UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ISAAC JAKOBOVITS, *as Trustee of the* LITE TRUST I,

Plaintiff,

-against-

ALLIANCE LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

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OPINION & ORDER

15cv9977

WILLIAM H. PAULEY III, United States District Judge:

Plaintiff Isaac Jakobovits, as trustee of LITE Trust I, brings this breach of contract and declaratory judgment action against Defendant Allianz Life Insurance Company of North America ("Allianz"). Jakobovits seeks damages for Allianz's alleged breach of nine lapsed life insurance policies on three different individuals (one of whom is now deceased), as well as an order reinstating the policies as to the two living insureds. Both parties move for summary judgment. For the reasons stated below, Plaintiff's motion is denied and Defendant's motion is granted in part and denied in part.

BACKGROUND

This dispute arises out of nine life insurance policies issued by Allianz in 2007 and 2008 on the lives of three individuals—Sandor Oberlander, Herman Stern, and David

Rosenberg.[1] The policies have a collective face value of more than $80 million. After a series of purported assignments, they came to rest in the hands of Plaintiff, an investment trust that purchased them in a block of approximately 40 insurance contracts for $80,000. (Defendant's Rule 56.1 Statement, ECF No. 48 ("Def.'s First 56.1"), ¶ 34.)

Aside from two small payments made on each of the Stern policies, none of the policyholders in the chain of ownership made any payments beyond the initial premiums required to open the accounts. During 2009 and 2010, Allianz placed each policy into the contractual "grace period" before lapsing them due to non-payment. In total, Allianz received nearly $6 million in premiums on the nine policies and has paid no benefits under them. At present, two of the insureds are still alive—Stern is 89 years old, and Rosenberg is 83. Oberlander passed away in December 2014.

I. Terms and Operation of the Policies

The policies at issue, which are substantively identical, are "Generation Planner II Life Insurance Policies." Under each, the owner has no set schedule of premium payments but rather must pay a "flexible premium . . . until the death of the Insured." (Plaintiff's Rule 56.1 Statement, ECF No. 56 ("Pl.'s First 56.1"), ¶ 33.) This flexible premium depends on the amount that the owner, at the time of the purchase, selects as the anticipated premium payments each year. (Def.'s First 56.1 ¶ 3.) The contracts contain three different "tests" to determine whether a policy has lapsed—the "Policy Protection Test," the "Net Cash Value Test," and the

[1] Allianz claims—and Plaintiff does not appear to dispute—that all nine policies were pieces of a "Stranger Originated Life Insurance" or "STOLI" transaction. A STOLI transaction is one in which individuals (typically elderly persons) are offered cash or other incentives to purchase life insurance using funds loaned to them by investors. The insured then assigns the policy to an investment vehicle in satisfaction of the loan, and the investors service the policy in hopes of profiting by collecting benefits at the insured's death. Although purchasing life insurance with the intent of selling it to strangers became illegal in 2009, such transactions were legal at the time the policies in this case were issued. See N.Y. Insurance Law § 7815.

"Guaranteed Death Benefit Test"—all of which take into account whether the policy owner has made sufficient minimum monthly payments. (Def.'s First 56.1 ¶¶ 2–5.) If the cash balance on a policy fails to meet each of the three tests at the end of any monthly billing cycle, Allianz places the policy into a "grace period."

The grace period starts a 61-day clock that ends with termination of the policy if the owner fails to make sufficient premium payments to keep it in force. (Def.'s First 56.1 ¶ 6.) To prevent termination, the policy owner must submit a payment "sufficient to keep [the] policy in force for three months." (Pl.'s First 56.1 ¶ 35.) That is, the owner can remove the policy from the grace period by submitting a premium payment sufficient to cause the cash balance to satisfy one of the three tests for three months. The grace period provision also provides that, "[a]t least 30 days prior to Termination," Allianz will "send written notification to your last known address advising that the Grace Period has begun." (Pl.'s First 56.1 ¶ 35.)

Following lapse (i.e. expiration of the 61-day grace period without sufficient payment), the policy owner can reinstate coverage via a series of contractual requirements, including notice within three years of lapse and a showing that the insured is "still insurable pursuant to [Allianz's] underwriting standards." (Def.'s First 56.1 ¶ 8.)

II. Origination and Assignment of the Stern, Oberlander, and Rosenberg Policies

Between December 2007 and March 2008 Allianz issued the nine policies to trusts held in the names of the three insureds—two policies on the life of Stern, three on Oberlander, and four on Rosenberg. (Def.'s First 56.1 ¶¶ 10–12.) The insureds paid the initial premiums required to obtain the policies (collectively, approximately $5.5 million), and Allianz received two subsequent payments on the Stern policies in the total amount of about $250,000.

(Def.'s First 56.1 ¶ 13.) No further premium payments were made on any of the nine policies. (Def.'s First 56.1 ¶ 13.)

The policies have changed hands a number of times. Premium Funding Group ("PFG"), a premium-financing company, loaned the insureds the initial premium payments in exchange for a collateral assignment of the policies. (Def.'s First 56.1 ¶¶ 29–30.) Prior to making these loans, PFG performed complex "life expectancy reports" and valuations of the policies as to each insured. (Def.'s First 56.1 ¶ 28.) Although the parties sharply dispute the effectiveness of the subsequent assignments, the alleged chain of ownership for each policy is as follows: (1) the initial owners (the trusts in the names of the insureds) assigned the policies to Global Secured Capital Fund ("GSCF") while the policies were still in force; (2) after lapse, GSCF assigned the policies to JMA Investors LLC ("JMA"); (3) in March 2013, JMA assigned its interest to Plaintiff LITE Trust I ("LITE"), the current owner of all nine policies. (Pl.'s First 56.1 ¶¶ 14–31.)

III. Grace Period and Lapse

Because the policy owners made no premium payments on any of the policies (aside from the two small payments on the Stern policies in September 2009), each policy entered the contractual grace period between October 2009 and March 2010. (Def.'s First 56.1 ¶ 13.) Allianz sent Grace Notices on each policy exactly thirty-two days before lapse. (Def.'s First 56.1 ¶ 20.) After receiving no further payments, Allianz lapsed the policies. (Def.'s First 56.1 ¶ 23.)

The focal point of this suit is the contents of these Grace Notices, which overstated the minimum payments required to keep the policies in force by between 74% and 584%. (Pl.'s First 56.1 ¶ 54.) In total, the nine Grace Notices instructed the policy owners to

pay nearly $950,000 more than they were actually required to pay in order to prevent lapse under the terms of the contract. (Pl.'s First 56.1 ¶ 53.) Instead of the amounts required to keep the policies in effect for three months (as set out in the contracts), the Grace Notices requested payments that would have kept the policies in force for five months (in the cases of the Rosenberg and Stern policies) and seventeen months (in the case of the Oberlander policies). (Pl.'s First 56.1 ¶¶ 57–59.) Representatives of the policy owners called and emailed Allianz many times during the grace period regarding the minimum payments, and Allianz employees repeatedly confirmed the amounts represented in the Grace Notices. Despite repeated contact with Allianz, however, no policy owner ever tendered payment in any amount during the grace period. (Def.'s First 56.1 ¶ 13.)

LEGAL STANDARD

Summary judgment should be rendered if the record shows that "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); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The burden of demonstrating the absence of any genuine dispute as to a material fact rests with the moving party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Once the moving party has made an initial showing that there is no genuine dispute of material fact, the non-moving party cannot rely on the "mere existence of a scintilla of evidence" to defeat summary judgment but must set forth "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." Beyer v. Cty. of Nassau, 524 F.3d 160, 163 (2d Cir.2008) (quoting Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)). "Where the

record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Scott v. Harris, 550 U.S. 372, 380 (2007) (citing Matsushita, 475 U.S. at 586–87). This Court resolves all factual ambiguities and draws all inferences in favor of the non-moving party. See Liberty Lobby, 477 U.S. at 255; see also Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005).

DISCUSSION

These summary judgment motions present three dispositive issues. First, the parties dispute whether there was an effective contract between Plaintiff and Allianz and, if so, which party was in breach. Second, Allianz argues that Plaintiff's declaratory judgment claims are duplicative of the primary claims and therefore subject to dismissal. Finally, Allianz seeks summary judgment on the basis of the two-year statute of limitations under New York Insurance Law § 3211(d).

I. **Breach of Contract**

To prove breach of contract, a plaintiff must show: "(1) the existence of a contract between the plaintiff and the defendant; (2) the performance of the plaintiff's obligations under the contract; (3) breach of the contract by the defendant; and (4) damages to the plaintiff caused by the defendant's breach." Prickett v. N.Y. Life Ins. Co., 896 F. Supp. 2d 236, 251 (S.D.N.Y. 2012).

The parties' arguments on this issue collapse these four elements into two distinct questions. First, the existence of the contract and the issue of damages both depend on whether the alleged assignments were effective to confer ownership of the policies to Plaintiff. If the assignments were effective, a contract exists between Plaintiff and Allianz, and Plaintiff stands in the shoes of all prior policy owners as to damages.

Second, there is no question that Plaintiff (through the actions of LITE's predecessors in interest) breached by failing to make premium payments under the policies. The material issue is whether Allianz breached first by overstating the amounts due in the Grace Notices and, if so, whether that breach caused the failure to pay the premiums. If Allianz's breach caused Plaintiff's breach, Allianz cannot thereafter rescind the policies and retain the profits created by its own improper conduct. If, on the other hand, Allianz performed under the contract and the policy owners simply failed to pay premiums, Plaintiff is entitled to no relief.

A. Whether a Contract Exists Between Plaintiff and Allianz

Under New York law, "[n]o contract or policy of insurance . . . shall be enforceable except for the benefit of some person having an insurable interest in the property insured." Cassadei v. Nationwide Mut. Fire Ins. Co., 21 A.D.3d 681, 682 (3d Dep't 2005) (internal citations omitted). An "insurable interest" is "any lawful and substantial economic interest." Cassadei, 21 A.D.3d at 682. The import of this rule is that "[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). An insurable interest—and the corresponding standing to sue—is freely assignable, even "to one without an insurable interest in the insured's life . . . so long as the policy was valid in its inception." Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 551 (N.Y. Ct. App. 2010) (internal citations omitted). A valid assignee "stands in the shoes of [the] assignor" as to the assignor's rights and obligations under the original contract. Septembertide Publishing, B.V. v. Stein & Day, Inc., 884 F.2d 675, 682 (2d Cir. 1989).

Allianz argues that Plaintiff lacks standing because the various assignments of the nine policies were ineffective due to lack of notice to Allianz. Alternatively, Allianz claims that

Plaintiff cannot show an unbroken chain of ownership between LITE and the original policy holders.

1. **Lack of Notice**

Each policy contains an identical assignment clause, which permits the policy owner to "assign or transfer all or specific ownership rights of this policy." (Declaration of Cynthia Rice ("Rice Decl."), ECF No. 49, Ex. K at 34.) The clause provides that "[a]n assignment will be effective upon Notice," and that Allianz "will record your assignment." (Rice Decl., Ex. K at 34.) "Notice" is defined in the policies simply as "[Allianz's] receipt of a satisfactory written request." (Rice Decl., Ex. K at 24.)

The record contains only a handful of instances in which Allianz received and/or responded to notice of an assignment of rights. Allianz recorded the collateral assignments and releases in favor of the two PFG entities shortly after issuing each policy. (See Declaration of Andres Healy ("Healy Decl."), ECF No. 79, Ex. 111 at 1–3.) Plaintiff points to no further evidence of Allianz receiving notice of or recording any subsequent assignment of the Stern or Rosenberg policies. As to the Oberlander policies, however, Allianz denied JMA's April 2011 request for an ownership change (to reflect the assignment by GSCF to JMA) because "the policies have lapsed, [and] therefore, we cannot honor the ownership change requests." (Healy Decl., Ex. 143 at 1.)

Plaintiff argues that the notice provisions cannot affect the assignments of these policies because the language in the provisions does not explicitly void improper assignments. Anti-assignment provisions, like any restraints on alienation, require "clear language . . . mak[ing] the assignment void." Pro Cardiaco Pronto Socorro Cardiologica S.A. v. Trussell, 863 F. Supp. 135, 137 (S.D.N.Y. 1994). As such, New York courts have long held that assignments

are valid regardless of contractual prohibitions against transfer unless those prohibitions employ the "plainest words." Allhusen v. Caristo Constr. Corp., 303 N.Y. 446, 452 (N.Y. 1952) (voiding an assignment clause where the clause stated that "assignment by the second party . . . without the written consent of the first party shall be void").

The assignment clause in the Allianz policies is, however, not an anti-assignment provision at all. It does not purport to void any invalid assignments or require Allianz's consent for an assignment to be effective; rather, it permits the policy owner to freely "assign or transfer all or specific ownership rights of this policy," and provides that any assignment "will be effective upon Notice." (Rice Decl., Ex. K at 34 (emphasis added).) The provision affirmatively requires Allianz to record each noticed assignment—"[w]e will record your assignment"—and disclaims any responsibility for the "validity and effect" thereof, as well as any liability "for actions taken on payments made before we receive and record the assignment." (Rice Decl., Ex. K at 34. (emphasis added).)

Plaintiff cites a bevy of cases regarding the language required to make anti-assignment provisions effective, but this situation is more analogous to Estate of Piper v. Met. Tower Life Ins. Co., No 07-CV-9548, 2009 WL 2431956 (S.D.N.Y. Aug. 10, 2009). In that case, the policy at issue contained a notice provision directing the insured to "please give us your name, address and policy number [in any communications] . . . [and] notify us promptly of any changes. We will write to you at your last known address." Estate of Piper, 2009 WL 2431956, at *2. After notices mailed to a new address were returned undeliverable, the insurer obtained a last known address using the insured's social security number and sent notices to that address (where the insured no longer lived) until the policy lapsed due to nonpayment. Estate of Piper, 2009 WL 2431956, at *3. The court found that plaintiffs' breach of contract claims failed

"because the Policy unambiguously provides that the policyholder has a duty to maintain a valid address on file, and that MetLife is to use the last known address when the current address on file fails." Estate of Piper, 2009 WL 2431956, at *6. Similarly, the assignment provision in this case creates a duty for the policy owner to provide notice to Allianz of any assignment, and a corresponding duty for Allianz to record that assignment. Indeed, Allianz appears to have no discretion when it comes to recording assignments under these policies, and any dispute over whether a written request was "satisfactory" would only be warranted if there were any written assignment requests in the record for the Stern and Rosenberg policies.

Because there are no such written requests in the record, there is no genuine dispute of material fact as to whether Allianz ever received notice of the assignments of the Stern and Rosenberg policies to LITE. And because the policy terms unambiguously provide that an assignment is "effective upon Notice," the purported transfers of the Stern and Rosenberg policies were ineffective to give Plaintiff an insurable interest in them. Accordingly, Allianz is entitled to summary judgment as to the Stern and Rosenberg policies due to Plaintiff's lack of standing.

This Court arrives at a different conclusion, however, with respect to the Oberlander policies. It is undisputed that in March 2010, both GSCF and the initial owner of the Oberlander policies notified Allianz of the first assignment (from the initial owner to GSCF), and that Allianz subsequently confirmed that it had updated its records to reflect the change. (Pl.'s First 56.1 ¶ 19.) Accordingly, the assignment by the original owners to GSCF was effective under the terms of the policy.

When GSCF notified Allianz one year later of its assignment of the policies to JMA, however, Allianz refused to recognize the change in ownership because "[o]ur records

reflect that the policies have lapsed, therefore, we cannot honor the ownership change requests." (Healy Decl., Ex. 143 at 1.) The terms of the policy do not require that the policy be in effect prior to assignment, and thus Allianz's wrongful refusal to recognize the assignment cannot destroy Plaintiff's standing in this matter. Plaintiff's failure to notice (and Allianz's failure to record) the subsequent assignments of the Oberlander policies to LITE by JMA does not compel summary judgment on these claims, as Allianz's communications with JMA and GSFC in March 2011 suggested that any future notice would not be accepted. See Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty, Inc., 522 N.Y.S.2d 292, 293 (N.Y. App. Div. 1987).

2. **Chain of Ownership**

Alternatively, Allianz argues that Plaintiff cannot prove an unbroken chain of ownership between the initial owners and LITE. Allianz is not entitled to summary judgment on these grounds because Plaintiff has submitted evidence that, at the very least, create a question of material fact as to the validity of the transfer of each policy between the various owners. Contrary to Allianz's contention, the "say-so of the transferee" can be sufficient to prove ownership under New York law. See Bourne v. Haynes, N.Y.S.2d 332, 333 (N.Y. Sup. 1962) ("Where there is satisfactory evidence of an oral assignment of the policy and delivery of the policy, the lack of writing to evidence the assignment does not bar recovery.") Because the record contains documents that attest to each transfer of the Oberlander policies, Allianz cannot obtain summary judgment on this theory. (See Pl.'s First 56.1 ¶¶ 19–24.)

B. Whether Allianz Breached the Contract

As discussed above, this issue turns on whether Allianz itself breached by overstating the amounts in the Grace Notices and, if so, whether that breach caused Plaintiff's failure to pay premiums. The question of Plaintiff's breach is, as a threshold matter, not in

dispute. "Punctuality in the payment of premiums in the case of a life insurance policy is of the very essence of the contract; and, when payment is not made at the time, the company has the right to forfeit." Holly v. Metro Life Ins. Co., 105 N.Y. 437, 444 (N.Y. 1887). Here, the parties agree that—aside from the initial premiums and the two payments on the Stern policies shortly after origination—no policy owner made a single premium payment on any of the nine policies.

Because Plaintiff (as assignee of the policies) materially breached by failing to pay any premiums, Allianz is entitled summary judgment unless Allianz itself breached and thereby caused the policy owners to stop paying. See In re Preston's Will, 29 N.Y.2d 364, 371 (N.Y. 1972) (an insurance company may not "depend upon a default in which its own negligence or wrongful act contributed, and but for which a lapse might not have occurred"). Plaintiff argues that Allianz breached the policies in two ways: first, by lapsing the policies after refusing to allow the owners to pay the minimum premiums required under the contracts and, second, by issuing Grace Notices that substantially overstated the amount due to prevent termination.

1. **Actual Breach—Allianz's Refusal to Allow Minimum Payments**

Plaintiff's first theory is one of actual breach—that is, breach of the "Three-Months Provision" of the Death Benefit Protection Rider ("DBP Rider"), under which a policy owner can prevent lapse during the Grace Period by paying enough premium to satisfy one of the three tests for three months. To prevail, Plaintiff must identify the specific contractual provisions at issue and show that Allianz failed to perform under them. See Katz v. American Mayflower Life Ins. Co. of N.Y., 14 A.D.3d 195, 198 (1st Dep't 2004) (dismissing breach of contract claims where plaintiff "has not, and cannot, identify any contractual provision that has been breached"). When a policy's terms "are clear and unambiguous, the court should enforce

[their] plain meaning and may not consider extrinsic evidence of the parties' understanding or intent." Katz, 14 A.D.3d at 200.

There can be no reasonable dispute that Allianz complied with the notification clause of the Grace Period provision, which simply required the company to send, at least thirty days before lapse, "written notification to [the policy holder's] last known address advising that the Grace Period has begun." (Rice Decl., Ex. K at 28.) Plaintiff argues instead that the overstated premium amounts on the Grace Notices violated the following sentence, which advises that policies in the Grace Period will be lapsed unless "[a] premium payment sufficient to keep this policy in force for three months . . . [is] received prior to the last day of the Grace Period." (Rice Decl., Ex. K at 28.) The Grace Period provision does not, however, require Allianz to include any minimum payment amounts in the Grace Notice; it merely obligates Allianz to send the notice itself. Cf. Weiss v. Lincoln Nat'l Life Ins. Co., No. 14-CV-4944, 2016 WL 4991533, at *4 (E.D.N.Y. Sept. 15, 2016) (denying insurer's motion for judgment on the pleadings where "the terms of the [policy] . . . plainly required the Grace Notice to state the amount due").

Similarly, the DBP Rider modifies the Grace Period provision "to require Allianz to consider a third test—the 'Guaranteed Death Benefit Test'—when determining (1) when a policyholder needs to make additional premium payment and (2) the amount of that additional premium payment." (Pl.'s First 56.1 ¶ 37.) Plaintiff would be entitled to summary judgment for breach of this provision if it were true, as Plaintiff contends, that Allianz "refus[ed] to accept" amounts in compliance with the DBP Rider to prevent lapse. (Pl.'s Opp. at 8.) However, there is no evidence that any policy owner tendered payment in any amount or attempted to pay any premium under the Three-Months Provision.

Instead, Plaintiff points to transcripts of recorded phone calls in which Allianz representatives confirmed that the overstated amounts in the Grace Notices were the amounts that were required to prevent lapse. (See Pl.'s Opp. at 10.) Incorrect as these statements may have been, however, they are not relevant to the issue of actual breach because the terms of the DBP Rider and Three-Months Provision were clear and unambiguous. Indeed, Plaintiff explains the steps required to satisfy the Three-Months Provision in a brief paragraph (see Pl.'s Opp. at 11) and provides a graphical breakdown of the discrepancies between the Grace Notice demands and the amounts actually due under the DBP Rider. (See Pl.'s First 56.1 ¶ 54.) Further, Plaintiff and the predecessor policy owners were sophisticated investors who were able to perform complex financial valuations of these policies and the capital required to hold and service them. (See Def.'s First 56.1 ¶¶ 27–28.)

This Court declines to grant summary judgment on actual breach because Plaintiff noticed the overstated Grace Notices, taped phone calls in which the policy owner's representative stopped short of offering contractually sufficient payment, and then filed suit without ever attempting to tender a premium. See McMillan v. Farm Bureau Mut. Auto. Ins. Co., 282 A.D. 1091, 1092 (3d Dep't 1953) ("If the plaintiff desired to stand upon his claim [that he had to pay less than the stated amount] . . . he should have advised the company of that claim and should have tendered payment accordingly."). If Plaintiff had tendered the amounts demanded by the contracts (rather than the Grace Notices, which did not have to contain any premium request) and Allianz had nonetheless refused to reinstate the policies, this would be an easy case for summary judgment. But that did not happen here.

2. **Good Faith and Fair Dealing**

Plaintiff's alternative theory—that Allianz breached by issuing (and subsequently reasserting) substantially overstated premium amounts—relies on the implied covenant of good faith and fair dealing. "Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (N.Y. 1995). This doctrine prohibits parties from doing "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87 (N.Y. 1933). A plaintiff relying on this theory "bears a heavy burden" of showing "that the particular unexpressed promise . . . is in fact implicit in the agreement viewed as a whole," Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69 (N.Y. 1978), and that the defendant acted "intentionally and purposely." Kader v. Paper Software, Inc., 111 F.3d 337, 342 (2d Cir. 1997). On a motion for summary judgment, the "only issue" is whether there is a genuine question as to whether the defendant "acted honestly and reasonably with respect to its contractual obligations." O'Shanter Resources Inc. v. Niagara Mohawk Power Corp., 915 F. Supp. 560, 569 (W.D.N.Y. 1996).

A triable issue of material fact exists concerning whether Allianz intentionally demanded excessive premiums in an effort to force these policies into lapse. For example, Plaintiff offers deposition testimony, telephone call transcripts, and internal Allianz documents suggesting that these policies were placed on a "watch list" targeted for lapse, and that representatives were instructed to insist on the minimum payments demanded in the Grace Notices even after Allianz realized the amounts were overstated. (See Pl.'s Mot. at 5–10.) A jury could reasonably conclude that this conduct constituted breach because Allianz "advance[ed] an untenable interpretation of the contract." Fonda v. First Pioneer Farm Credit,

86 A.D.3d 693, 695 (3d Dep't 2011) (denying summary judgment where insurer's extra-contractual payment demands could be construed as breach of the implied covenant).

The record also raises issues of fact that cut against Plaintiff's position—namely, the question of whether Allianz's alleged breach caused the policy owners to stop paying premiums. The factfinder could infer from the record that the investors knew they were entitled to pay less than Allianz demanded, but instead chose to let the policies lapse and preserve their lawsuit. Allianz also contends that it targeted Plaintiff's policies as part of a statutory compliance effort aimed at suspected STOLI transactions (which became illegal in the years following the origination of these policies), and that the overstatements in the Grace Notices were honest mistakes by Allianz employees. (See Def.'s Opp. at 3–6.)

Considering the robust factual disputes and the absence of any literal breach of the policy terms, the question of whether Allianz "acted honestly and reasonably with respect to its contractual obligations" is a factual determination within the province of a jury. O'Shanter Resources, 915 F. Supp. at 569.

II. Declaratory Judgment

In deciding whether to exercise its discretion to entertain a declaratory judgment action, a district court must inquire, inter alia, "[1] whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; . . . [and] [2] whether a judgment would finalize the controversy and offer relief from uncertainty." Dow Jones & Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir. 2003). Plaintiff seeks a declaration of wrongful lapse, a clarification of its rights under the policies, and an order reinstating coverage for each policy.

Plaintiff contends that declaratory judgment is necessary to prevent future overstatements of premiums due under the policies, if they are in fact reinstated in this action.

Such a declaration would serve no useful purpose, however, because resolution of Plaintiff's breach of contract claims based on that same conduct will necessarily decide the propriety of those practices. See Fleisher v. Phoenix Life Ins. Co., 858 F. Supp. 2d 290, 302 (S.D.N.Y. 2012) (finding declaratory judgment unnecessary with respect to future conduct where "the Court will need to determine whether [the conduct at issue] is improper in order to evaluate" whether it constitutes present breach). Similarly, a declaration that Allianz breached by demanding inflated premiums would offer no incremental relief from uncertainty. "[A]ny uncertainty regarding the legality of such actions will" be ameliorated by a final determination on the breach of contract claims. Fleisher, 858 F. Supp. 2d at 303.

Because Plaintiff's declaratory judgment claims are duplicative and seek no distinct relief relative to the breach of contract count, Defendant's motion for summary judgment dismissing Count II is granted.

III. Statute of Limitations

Finally, Allianz seeks summary judgment pursuant to the two-year statute of limitations in New York Insurance Law § 3211(d). This argument is misplaced as Plaintiff does not bring statutory claims under § 3211(d), which imposes technical requirements upon insurers and can prevent lapse if the insurer does not comply. Rather, Plaintiff brings contractual claims within the six-year statute of limitations provided by New York law. See C.P.L.R. § 213.

Further, § 3211(d) only applies to claims based on policies that insurers have rightfully lapsed—i.e. terminated due to failure to pay premiums. See Thompson v. Postal Life Ins. Co., 226 N.Y. 363, 363 (N.Y. 1919). Because there is a material dispute as to Allianz's breach of the implied covenant of good faith and fair dealing, the question of whether Allianz

rightfully lapsed these policies is an open one. Accordingly, Allianz is not entitled to summary judgment under § 3211(d).

CONCLUSION

For the reasons stated above, Plaintiff's motion for summary judgment is denied and Defendant's motion for summary judgment is granted in part and denied in part. Plaintiff lacks standing to bring claims on the Stern and Rosenberg policies. Defendant's motion is denied as to the Oberlander policies because a jury question remains as to whether Defendant breached the implied covenant of good faith and fair dealing. Defendant's motion is denied in all other respects. The Clerk of Court is directed to terminate the motions pending at ECF Nos. 46 and 52.

Dated: July 18, 2017
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.