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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

When Plaintiff Trust purchased the Policy, it also obtained a complete assignment, including an assignment to sue Allianz. Allianz claims that a certain provision in its policy invalidated the assignment but somehow, that provision, which eliminated an otherwise valid assignment was not an anti-assignment clause. That position in untenable. If there is a provision in the Policy that eliminates assignments, it is an anti-assignment clause and ought to be treated that way. Under well-established New York law, the anti-assignment provision in Allianz's policy cannot strip the Trust of the standing it purchased when it received the assignment.

ARGUMENT

I. ALLIANZ SEEKS TO ENFORCE AN ANTI-ASSIGNMENT CLAUSE BY A DIFFERENT NAME

Under New York law, anti-assignment provisions only negate valid assignments if written clearly and unequivocally. Allianz claims that its provision is not an anti-assignment clause and so should not be treated as one. But if the provision is to defeat the Trust's standing then it can be nothing more than an anti-assignment clause in disguise.

On May 24, 2016, Plaintiff Trust was assigned the Policy from Miriam Muschel [A-100]. The assignment stated:

> (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…including, without limitations, the right to take any legal action or file suit in a court of law as Seller's assignee…
> [A-103]

The agreement was signed by the parties and but for the policy provision that Allianz seeks to enforce, the assignment was valid under New York law to bestow the Trust with standing.

Allianz claims that its policy provision destroys and invalidates the assignment and that as a result, the Trust lacks standing, not only in this action against Allianz but, presumably, against anyone else. There is no legal basis to a claim that the Trust would have standing to sue anyone else in the world as owner and assignee of the Policy but not Allianz. So, taking Allianz's position to its natural conclusion, if the Trust commenced action against a third party for some reason, Allianz maintains that such an action must fail for lack of standing because the assignment is invalid.

That being the case, it is hard to understand Allianz's claim that the provision it seeks to enforce is anything other than an anti-assignment clause.

The law in New York for anti-assignment clauses is clear and ironically, stands in deep contrast to the business model of insurance companies. Unlike

insurance companies who have the reputation of offering purchasers the illusion of all-encompassing coverage only to have the limitations on coverage nibble away the entire cake – (as the classic gag describes the insurance business model: we will cover you for the fall from a roof but not for the landing) – New York law on anti-assignment clauses is the exact opposite. If a party to a contract wishes to make the contract unassignable, the party must state so clearly, unequivocally and without limitation. Nothing, other than perhaps sales, prevents Allianz from drafting an unequivocal anti-assignment clause.

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 only remedy is against the breaching party on a suit for damages. *Citibank, N.A. v. Tele/Res., Inc.*, 724 F.2d 266, 268 (2d Cir. 1983).

Here, Allianz's attempted anti-assignment clause is not clear and so the prohibitory language it seeks to enforce cannot strip the Trust of standing. At most, it is a promise by Muschel to report ownership changes to Allianz. If Allianz feels that it was damages by Muschel's breach and failure to notify it of the ownership assignment, Allianz can sue Muschel for damages.

Allianz cites a number of unpublished District Court decisions finding in its favor. Jakobovits v. Allianz Life Ins. Co. of N.A., 2017 WL 3049538 (S.D.N.Y. July 18, 2017); Farb v. Federal Kemper Life Assurance Co., 2003 WL 21820714 (D.Md. July 21, 2003); Quilling v. Trade Partners, Inc., 2011 WL 3585398 (W.D.Mich. Aug. 16, 2011). These decisions clearly do not have any precedential value but also lack persuasive value.

Quilling is completely devoid of any facts or analysis to have any persuasive value and Jakobovits was decided wrongly. In Farb, decided under Maryland law, there never was an assignment of the Policy to the plaintiff, at all ("Kopp and DiPietro, however, never assigned the policy [Farb, at *7])." Ownership of the policy never changed hands. Rather, the plaintiff claimed he was assigned the position of beneficiary from the last beneficiary of the policy. Obviously, a policy is only assignable by its owner or owners. Here, Muschel, as owner, assigned ownership to the Trust and the Trust is suing as the owner. Accordingly, in Farb, the Court ruled that a change of beneficiary designation does not take effect unless filed with the insurer. A change of beneficiary designation is obviously a very different animal and not subject to New York's law on assignments. Farb, at *8. The Farb decision is irrelevant.

Allianz also points to Banco Popular, N. Am. v. Kanning, 638 F. App'x 328, 336 (5th Cir. 2016) but that decision was rendered under Texas law which governs

the applicability of anti-assignment clauses in insurance policies by statute. As the Court ruled in Kanning, "Texas law permits assignment of insurance policies 'in a manner and to the extent not prohibited by the policy'. Tex. Ins. Code Ann. § 1103.055(2)." As Texas has a statutory scheme by which to deal with life insurance anti-assignment clauses, "[n]on-assignment clauses have been consistently enforced by Texas courts". Tex. Farmers Ins. Co. v. Gerdes, 880 S.W.2d 215, 218 (Tex. App. 1994). New York does not share the same statutory scheme and so the anti-assignment clause that Allianz seeks to enforce needs to be treated the same as any anti-assignment clause in any contract.

Nor should this Court be moved by Allianz's purported nightmare scenario. Allianz argues that "it is not hard to envision the potential havoc that could be wreaked on" Allianz "for example, Muschel could obtain a loan from Allianz Life without the Trust knowing." [Respondent's Brief at 13-14] This scenario is no different than an ordinary lender that fails to record a mortgage. Sure, it makes business sense for the Trust to record itself as the new owner so that Muschel, the prior owner, does not borrow against the Policy without the trustee's knowledge, but the Trust's failure to do so is a risk that the Trust undertakes at its own peril. There is no risk to Allianz. The Policy contains a separate provision obligating Allianz to pay only the last designated beneficiary and no one contests the fact that

beneficiary designations must be filed with Allianz in order to be effective. At issue here is whether Allianz's provision destroys the assignment of ownership.

Looking to avoid the outcome of an anti-assignment clause, Allianz wants to claim that its provision does not attack the assignment itself but only protects Allianz from facing suit by unrecorded assignees. Allianz claims "the import of the notice provision is simply that unless Allianz Life is notified of the assignment, the assignment is not effective with respect to and does not affect Allian Life." [Respondent's Brief at 18]. But under New York law, "an unequivocal and complete assignment extinguishes the assignor's rights against the obligor and leaves the assignor without standing to sue the obligor." Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A., 731 F.2d 112, 125 (2nd Cir. 1984). Under Allianz's stratagem, the Trust cannot sue it because the Trust did not record the assignment and Muschel cannot sue because she assigned the Policy; clearly, an absurd result. In any event, as argued earlier, Allianz's scheme results in another absurdity: the Trust would have standing to sue anyone else in the world as owner of the Policy but not Allianz.

Instead, Allianz's clause walks like an anti-assignment clause and talks like an anti-assignment clause and should be treated like one. Since the provision does not clearly and unequivocally block assignments, it lacks the necessary force to destroy the assignment and plaintiff's standing.

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
June 28, 2023

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
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