrates that this policy owner had decided to minimally fund the Policy, and to pay premium as infrequently and in as low amounts as possible to keep the Policy in force"); *id.* ("This premium payment pattern is characteristic of someone paying the absolute minimum premium necessary to prevent the lapse of a policy."); 2d Petit Decl. ¶ 10 ("[T]he actual premium paid on this Policy in the first 4 years reflects that the Plaintiff-owner . . . paid the bare minimum necessary to meet the Guaranteed Death Benefit test.").

Both parties acknowledge that, had the defendant not breached the contract, the most likely scenario would have been a continuation of the same pattern of payments. *See* Pl.'s Opp'n 5 ("[I]t is likely that payment would have continued in the same pattern, roughly once every two or three months."); Def.'s Reply 4 ("[T]he undisputed fact record demonstrates that . . . it is most likely that plaintiff would have deliberately failed to pay premium and allowed the Policy to enter grace periods repeatedly."). That, then, is our answer.

The amount of premium that the trust has to pay now is the amount that the trust would have paid if the trust had, from 2012 up through today, continually paid nothing until the policy entered a grace period and only then paid the least premium possible, on the last day possible, to keep the policy from lapsing.[2]

**B. Ancillary Matters**

In the interest of the expeditious resolution of this case, and to avoid any further dispute between the parties, I take the time to clarify a few other matters.

First, the defendant notes that it has missed out on "the benefit of having been able to earn investment income on the premium" that would have been paid over the past six years. Def.'s Br. 4. That is the sort of loss that can be remedied by an award of prejudgment interest. *See, e.g.*, *U.S. Naval Inst. v. Charter Commc'ns, Inc.*, 936 F.2d 692, 698 (2d Cir. 1991) ("Under New York law, . . . a plaintiff who prevails on a claim for breach of contract is

[2] This amount will presumably differ somewhat from the payment scenario that the defendant first presented in its opposition papers. *See* Def.'s Opp'n 13. As explained by the defendant's actuary, that scenario was based on the trust having "paid the Minimum Monthly Premium amount" between 2012 and 2018 (2d Petit Decl. ¶ 7), and it appears to assume *monthly* premium payments (*see id.* at 3 (table)). By contrast, the scenario that I am describing assumes that payments would have been made only when the policy had entered the grace period and was about to lapse, rather than every month. That said, both scenarios are based on the same essential logic: "plaintiff paying the minimum amounts necessary under the Rider to keep the Policy from lapsing" (Def.'s Reply 5 n.11).

entitled to prejudgment interest as a matter of right."). The problem for the defendant, of course, is that it is the one who breached the contract. I thus decline to compensate the defendant for the lost opportunity to earn interest. *Cf. Rubenstein v. Lincoln Nat'l Life Ins. Co.*, No. 501605/2012, 2014 N.Y. Misc. LEXIS 3327, at *4–5 (Sup. Ct. July 25, 2014) (observing that inclusion of "fees and interest" in calculation of "unpaid premiums" "may not be appropriate since the lapse was initially brought on by the defendant").

Second, the plaintiff points out that, under the terms of the policy, any aggregate premium payments that surpass $555,600 in any given year have a diminished effect on the balance in the side account, thus requiring the plaintiff to pay relatively more premium to keep the policy in force. *See* Pl.'s Br. 2, 5. The plaintiff argues that, had the contract not been breached, he would never have paid that much premium in any one policy year, and so that term—called Premium Factor B—should be read out of the policy for the purpose of calculating the amount of premium due now. *See id.* at 11; *see also* Policy 10, 22. The defendant apparently concedes that this "higher premium factor is designed to come into play mainly when a policy owner funds a policy in an amount that is substantially greater than the minimum monthly premium rate, and the trust never funded this Policy in that manner." Def.'s Opp'n 10. Accordingly, under the payment scenario that I have outlined above—designed to re-create the trust's actual payment history—it may be that this term of the policy will simply not come into play. If it does, however, it should be factored into the calculations just as it would have been had the payments been made over the six years in question. I will not "re-write the premium calculation formula" of the policy (Def.'s Reply 3–4).

And third, the parties have failed to agree on which target date the premium calculation should be based on. *Compare* Petit Decl. ¶ 6 (noting that defendant's calculations

were designed to carry policy until December 7, 2018), *with* Pl.'s Reply 5 (stating that plaintiff's calculations were designed to carry policy until January 2019). The parties are welcome to use any target date on which they can agree. But if they cannot agree, they are instructed to calculate the amount of premium that would need to have been paid to keep the policy from *lapsing* no sooner than March 7, 2019.

**CONCLUSION**

For the foregoing reasons, the parties are directed to make a good-faith effort to determine the amount of premium owed under the scenario and conditions that I have described above. The parties are directed to inform the court of that amount within thirty days of this order.

So ordered.

/s/
Allyne R. Ross
United States District Judge

Dated: December 19, 2018
Brooklyn, New York