SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------x

SAMUEL WEISS as TRUSTEE of the AGI WEISS INSURANCE TRUST u/t/d September 1, 2005,

Plaintiff,

- against -

DECISION and ORDER
POST TRIAL
Index No. 035397/2014

JOHN HANCOCK LIFE INSURANCE COMPANY OF NEW YORK

Defendant.

----------x

Hon. Thomas E. Walsh II, J.S.C.

The following constitutes the Decision and Order of this Court after a Trial Conducted in the instant matter.

This action was commenced by the filing of a Summons and Complaint on November 25, 2014 seeking to reinstate a universal life insurance policy which insured the life of Mrs. Agi Weiss for $8 million dollars. An Amended Complaint was filed on February 16, 2016 also seeking to reinstate the aforementioned life insurance policy. Defendant joined issue with the filing of an Anser and Affirmative Defenses to the Amended Complaint on March 10, 2016. On May 6, 2016 the parties filed motions for summary judgment, which the undersigned denied on October 3, 2016 indicating that there questions of fact. As a result a bench trial was held on February 21 and 22, 2017.

Plaintiff's post trial memorandum was received on May 3, 2017 and Defendant's post trial memorandum was also received on May 3, 2017. During the trial, the Court provided each

party with a full and fair opportunity to: present witnesses; prosecute claims; present defenses; cross-examine witnesses; admit and/or object to the admission of documentary evidence; proffer comments on contested rulings; make arguments which they believed were persuasive; and fully brief their respective positions in post trial submissions. Additionally, the Court has been open and available to communications, requests for conferences, and motions from counsel.

In arriving at this Decision and Order the Court has reviewed, evaluated, and considered the entirety of the admissible evidence, including testimony from the parties and each party's post-trial memorandum. Additionally, the Court has also relied on its personal observation of each witness in determining issues of credibility. It should be noted that the failure of the Court to specifically mention any particular piece of evidence in this Decision and Order does not mean that item has not been considered by the Court. As the trier of facts it is the Court's obligation to review all admitted evidence, but that duty does not mean that all admitted evidence is necessarily accepted at face value. In reaching its conclusions the Court has carefully observed and listened to the parties during each day of the trial and has evaluated all evidence in light of its relevance, materiality, credibility, importance, weight, and, where applicable, permissible inferences have been considered. Moreover, the evidence has been viewed in light of the appropriate legal authority and their interpretive case decisions. The Court recognizes the importance of the instant Decision and Order to each of the parties. No Decision rendered here is made lightly or unadvisedly, as all Decisions result instead from a reasoned view of the credible evidence, applicable law, and considerations of equity. Additionally, all claims have been subjected to the standard of proof by the preponderance of the evidence. Finally, the Court notes that each party was represented by able counsel during the trial.

FINDINGS OF FACT

GENERALLY:

John Hancock (hereinafter Hancock) issued a universal life policy (policy number 59969170)[1] on March 28, 2007 on the life of Agi Weiss for $8 million dollars for the benefit of the Agi Weiss Insurance Trust. Plaintiff Samuel Weiss (hereinafter Weiss) was the current trustee of the Agi Weiss Insurance Trust (hereinafter the Trust) and also the son of Agi Weiss. The policy is a universal life policy which has a "flexible" premium feature and also provides for a specified annual "Planned Premium" amount which ranged from $500,000 in year one to above $538,000 in year twenty-one and beyond. The owner of the policy continues to make payments for as long as they elect to have the coverage. However, if a planned premium is not made the Policy does not automatically terminate. Rather, the Policy would remain in effect as long as there was sufficient cash value to cover Hancock's monthly charges for the cost of the insurance. In the circumstance of an owner failing to make sufficient payments to cover the monthly charges, a 61 day grace period begins and the owner is sent a written (via the mail) notification of default with instructions how to cure the default and prevent lapse.

According to Defendant on each processing date the monthly deductions are subtracted from the policy value covering the costs of keeping the insurance policy in effect. The subject Policy had a processing date of the 16th day of each month. Defendant submits that once the deductions are taken, the insurance policy is "tested" on the processing date using the policy

---

[1] Plaintiff's Exhibit 1 in evidence on consent to the extent that the copy of the policy was offered to prove the terms and conditions of the policy that Hancock had issued on the specific policy number.

value to determine the net cash surrender value. The Defendant contends that when the "test" occurs, if the net cash surrender value is less than or equal to zero then the policy is considered in default and the written notification is automatically generated and sent to the policy owner. The facts from this point forward are in dispute between the parties and are the subject of the instant action. Undisputed by the parties is that as of January 6, 2014 the subject Policy had lapsed for failure to pay the premium.

TESTIMONY OF THE WITNESSES AT TRIAL

a. Testimony of Samuel Weiss

According to the testimony at trial at the time of the trial, Weiss had been the trustee of the subject Agi Weiss Insurance Trust for six or seven years. Weiss also testified that the Trust owned the aforementioned insurance policy for which his "office" funded and paid the premiums. Weiss testified that he was unaware if there was prior trustee or if he knew the original owner of the policy was "Mark Kraft." On cross examination Weiss testified that the policy is almost ten years old and that he believed he purchased it directly or through an agent called Mr. Moskoff. Further, Weiss testified that he had seen the original policy, but on cross examination he stated that he did not know if he had ever examined a complete copy of the original of the subject insurance policy. Additionally, on cross examination Weiss stated that he had never read the policy and believed that the policy requirements regarding the premiums were that they "have to get paid." As to the terms of default, on cross examination Weiss stated "[t[he policy has over twelve thousand words and maybe one hundred pages. I didn't read it. I don't read it. When I buy a policy, I know the face amount of the policy, how much the premium will

cost a year. We go on from there." During cross examination Weiss was asked numerous questions about how the policy was originally obtained, by whom and how the policy was transferred to the Trust, but he continuously stated he "did not remember" or "didn't know."

On direct examination, Weiss stated that the Trust had never sold the policy or given collateral assignment or otherwise encumbered the policy. However, Weiss testified that the Trust paid premiums for the policy and the face amount of the policy was eight million dollars. Based upon the testimony of Weiss, upon the death of Agi Weiss then Weiss' family and two (2) of his sisters would receive the life insurance benefits. During cross examination Weiss was evasive and vague when he was asked about other life insurance policies owned by the Trust for Agi Weiss. Specifically, he stated several times "[i]t is possible" or "[i]t could be" or "[s]ome policies." Upon further questioning Weiss stated he believed there were three or four other policies, but could not recall if any of those were issued by John Hancock.[2] Additionally, Weiss testified in October 2013 he owned an insurance policy through Mass Mutual on his mother's life.

As to the management of the subject policy, Weiss testified that his office was responsible for the payment of premiums on the policy which was funded by "various accounts in our office." Weiss also testified that he was not directly involved in paying the premium for the subject life insurance policy, rather his secretary Dasi (also known as Mrs. Landau) was responsible for all premium payments. Ms. Lan stated on cross examination that "Mr. Weiss is

---

[2] The Court notes that a life insurance policy owned by Benjamin Weiss insuring the life of Agi Weiss with Security Mutual Life Insurance was issued on March 17, 1999 and was the subject of litigation for failure to timely pay the premiums between November 19, 2008 and January 13, 2009. [*Weiss v. Security Mutual Life Insurance*, 146 AD3d 842 (2d Dept 2017)].

not involved in everyday operations." As to the account from which the premiums were paid, Weiss testified that he did not think they were paid from the Trust account. Weiss qualified his answer indicating that he needed to check with his "secretary," but he believed that the money for the premium payments was taken from "the operation of our real estate business." During cross examination Weiss was asked about whether he was aware that the policy went into default "from time to time" without actually lapsing, which he stated he only learned of that fact during the instant litigation.

Turning to testimony regarding the payment of the premium in December 2013, Weiss testified that he "wasn't too familiar with it, because I was not involved directly. My office took care of that." Weiss stated that the premium payment was approved through "the office in advance" by himself and the secretaries. Further, Weiss testified that he was not familiar with the term "grace." Throughout Weiss' testimony he continuously stated that he had a lack of knowledge of the provisions within the subject policy.

b. Testimony of Frieda Landau a/k./a Dasi Lan

Frieda Landau (hereinafter Lan) testified on behalf of the Plaintiff regarding the procedure she undertook in mailing the premium payment on the subject Policy. Mrs. Landau testified that she is also known as "Dasi Lan" and that she has been employed by Weiss "under one of his entities" for eight years doing real estate management, payroll, taking care of violations, legal collections and paying life insurance policies. According to Lan she was responsible for making payments on approximately six insurance policies in 2013. Lan testified that her procedure in 2013 for paying the premiums was as follows: "I would look at the notice

see when it is due, make sure to make payment in time, make sure I either make out a check, mail it out in time or overnight it in time, and make sure the check cleared, ro call up the company and make sure they got it." Her understanding of "grace notice" is that there is a certain amount of time to pay the policy before it lapses and her procedure in 2013 was to make sure that the premium payment "gets there" timely to ensure the policy did not lapse. Further, she testified that "in time" meant to her "before the lapse date."

As to the subject policy, Lan testified that it was not a policy she was regularly responsible for, but in December 2013 she was asked to send the premium check owed on the policy. On cross examination Ms. Lan stated that Giti Mayer was responsible for handling the instant policy, "since it is a bigger policy." Further, Lan testified on cross examination that Mrs. Mayer decided when to make the premium payments on the subject policy.

Lan testified that in paying the premium due in December 2013 she printed a check, made the FedEx Waybill, put it in an envelope and scheduled a FedEx pickup on December 12, 2013. According to Lan's testimony on direct examination the FedEx label was created by going on to the online FedEx account, entering the information in their database, "the information that comes up automatically," and print the FedEx Waybill out. On cross examination Ms. Lan testified that Giti Mayer put the information into the computer and Lan printed the check out. According to Lan, John Hancock was the payee on the pre-signed check[3] which she placed into FedEx plastic along with a FedEx Waybill and waited for it to be picked

[3] A copy of the check, the envelope from Mass Mutual in which it was sent and a letter from Mass Mutual were all admitted into evidence as Plaintiff's Exhibit 2 in evidence.

up for delivery.[4] Lan also testified on cross examination that the address on the check sent on December 13, 2013 was correct, but she placed the incorrect address on the FedEx Waybill.

After sending the premium payment, Lan testified that she received a confirmation in her email that the aforementioned FedEx was delivered based upon her request for confirmation. During Lan's testimony she admitted that upon receipt of the delivery confirmation receipt she "glanced at the screen" and saw that the side of the email said "confirmed" and that there was a signature and therefore she did not look any further.[5] Lan testified that she subsequently learned on January 6, 2014 that the aforementioned premium check was never delivered to John Hancock. Further, Lan testified that she never scrolled down on the confirmation page and therefore never looked at page two where the recipient's information was located. Lan denied that she was aware on December 13, 2013, when she received the FedEx delivery confirmation page, that the premium check she sent was incorrectly sent to Mass Mutual (another insurance company).

In terms of her procedure in paying the insurance premiums, Lan testified that on December 16, 2013 she called Hancock to see if they received the aforementioned premium check (despite believing it was received based upon the FedEx confirmation). According to Lan,

---

[4] Upon review of Plaintiff's Exhibit 2 the Court notes the check was dated December 12, 2013 and the address for Samuel Weiss on the check was P.O. Box 552 Brooklyn, New York 11211 and the address for John Hancock was P.O. Box 7249-0239 Philadelphia, PA 19170. The second portion of Plaintiff's 2 includes a photocopy of an envelope mailed December 18, 2013 from Mass Mutual to Samuel Weiss. The envelope appears to have a forwarding sticker from the United States Postal Service on the outside indicating that the mail would be forwarded to Samuel Weiss P.O. Box 23024 Brooklyn, New York 11218-0248.

[5] The confirmation email from FedEx to Dasi Lan was admitted into evidence as Plaintiff's Exhibit 3.

during the telephone conversation she was told that the check was not in their system yet and was told to call back the next day.[6] Upon being informed that the check was not in Hancock's system, Mrs. Lan testified that she informed the Hancock customer service representative that she received a confirmation that the premium was received on Friday. Plaintiff contends that Mrs. Lan was informed that "it was fine" regarding the fact that the payment was not yet in Hancock's system on December 16, 2013.[7] According to Mrs. Lan her procedure was to verify that the check had been received despite the FedEx confirmation and that "[i]f payment wasn't received in the right time, we would wire funds that day." Mrs. Lan stated during her testimony that she did not wire funds on December 16, 2013 when she was told that the premium check she had sent was not posted to the account.

Dasi Lan testified she called Hancock again on December 17, 2013, but could not obtain any information since the representative refused to offer any information and sought the answers to security questions. According to Lan's testimony the representative from Hancock hung up on her and "hung up on Ms. Lan without offering any information."[8] The recording and transcript do not reflect that Lan was "hung up" on, but rather that she was told that the representative needed to speak with the trustee. According to Ms. Lan's testimony she called Hancock on December 17 to follow up to see if they had received the premium payment. On cross

---

[6] Based upon the transcript of the telephone call the customer service representative informed Mrs. Lan that nothing had been received as to the subject insurance since September 11.

[7] Plaintiff's 4 in evidence is the CD of the telephone call and Plaintiff's 5 in evidence is the transcript of the phone call.

[8] Plaintiff's 6 in evidence is the CD of the telephone call and Plaintiff's 7 in evidence is the transcript of the phone call

examination Lan was asked why she did not put Weiss on the telephone to confirm that he was the trustee and she indicated that "Mr. Weiss is a very busy man. I have a very hard time reaching him. So, if I can get around it, I try to."

Ms. Lan testified that she again called Hancock on December 19, 2013, but there is no testimony about the reason for that call or any issues that Ms. Lan had during that telephone call.[9] According to Plaintiff during the December 19, 2013 telephone call the Hancock representative was unable to provide any information "but stated that he will check with the correct department and call her back the following day." Further, Plaintiff asserts during the December 19, 2013 telephone call with a Hancock representative Ms. Lan "begged to be called back within two hours, John Hancock promised to try," but never called back in two hours or the next day.

According to Plaintiff, when Ms. Lan did not hear back from Hancock on December 19 or December 20 so she called them again on December 23, 2013.[10] The Plaintiff contends that during the December 23, 2013 telephone call the Hancock representative (Robert) informed Ms. Lan that the premium was received in the Philadelphia office on December 13, but had not been received in billing so it was not applied to the policy. As a result, Plaintiff asserts that they relied on that statement by Hancock's representative and did not send a wire transfer of the funds to ensure the life insurance policy would not lapse. Ms. Lan testified that once she was made aware during the December 23, 2013 telephone conversation that the check was received she took no further action, "I was like I just put the case out of my mind, that it was paid." Further, Ms. Lan

---

[9] Plaintiff's 8 in evidence is the CD of the telephone call and Plaintiff's 9 in evidence is the transcript of the phone call

[10] Plaintiff's 10 in evidence is the CD of the telephone call and Plaintiff's 11 in evidence is the transcript of the phone call

testified that she could have wired funds from another account before December 26, 2013 to prevent the policy from lapsing.

Ms. Lan testified that in January 2014 she received a notice from Hancock that the subject policy had lapsed due to non-payment of the premium and called Hancock on January 6, 2014 for clarification. According to the recorded telephone call between Lan and the representative from the Hancock Plaintiff was told that the policy lapsed on December 26, 2013.[11] Further, during the conversation Lan referred to the FedEx confirmation she received confirming delivery on December 13, 2013 providing the tracking number, amount of the check and that she was previously informed that the check was received in Philadelphia. Based upon the recording , Ms. Lan was informed by "Robert" that he would email the billing team and research what occurred.

Dasi Lan called Hancock again on January 6, 2014 indicating that she determined that the premium payment she sent had not cleared, that she figured out what happened and that she needed help. Lan explained that the premium payment was mailed yo Mass Mutual instead of John Hancock and "we're in deep trouble." In response "Robert" from Hancock informed Lan that he also received an email from billing indicating that they did not ever receive the premium payment and therefore the policy lapsed on December 26, 2013. Ms. Lan sought to find out what happened with all the money that had been paid into the policy and she was informed that the policy was cancelled and since the policy had no value "it couldn't go further than the 26th." Additionally, Lan asked what to do and "Robert" informed her that reinstatement forms could be completed and explained the process to her. During the conversation Ms. Lan seeks to speak

---

[11] Plaintiff's 12 in evidence is the CD of the telephone call and Plaintiff's 13 in evidence is the transcript of the phone call

with a supervisor and states "I understand that it's our error. But maybe there's someone that can work with us and see if something can be done since we did send out payment, it was just sent out to the wrong place."

According to the testimony of Ms. Lan she received the check back from Mass Mutual after the January 6, 2014 conversation with the Hancock representative. Lan also testified that she made a second premium payment on January 7, 2013, the day after the conversation via a wire, but that money was subsequently refunded. There was no testimony by Lan that she or anyone else working for Weiss ever attempted to follow outlined steps in seeking to reinstate the subject policy after the lapse on December 26, 2013.

c. Deposition of Brian Latcham

Prior to the close of the Plaintiff's case, Plaintiff's counsel sought to read a transcript into the record due to the unavailability of the witness, Brian Latcham (hereinafter Latcham). According to Plaintiff's counsel, the witness was a John Hancock corporate designee and Hancock advised Plaintiffs that he was unavailable to testify. In response, Defendant's counsel clarified that they were not consenting to the Latcham deposition being read into the record and noted that the deposition did not occur in Toronto. Despite the objections, no argument was made by either party pursuant to *Civil Practice Law and Rules* § 3117(a)(3)(I-v) and no specific ruling was made by the Court. However, there was no dispute by Defendants that Latcham was out of the state and more than 100 miles from the courthouse. Additionally, the deposition was used by Plaintiff, an adverse party. However, the Court notes that in error, the deposition transcript was never marked into evidence and was merely read from by Plaintiff's counsel.

The portion of Latham's deposition that was read addressed several areas. First, Plaintiff read the questions regarding whether Hancock accepts premium payments via wire transfer. Latham stated that Hancock does accept premium payments by wire transfer and the location for those to be sent is available at the Customer Service Center and he believed on the website. As to the lapse notice Plaintiff asked if the due date for the minimum premium needed was known to the policy owner, Latham stated on the lapse notice in the instant action the payment was due by December 16, 2013. Latham was also asked whether Hancock would have accepted a premium payment made on a date before December 16 and he indicated they would have. As to a payment received on December 16, Latham also stated Hancock would have accepted that premium payment.

Latham was further questioned about dates after the aforementioned lapse date of December 16, 2013. In his deposition Latham stated that the system Hancock uses sets the policy to terminate during the grace period a few days beyond the 61-day grace period and if a payment had come in during that additional period then it would be applied to a policy. According to Latham's testimony the same applied to a wire transfer that "hit" during that additional period. Further, Latham explained in his deposition the period between the lapse date on the notice of December 16, 2013 and the actual lapse date of December 26, 2013 was a difference of ten days rather than the administrative policy of Hancock of nine days due to Christmas falling within those dates.

In response to the reading, Defendant opted not to read any portion of Latham's deposition testimony.

PLAINTIFFS ARGUMENTS/CONTENTIONS

The Plaintiff's are seeking to have the Policy reinstated arguing that the life insurance policy would not have lapsed but for a material misrepresentation made by Hancock to the Trust on December 23, 2013. According to the Plaintiff, it is "undisputed" that if the Trust had made a payment on December 23, 24, 25 or 26 of 2013 then Hancock would have accepted that payment, considered the payment "timely," and the policy would not have lapsed. The Plaintiff concedes that the initial premium payment sent by the Plaintiff was mailed to the wrong address. However, Plaintiff directs the Court to the testimony of Dasi Lan (a/k/a Mrs. Frieda Landau), secretary of Plaintiff Weiss, in which she stated she repeatedly called Hancock to ensure the payment was received by them as to the subject policy. Additionally, the Plaintiff directed the Court to the recorded telephone conversations between Ms. Lan and the Hancock representatives on December 16, 17 and 19 and 23, 2014. The Plaintiff argues that during the conversations between Ms. Lan and Hancock representatives she tried to determine if the payment had been received for the instant policy, but was provided mis-information upon which she relied and therefore did not send a second premium payment until after she received notice of the lapse.

The Plaintiffs also asserted that Plaintiff has a internal procedure in which they do not lapse the policy for nine (or ten) days after the last day of the grace period during which a check sent to the Plaintiff for a premium payment would have been accepted as timely. According to Plaintiff, the testimony of Dasi Lan demonstrates that she detrimentally relied upon the statements made by Plaintiff's representatives on December 23, which was within the nine (or ten) day period between the end of the grace period and lapse, a time in which Plaintiff could have wired funds and the policy would not have lapsed. Plaintiff contends that they had the

funds to wire before December 23, 2014 and but for the misrepresentation by Hancock's representative they would have wired funds and the policy would not have lapsed. Plaintiff argues that "John Hancock has conceded that it would have accepted payment for the policy on or before December 26, 2013." As such the Plaintiff's argue that the doctrine of equitable estoppel should be applied based upon their showing of detrimental reliance on Defendant's misrepresentations.

a. Plaintiff's Argument that Forfeitures are Unfavored by Law/Equitable Estoppel

Plaintiff contends that the law attempts to prevent forfeiture by lapse and tries to find any indication of waiver, estoppel or deficiency by an insurance company for the purpose of invalidating the lapse and cancellation of life insurance policies. According to the Plaintiff, the basis of their belief that Forfeitures are unfavored by law is "New York's long-standing and strong public policy against the forfeiture of insurance policies through lapse." [*Gallien v. Connecticutc Gen. Life Ins. Co.*, 49 F3d 878, 886 (2d Cir 1995)]. The Plaintiff argues that the facts as they were presented at trial "conclusively" prove that Defendant is estopped from declaring Plaintiff's policy was forfeited by lapse. Further, Plaintiff contends that when it is a "close call," the "tie goes to the policyowner."

According to Defendant, the New York State legislature has also promulgated this public policy against forfeiture by placing in the statutes a required notice before forfeiture of life insurance for nonpayment of premiums and that notice is to be strictly construed in favor of the insured. Also, Plaintiffs argue that the statutes require specific conformation of notices of cancellation with the statutory provision. Further, Plaintiff submits that any ambiguity is strictly

construed against the insurer.

b. Plaintiff Contends that the Notice Sent by Defendant to Plaintiff is Insufficient

The Plaintiffs also argue in their post trial memorandum that the lapse notice was also insufficient as it failed to inform the Plaintiff where to send an overnight or wire payment. According to Plaintiff, the failure of Plaintiff to include this information in the lapse notice is a violation of New York insurance statutes [*New York Insurance Law* § 3211(b)(2)] which require the insurer to inform the policy owner where to send the premiums. As a result, Plaintiff contends that the policy owner was left "to hunt for the correct place to send funds." The Plaintiff submits that if the proper wire or overnight payment information was included on the lapse notice then "the entire predicament would have been avoided." Plaintiff concedes that Defendant has one address on the lapse notice where payment can be sent, but that address does not allow for overnight delivery, as it is a P.O. Box address. Further, Plaintiff admits that there is no case law or specific statutory section of New York Insurance Law which addresses the various methods of payment an insurer accepts, but nonetheless argues that "the intent and spirit of the statute is clear: if an insurer accepts payment by wire or overnight mail, that information should be supplied in the notice by the insurer." Additionally, Plaintiff asserts that Defendant has admitted in testimony that they accept overnight and wore payments, but does not share that information with policy owners and results in the insured scrounging "the internet and other sources to find the correct place to send premiums." Plaintiff contends that is what occurred in the instant circumstance and therefore there was an additional violation of *New York Insurance Law* § 3211(b).

c. Plaintiff Argues Defendant Sought Excess Premiums in the Lapse Notice Than Were Allowed by the Terms of the Policy

The second argument raised by the Plaintiffs is that the lapse notice sent to the Plaintiff is invalid since the amount sought of $93,327.27, in the lapse warning exceeded the amount allowed by the terms of the policy. Specifically, the Plaintiffs argued in their opening and in opposition to the Defendant's application for a directed verdict that Section 10 of the subject Policy indicates that the default amount requested to bring the policy out of default is "equal to (a) plus (b) plus (c). According to Plaintiff, based upon the policy subsection (a) is defined as the amount by which all unpaid monthly deductions exceed the net cash surrender value at the date of default, which Plaintiff asserts equals $27,829.33. Further, Plaintiff contends that in the subject policy there is a typographical error in Section 10 and there is no subsection (c) and two subsections (b). Plaintiff submits that the "first (b)" is defined as "the amount equal to three times the Monthly Deduction due on the date of the default," which they allege would have been $89,452.62. As to the "second (b) provision that is the "applicable premium charge," which Plaintiff contends would have been $2,419.94. Therefore, in their post trial memorandum the Plaintiff argues that due to the "ambiguity" in the subject policy (a/k/a contract) that the "ambiguity" must be resolved as a matter of law against the drafter, who was the Plaintiff. Therefore, Plaintiffs contend that the payment due would have to be calculated as the amount in subsection (a) and either subsection (b), which is less than the amount requested by Plaintiff in the default notice.

According to the Plaintiff, with the most favorable reading of the policy the Plaintiff could not have sought more than $27,829.23, plus $2,419.94 for a total of $30,249.27. Plaintiff

contends Defendant violated the terms of their own policy by seeking $93,296.20 resulting in a void notice of lapse and reinstating the subject policy in full force and effect. Plaintiff further argues that even if the court believes Defendant should be allowed to reform the mistake I the subject policy to read they can demand (a) + (b) and the second (b) once the policy went into grace, the Defendant still requested more than allowed by Insurance Law § 3203. According to Plaintiff, § 3203 allows Defendant to seek premiums necessary to keep the subject policy in effect for three (3) months from the date the policy entered the grace period, which was October 16, 2016. Further, Plaintiff argues that the notice sent to Plaintiff, which was introduced into evidence, sought in excess of three (3) months of premiums ad failed to inform Plaintiff the amount due to prevent the policy from lapsing as required by statute.

DEFENDANT'S ARGUMENTS/CONTENTIONS

The Defendant contends that the subject life insurance policy should be read like a contract with the timely payment of premiums an essential material term of the contract life insurance policy. Defendant notes that Section 11(a) of the subject policy states that the failure to timely pay premiums on the policy will result in termination. Defendant cites a case from 1887 in support of the premise that timely payment of life insurance premiums is the "very essence of the contract" and the failure to comply with the requirement provides the insurance company the right to forfeit the contract. The Defendant asserts that the evidence testimony at trial demonstrated that the subject policy entered default on October 16, 2013 triggering the sixty-one (61) day Grace Period. Further, Defendant contends there is no dispute from Plaintiff

they received the Lapse Warning Notice which indicated $93,327.27 was to required to be received by December 16, 2013 to avoid lapse. Defendant states that based on the testimony and evidence they have shown the premium was not received by them by December 16, 2013 to avoid lapse. Further, Defendant states that based on the testimony and evidence they have shown the lack of receipt of the premium resulted in the termination of the subject insurance policy. The Defendant asserts that based on the Plaintiff's failure to comply with the terms of the default section of the subject life insurance policy that the policy automatically lapsed on December 16, 2013 and the fact that Plaintiffs would have ensured receipt of money by Defendant if they knew their premium had not been received is contrary to the provisions of the subject policy.

The Defendants note that Plaintiff presented no evidence at trial and did not mention their opening anything about their allegation in the Amended Complaint that the Grace Notice sent by Defendant to Plaintiff was deficient and did not comply with New York Statutory law. According to Defendant, these arguments were first raised by Defendant in their post trial papers. Nonetheless, Defendant argues in their post trial submission that the testimony at trial demonstrated that Lapse Warning Notice, Defendant's Exhibit B at trial, was sent to the Plaintiff. Further, the witnesses testified that the Notice contained all of the information required under New York law and the terms of the Policy including the default amount owed by Plaintiff correctly calculated under New York Law. The Defendant asserts that Dasi Lan testified that she understood the Lapse Warning Notice and that the notice required payment by December 16, 2013 to avoid lapse. Further, Defendant notes Plaintiff failed to produce any evidence or illicit any testimony at trial that demonstrated the Lapse Warning Notice did not comply with New York Insurance Law or the terms of the policy or that these alleged insufficiencies prevented the

Plaintiff from paying the default amount timely.

Defendant Contends Equitable Estoppel is Inapplicable to the Instant Action

Plaintiff argues that Defendant should be equitably estopped in terminating the subject policy due to missteps and failures on behalf of the Defendant. The Defendant asserts that the Plaintiff has failed to prove facts that would allow the application of the doctrine of equitable estoppel. Defendant contends that the application of equitable estoppel is not favored when the claimant was aware of information within the necessary time frame and instead did nothing. Specifically, Defendant cites a mortgage foreclosure matter, *Graf v. Hope Bldg. Corp.*, 254 NY1, 4 (1930), in which the Defendant sought equitable relief due to a clerical error that resulted in a failure to submit the payment owed on a mortgage. According to Defendant the Court declined to grant equitable relief because that would result in the Court interfering in a clear contract that existed between the parties. The Defendant also notes that clear contract obligations cannot be rejected due to judicial sympathy. Further, Defendant contends that Plaintiff failed to demonstrate they acted with diligence. Defendant notes that the Plaintiff was unfamiliar with the policy, testified that he never read the Lapse Warning Notice and stated that he delegated the duties of the Trust to his staff. Based upon the testimony, Defendant argues that the failure to pay the instant life insurance premium timely was due to the negligent actions of Plaintiff's employee and the Defendant's actions did not cause the employee to send the payment to the incorrect address at the outset.

In considering the cause of the negligence in the instant action, Defendant states that Plaintiff's Exhibit B (the notice sent to the Plaintiff) demonstrate that Defendant provided the

correct mailing address for the premium and the date upon which it was due for the payment to be considered timely. In support of this assertion, the Defendant directs the Court to the testimony of Dasi Lan in which she stated that received an email confirming that the premium check was sent to the incorrect location, but she did not scroll down and as such did not read it in its entirety. Further, Defendant argues that if the Plaintiff's employee, Ms. Lan, had read the email in its entirety then she would have been aware of her own mailing error timely and could have wired the funds timely to avoid the lapse. As to the phone calls made by the Plaintiff's employee, the Defendants argue that they also fail to prove her diligence since she was told in the phone calls before the premium was due, (on December 16), that the funds were not received and that she was only mistold of the receipt of the funds after the lapse of the policy during a phone call on December 23. Defendant notes that in Ms. Lan's own words during the phone call she admitted that the error in sending the payment (and therefore the cause for the lapse of the policy) was her fault, not the Defendants. Defendants argue the instant action was brought in an attempt to avoid or nullify Plaintiff's staff's own mistakes which caused the lapse of the insurance policy.

The Defendant submits that the subject policy terminated as a matter of law on December 16 due to the Plaintiff's own negligence and equity cannot be used to relieve Plaintiff of the result of their own negligence and excuse Plaintiff's default

Plaintiff Failed to Meet the Elements of Estoppel

The Defendant argues that the Plaintiff failed to show the following: (1) lack of knowledge and of the means of knowledge of the true facts (2) reliance upon the conduct of the party estopped and (3) prejudicial changes in their position.

a. Plaintiff Had Means of Knowing that it Sent the Check to the Wrong Insurer

As to the first element, Defendants note that Ms. Lan testified that she sent the premium check to Mass Mutual Insurance rather than John Hancock and therefore she could not have lacked the knowledge or means of knowledge of the true facts. Further, Ms. Lan testified that she received an email confirmation of the check delivery stating it was received by Mass Mutual instead of John Hancock, but admitted she chose to only read a portion of the email. Defendant notes that Ms. Lan testified that if she had read the email in its entirety then she would have seen that she had sent the premium check to the incorrect insurer. Additionally, Defendant contends that they told Ms. Lan on December 16 and December 19th, in recorded telephone calls, that they had not received the check. Defendants argue that despite hearing from Defendant's customer service representative that the premium check was not received, Plaintiff's employee did not verify if the check cleared or take a look further to locate of the delivery location in the confirmation email. Therefore, the Defendant submits that first element of equitable estoppel has not been proven since the Plaintiff had the knowledge or means to know the true facts, but chose to not read the entire email confirmation received upon delivery of the premium check sent or to verify if the check had been cashed.

b. Plaintiff Argues Defendant Made Misrepresentations which Plaintiff Detrimentally Relied on and the Defendant Should be Equitably Estopped from Declaring Plaintiff's Policy Lapsed

Plaintiff asserts that Defendant's customer service's indication to Plaintiff on December 23, 2013 that the payment sent on December 12, 2013 was received and the policy would not

lapse, equitably estops Defendant from declaring Plaintiff's policy lapsed. According to Plaintiff, they demonstrated all of the elements of equitable estoppel in the instant action. Plaintiff asserts that in the testimony at trial Defendant's representatives conceded they would have accepted payment on the policy on or before December 26, 2013. Further, Plaintiff states the testimony of Dasi Lan demonstrated Plaintiff made several attempts between December 12, 2013 and December 26, 2013 to confirm Defendant received payment and was told on December 23, 2013 that payment was received. Plaintiff argues that as a result of Defendant's representative's statement, Plaintiff did not wire or send additional funds, which Ms. Lan testifies she could have and would have if she was aware the payment she sent was not received.

The Plaintiff contends that the testimony at trial demonstrates the most "egregious" misrepresentations made by Defendant was during the December 23, 2013 telephone call between Mrs. Lan and Defendant's customer service representative. According to Plaintiff, the testimony showed Defendant's customer service representative told Mrs. La that the premium had been received by Defendant in their own Philadelphia office and that the payment had not been entered into their Billing Department. Further, Plaintiff submits that the recording of the December 23, 2013 call demonstrates that the premium payment would be applied to the policy as the date received, which was December 13, 2013. Plaintiff notes that "the reading of the transcript does not fully reflect the emphasis in which John Hancock assured the trust that the payment was received." However, Plaintiff argues that the transcript "self-evidently" informed Mrs. Lan that the Defendant had the funds in their possession.

c. Plaintiff Failed to Prove Justifiable Reliance Because the Default Occurred After the

Policy Lapsed

The Defendant argues that Plaintiff's assertion that they relied on statements made in the telephone call with Mr. Boileau on December 23 is flawed since the policy lapsed earlier on December 16. Specifically, Defendants assert that a date after the lapse cannot demonstrate reliance, as the default had already occurred. Defendants cite a Court of Appeals case *Gilbert Frank Corp. v. Federal Ins. Co.*, arguing that communications between Plaintiff and Defendant that occurred after the lapse of the Policy on December 16, 2013 do not demonstrate estoppel. According to Defendant, the Plaintiff relies upon a call between Ms. Lan and Mr. Boileau which occurred seven (7) days earlier on December 16, 2013, but provided no evidence that the reliance was coupled with the submission of the check to the correct address or that Defendant had received the check. Further, Defendant's argue that if the Court considers the "reliance" of Plaintiff on Defendant's employee's statement on December 23, 2013, that reliance is unreasonable since Ms. Lan had the confirmation email in her inbox on December 13, 2013, three (3) days before the due date, but chose to only read a portion of the email before December 16, 2013. Additionally, Defendant asserts that Plaintiff's reliance on the statement by Defendant's customer service representative was unreasonable as a matter of law.

In arguing the reliance was unreasonable as a matter of law, Defendant cites a Nassau County Supreme Court case in which the plaintiff contacted the defendant bank's tellers and customer service representatives several times and were told that a cashier's check in the amount of $6,470 had cleared only to be told five (5) days later that the check was dishonored causing the defendant to withdraw funds from the plaintiff's account to cover an advance. [*Amthor v. Commerce Bank*, 15 Misc.3d 1130(A) (Nassau Cty Sup. Ct. 2006)]. Defendant's argue that the

Court in Nassau County cited the uniform Commercial Code (UCC) indicating that the plaintiff bore the risk of loss until a check is settled. The Defendant's compare the facts of the instant matter to the facts in *Amthor* arguing that the Plaintiff here had an obligation to ensure that the premium payment was received timely under the terms of the life insurance policy. Further, the Defendants argue that similar to *Amthor* the Plaintiff cannot shift the loss to Defendant through the claim of reliance on Defendant's employee's mistake when the Plaintiff's employee knew (or should have known) that the check was sent to the incorrect insurance company and she never informed the Defendant's employee that she had not read the entire confirmation email and that the email indicated delivery to the wrong location. Defendant asserts that instead Plaintiff's employee insisted (incorrectly) on each and every call with Defendant's employee that she had received confirmation that the premium check was delivered to Defendant. Finally, Defendant submits that Ms. Lan's reliance was unreasonable as she relied on statements of Defendant's customer service representative regarding the timely receipt of the policy premium despite the Policy having contradictory language. Defendant submits that the statement of Mr. Boileau on December 23 to the Plaintiff contradicted the Policy, the Lapse Warning Notice mad the Lapse Termination Notice. The Defendant contends the language in the policy controls.

d. Plaintiff Did Not Detrimentally Change its Position as a Result of Defendant's Conduct

The Defendant argues that the call between Ms. Lan and the Defendant's customer service representative on December 23 occurred seven (7) days after the Policy had lapsed on December 16, as stated on the Lapse Warning Notice. According to Defendant, Plaintiff's argument regarding the administrative delay in recording policy terminations, an internal

procedure within Defendant company, extends the Plaintiff's time to pay the default payment is contrary to New York Insurance Law. The Defendant contends that the nine (9) day internal delay in recording policy terminations does not extend the Grace Period for the Policy since that period is set forth by the terms of the Policy and by New York State Insurance Law § 3203. Further, Defendant argues that their administrative "house rule" of allowing nine (9) days to record policy terminations does not create or infer a legal duty on the part of the Defendant as it is not written in any insurance policies (including the subject policy) and is not communicated to policy holders in any documents sent to inform insureds of payment due dates. Additionally, Defendant states that Mr. King testified that the nine (9) day administrative delay is a policy, which has been created by the Defendant since they receive so many checks per day they do not want to unintentionally terminate a policy when the premium check has been received by Defendant, but has not been processed. Finally, Defendant submits that Plaintiff cannot argue reliance on the Grace Period since no evidence was offered by Plaintiff that there was an attempt to wire funds to Defendant during the nine (9) day administrative processing delay. Based on the foregoing, Defendant contends that no evidence was introduced by Plaintiff at trial that they were aware of the administrative nine (9) day delay in recording policy terminations prior to the December 23 phone calls with Defendant's Customer Service Representatives and as such could not have relied upon something they did not know on December 16th, 19th or 23rd.

e. Plaintiff Did Not Prove that Defendant Made a False Representation Knowing Plaintiff Would Rely on It

According to the Defendant, Plaintiff has failed to demonstrate that Defendant engaged in

conduct which amounts to false representation or concealment of material facts, that there was an intention that Plaintiff would act on Defendant's conduct and the Defendant had knowledge of the real facts. The Defendant contends that the Plaintiff failed to introduce evidence at trial that demonstrated that Mr. Boileau's statement on December 23 was made with actual knowledge of the "true facts" surrounding Plaintiff's attempted premium payment. In support of this assertion, Defendant submits that Mr. Boileau did not identify the amount of the premium or the policy number and specifically stated that "billing and income" did not have the allegedly submitted premium check. Further, Defendant avers that no evidence was submitted that Mr. Boileau knew his statement was false or he made the statement for the purpose of preventing or discouraging the Plaintiff from sending the premium check.

Defendant Did Not Waive the Policy's Termination

The Defendant argues that the December 23, 2013 call is not a waiver of the termination of the Plaintiff's life insurance Policy. Defendant asserts that Plaintiff made a conclusory allegation that the Defendant waived the termination of the life insurance but failed to identify a specific act of waiver in the Complaint or identify one at the trial. According to Defendant, the caselaw indicates that when one waives a known right they do it intentionally, but waiver cannot be created by negligence, oversight or thoughtlessness. Therefore, Defendant argues that the Plaintiff must prove that a party intentionally or voluntarily waived a contractual right or advantage. Based upon the foregoing, Defendant contends that they did not waive anything.

Defendants argue that their conduct did not waive anything, but rather Defendant confirmed the lapse of the policy in a letter written to Plaintiff and confirmed the same during a

telephone call on January 6, 2014. The Defendant also asserts that they demonstrated at trial the call between Mrs. Lan and the Defendant's customer service representative cannot be a waiver since Mrs. Lan "misled" the Defendant's customer service representatives by telling them during the calls on December 16, 17, 19 and 23rd that the check in question had been delivered to Defendant. Defendant contends Plaintiff knew these statements were in correct since she had an email confirmation from Federal Express that the subject check was delivered to Mass Mutual, not the Defendant. Additionally, Defendant submits that Defendant had no way to know the check the Plaintiff's representative Mrs. Lan was referring to had been sent to the wrong insurer and as such could not have knowingly waived the termination of the policy.

Defendant's second argument as to the lack of waiver is that the subject policy contains "no-waiver clause" which only provides the President, Vice President, Secretary or Assistant Secretary of Defendant authority to waive or change any condition or provision of the policy. Further, Defendant notes that these non-waiver clauses are enforceable under New York Law. Defendant submits that the customer service representative, whose statements had no authority under the "no-waiver clause" and therefore his statements/actions cannot be construed as a waiver. Additionally, Defendant notes the Plaintiff did not raise this at trial.

Defendant's third argument as to waiver is that the Defendant's acceptance of "late payments" is not a waiver for all payments. The Defendant references a Court of Appeals case indicating that an administrative policy allowing/accepting late payments on a policy did not constitute a waiver of the right to claim the policy lapsed. Further, Defendant contends that if Defendant accepts late payment on the subject policy or any other of their policies does not constitute a waiver of payments. Additionally, Defendant submits Plaintiff never submitted

evidence that a late payment was accepted on the subject policy.

Plaintiff Contends the Typographical Error in the Policy is Irrelevant

At the outset, Defendant noted that the Plaintiff cross examined Defendant's witness Brian Latham regarding the typographical error in the subject policy, which Plaintiff admitted into evidence as Exhibit 1. However, Defendant argues that there is no cause of action plead in the original Complaint or Amended Complaint regarding the typographical error and it was never mentioned during Plaintiff's opening arguments. Further, Defendant submits that none of the Plaintiff's witnesses ever testified that they were aware of the error or that they had read the policy and detrimentally relied on the typographical error which caused them to be misled or confused.

Despite the failure of Plaintiff to raise the typographical error in their Complaint or in opening the Defendant addressed the argument within their post trial memorandum. The Defendant contends that a typographical error does make a contract ambiguous and whether a writing is ambiguous is a question of law which the court must resolve the typographical error at issue.

Section 10 of the subject policy which provides the formula as to how the premium default is calculated and is the section in which the Defendant concedes there is an error. The Defendant argues that the formula that is listed in the policy complies with *Insurance Law* § 3203(a)(1) which requires the insurer collect an amount to keep the policy in effect for three (3) months from the date of default. Defendant asserts that if the formula set forth in the policy before the incorrect list (which includes 2(b)s and no (c)s) is followed, the proper amount set

forth in § 3203(a)(1) is obtained. According to Defendant, if the list is followed, then the payment that results is not in compliance with *Insurance Law* § 3203(a)(1) and would be insufficient to cover monthly deductions during the Grace Period. The Defendant submits that case law indicates that when presented with two (2) interpretations of an instrument, one that results in a legal conclusion and one in an illegal conclusion courts favor the legal alternative.

In considering the Plaintiff's interpretation of Section 10 of the subject policy, Defendant submits that Plaintiff's interpretation is unreasonable. Defendant argues based upon the explanation of the formula as set forth in the section, to follow the list with two (2) (b)s ad no (c)s would result in a nonsensical amount for default. The Defendant cites caselaw for the contention that a reading or interpretation of a contract that results in a "superfluous" formula should not e followed by a court as it would alter the intent of the parties who entered into the contract. According to Defendant, in this circumstances where "absurdity has been identified" which would cause the contract to be unenforceable the court can reject the words or "supply" words to make the contracts meaning clear. As such, Defendant submits the only reasonable interpretation of Section 10 in context of the policy with §3203 of *Insurance Law* is that Defendant charges the three (3) components of the formula (a) + (b) + (c).

The Defendant contends that the Plaintiff failed to introduce evidence or an expert to testify that the default amount set forth in the lapse notice was incorrect. Defendant cites to the trial transcript asserting that upon questioning by the Court regarding the calculation for the default amount, Plaintiff's counsel stated they did not introduce any evidence as to the correct amount or the interpretation of the policy.

LAW AND COURT'S FINDINGS

a. Equitable Estoppel

The basis of equitable estoppel is in the idea of fair dealing and good conscience with the purpose of helping law with the administration of justice, where injustice would be the result. [*Readco, Inc. v. Manne Midland Bank*, 81 F3d 295, 301 (2d Cir 1996)]. Equitable estoppel is "imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is ought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would be sought." [*Readco, Inc. v. Marine Midland*, 81 F3d at 301]. To properly invoke equitable estoppel must show that enforcing rights of one party would create an injustice on another party due to the latter party's justified reliance upon the former's words or conduct. [*Kosakow v. New Rochelle Radiology Assocs.*, P.C., 274 F3d 706, 725 (2d Cir. 2001)]. The elements of estoppel as to the party estopped are: (1) conduct which amounts to false representation or concealment of material facts, (2) intention that such conduct will be acted upon by the other party and (3) knowledge of the real facts. However, the party asserting the estoppel must demonstrate as to themself: (1) lack of knowledge of the true facts, (2) reliance upon the conduct of the party estopped and (3) a prejudicial change in its position." [*First Union National Bank v. Tecklenberg*, 2 AD3d 575 (2d Dept 2003) *quoting Airco Alloys Div. v. Niagra Mohawk Power Corp.*, 76 AD2d 68, 81-82 (4th Dept 1980)]. If the evidence fails to show a party was misled by another's conduct or that the party significantly and justifiably relied on conduct to its disadvantage, then an essential element of the estoppel is missing. [*Wallace v. B.S.D.-MRealty, LLC*, 142 AD3d 701, 703 (2d Dept 2016)]. The doctrine of equitable estoppel

"is to be invoiced sparingly and only under exceptional circumstances." [*Nowinski v City of New York*, 189 AD2d 674, 675 (1st Dept 1993)].

The Court finds that the Plaintiff has failed to demonstrate the three elements of equitable estoppel as to the Defendant in the instant action. Plaintiff presented insufficient evidence at trial to establish Defendants falsely represented to Plaintiffs that the premium checked mailed by Dasi Lan on December 13, 3013 was received by Defendant. Rather, the Court finds that Defendant's customer service representative in the phone conversations between December 16 and the 23rd responded to the assertions being made by Mrs. Lan when she called the Defendant. Mrs. Lan continually informed the Defendant's customer service's representatives that she had in her possession a delivery confirmation indicating that the check she sent was received by Defendant, despite negligently not reviewing the entire email. The Plaintiff's employee's negligence was the reason that the Plaintiff's policy lapsed on December 16, 2013, not the representations made by the Defendant's customer service representatives in the various phone calls. None of the Defendant's customer service representatives had any knowledge of the contents of the delivery confirmation referred to by Mrs. Lan. Specifically, Mrs. Lan's own negligence in reading the delivery receipt caused her to misinform Defendant regarding the status of the delivery of the premium check. Therefore, Plaintiffs have failed to demonstrate that Defendant's customer service representative conduct amounted to false representative or concealment of material facts or that Defendant had knowledge of the real facts.

As to the element of detrimental reliance, Plaintiff failed to show that the misstatement by Defendant's customer service representative on December 23, 2013 caused Plaintiff to detrimentally change their position. The main issue here is by the time Ms. Lan contacted

Defendant and spoke with Mr. Boileau on December 23, 2013 the subject policy had lapsed seven (7) days earlier. The Plaintiff's argument that they relied upon the delay that Defendant has in the inputting of checks in their system also lacks merit. The Plaintiff provided no testimony or evidence that Mrs. Lan or anyone else working for Plaintiff was aware that an internal administration delay existed at Defendant company in which they accepted check and inputted them. In fact, the testimony at trial was that the delay was something Plaintiff only became aware of after commencing the instant action. The Court finds that since the Plaintiff was not aware of the existence of the Defendant's internal administrative policy allowing a grace period for them to enter the voluminous checks they received, there is no way that Plaintiff detrimentally relied on a policy they were unaware of.

As such, Plaintiffs have failed to prove two (2) out of three (3) elements of equitable estoppel as to Defendant.

b. Waiver of Policy

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed." [*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *S & E Motor Hire Corp. v. New York Indem Co.*, 255 NY 69, 72 (1930)]. The communications between an insured and insurer before or after the expiration of a limitation period set forth in a policy without more are insufficient to demonstrate waiver or estoppel. [*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d at 966].

The Plaintiffs presented no evidence at trial or elicited any testimony which demonstrated a "clear manifestation" of intent by Defendant to relinquish the protection of the contractual

limitations period. There is also nothing in the evidence which showed that during the telephone conversations between Plaintiff and Defendant from December 16 through December 23 that the Defendant encouraged or "lulled" Plaintiff into foregoing any of their rights as set forth in the policy. [*Botach Management Group v. Gurash*, 31 NYS2d 80 (2d Dept 2016)]. In short, the Plaintiff was not estopped by Defendant from wiring funds to ensure receipt. [*Van Hoesen v. Pennsylvania Millers Mut. Ins. Co.*, 86 AD2d 733 (3d Dept 1982)]. Additionally, the telephone calls made by Dasi Lan on behalf of Plaintiff to determine whether Defendant received the premium check she mailed to them alone is insufficient to prove waive or estoppel on part of the Defendant. [*Botach Management Group v. Gurash*, 31 NYS2d at 82]. Plaintiff has failed to provide additional admissible evidence which along with the statements made by a customer service representative (not an authorized person under the waiver section of the subject insurance policy) was sufficient to demonstrate that the Defendant waived its rights to terminate the life insurance policy issued for Agi Weiss. As such, the Court finds that argument raised by Plaintiff fails.

c. Notice of Lapse

The Court notes that Benjamin Weiss made a similar argument regarding the sufficiency of the premium notice in matter regarding another life insurance policy for Agi Weiss[12] in Supreme Court, Kings County, which was appealed to the Appellate Division, Second

[12] The Court is unsure if the Agi Weiss referred to in the Kings County matter is the same as the Agi Weiss in the instant matter, but the Court notes that the Plaintiff in the Kings County Matter, Benjamin Weiss, was represented by the same counsel as Plaintiff in the instant action (Lipsius-Benhaim Law, LLP).

Department, and the Supreme Court's Decision and Order was Affirmed. [*Weiss v. Security Mut. Life Ins. Co. Of New York*, 146 AD3d 842 (2017)]. In the Kings County *Weiss* matter, the Plaintiffs failed to seek reinstatement of the policy within the one year period after the policy expired and that policy had expired after missed a premium payment. The plaintiffs in the Kings County *Weiss* action argued that the premium notice mailed to them by the defendant insurer failed to comply with the statutory requirements and that they relied upon the insufficient notice and as such the defendant insurer should have been collaterally estopped from cancelling the life insurance policy. The Appellate Division, Second Department found that whether the premium notice complied with the statutory requirements in *Insurance Law* § 3211(b) was not relevant, as the policy had lapsed by its terms and in accordance with the insurance law statute one year after the plaintiff missed the premium payment and plaintiff failed to seek timely reinstatement of the policy.

Under New York Law, a notice of termination of a life insurance policy due to default in payment of the premium must be mailed to an insured at least fifteen and no more than forty-five days prior to the day when the payment is to come due. [*Insurance Law* § 3211(a)(1)]. Further, the notice sent by the insurer must "state the amount of the payment, the date when due, the place where and the person to whom it is payable." [*Insurance Law* § 3211(b)(2)]. Courts have indicated that "[a]lthough forefiture of life insurance coverage for late payment of premiums is not favored in the law, these notice requirements should not be construed as creating a trap for either the insurer or the insured." [*Stein v. Am. Gen. Life Ins. Co.*, 665 Fed. Appx. 73, 76 (2d Cir 2016)]. In *Blau v. Allianz Life Insurance Company of North America*, (a Second Circuit matter), the plaintiff made the same argument raised in the instant action which was that the defendant

failed to satisfy the *Insurance Law* § 3211(b)(2) requirements and as such the defendant was not able to lapse the policy at the conclusion of the Grace Period. [2018 WL 949222 (2d Cir February 16, 2018)].

In the instant action, the Court will follow the ruling of the Second Department in *Weiss v Security Mut. Life Ins. Co. of New York* as to the argument regarding the sufficiency of the lapse notice and the Plaintiffs defense of equitable estoppel. Therefore, the Court finds that it is not relevant whether the premium notice (Notice of Lapse) mailed by the Defendant to the Plaintiff complied with the statutory requirements relied upon by the Plaintiff, as set forth in *Insurance Law* § 3211(b), because the subject life insurance policy lapsed by its terms since the Plaintiff failed to make the premium payment by December 16, 2013, the sixty-first (61st) day of the Grace Period, as required by the instant life insurance policy.

Nonetheless, the Court reviewed the Grace Notice sent to the Plaintiff in October 2013 and noted that it contained an address for the Defendant for which the Plaintiff to remit payment. Plaintiff argued that there was not an address on the Grace Notice that allowed for overnight payments and that the Grace Notice only contained an address for regular delivery. The Court heard testimony that the Plaintiff had previously remitted payment on the subject life insurance policy, indicating that they were aware of how to send the payments with the Grace Notice stub. Additionally, Dasi Lan testified that she was involved in paying several of the life insurance policies owned by the Plaintiff and that she was aware of the procedures, which included placing the payment stub attached to the Grace Notice into a Federal Express envelope along with the check and remitting the envelope to the address on the Grace Notice. Therefore, given the lack of ambiguity in the October Grace Notice, as well as the Plaintiff's history in making payments

using the Grace Notices previously and the Plaintiff's employee's testimony that she was aware of the procedure to follow and was able to follow the instructions on the Grace Notice. The Court finds that the argument that the Grace Notice lacked an address to send overnight payments is a red herring, as the Defendant is not required pursuant to New York Insurance Law to provide multiple addresses depending on the manner in which the Plaintiff wishes to send the premium to the insured. The Plaintiff seeks to add a requirement to the statute, which has not been placed by the legislature onto the insurance companies. The Court finds the Grace Notice contained an address to which the Plaintiff could send the premium and that the Plaintiff could not have been confused or prejudiced by the failure of the Defendant to provide a different address for overnight mailing, a choice of the type of mailing made by the Plaintiff.

As to the amount due, the Court notes that the Grace Notice clearly provides the amount due as required by *Insurance Law* § 3211(b)(2) based upon the formula set forth within the instant policy. New York Law requires a lapse notice to contain "the amount of [the premium required to save the policy from default]." *Blau v. Allianz Life Insurance Company of North America*, 2018 WL 949222 (2d Cir February 16, 2018) *citing Insurance Law* § 3211(b)(2)]. The Court in *Blau* noted that § 3211 does not specifically state that the amount provided in the notice must be correct, but notes that courts in states with similar provisions have read that requirement into New York's Statute. Therefore, in a circumstance in which the premium listed in the Grace Notice is higher than the amount owed, than then the notice would not be sufficient to cancel the policy. [*Blau* at *3 -*4]. In *Blau* the Plaintiffs provided expert testimony in which the expert indicated that the request made by defendant insurance company in the Grace Notice was for four (4) months of monthly deductions, rather than three (3) months as required by the grace section

of the life insurance policy. Additionally, in *Blau* the Court noted that the defendant nor defendant's expert rebutted the premium amount offered by plaintiff's expert and there was no testimony from defendant as to how the amount on the Grace Notice was calculated. As a result of that failure, the *Blau* Court found there was an issue of material fact as to the amount due in the Grace Notice and they could not find that the policy lapsed due to the plaintiff's failure to cure.

The instant action is distinguishable from *Blau* in that the Plaintiff's failed to proffer an expert or any testimony during their case in chief, in cross examination or in rebuttal which provided admissible evidence as to the basis for their argument that the amount in the Grace Notice was in excess of the amount owed to prevent the policy from lapsing. In contrast, Defendant's witness testified as to the manner in which the amount on the Grace Notice was obtained and provided the calculations within his testimony. Plaintiff during cross examination raised an issue as to a topographical error within the policy which if followed would result in the incorrect amount due on the Grace Notice. The Plaintiff, with no basis for the argument, asserted that the Defendants should have followed the topographical error, which would have resulted in the incorrect amount owed. Defendant's witness testified that above the listing with the typographical error in the policy is the correct formula, which the Defendant followed and which would yield the statutorily required amount due on the Grace Notice. The Plaintiff seeks the Court to find for the Plaintiff in their interpretation of the ambiguous terms in the policy and therefore find that the amount due in the Grace Notice was incorrect as per § 3211. The Court finds that the argument raised by Plaintiff lacks merit, as discussed below. The Court finds that the Grace Notice sent to the Plaintiff in the instant action has the correct amount due to prevent

lapse of the subject life insurance policy.

d. Contract Terms

The court first notes that "an insured is bound by the terms of a contract whether read or not." [*Bitman Constr. Corp. v. Insurance Co. of N. Am.*, 66 NY2d 820, 823 (1985)]. "The unambiguous terms of an insurance contract must be accorded their plain and ordinary meaning." [*NIACC, LLC v. Greenwich Ins. Co.*, 51 AD3d 883, 884 (2d Dept 2008)]. Ambiguity of terms must be construed against the insurance company, as they are the drafter of the policy. [*Guardian Life Ins. Co. of Am. v. Schaefer*, 70 NY2d 888, 890 (1987)]. Under New York Law....whether a contract is ambiguous is a matter of law for the court to decide and parol evidence is not admissible to create an ambiguity. [*General Elec. Capital Corp. v. Volchyok*, 2 AD3d 777, 778 (2d Dept 2003)]. "A contract is ambiguous where reasonable minds could differ on what a term means, bit no ambiguity exists where the alternative construction would be unreasonable." [*Readco, Inc. V. Marine Midland Bank*, 81 F3d 295 (2d Cir 1996]. The courts have stated that the test for ambiguity is "whether the language in the insurance contracts is 'susceptible of two reasonable interpretations." [*NIACC, LLC v. Greenwich Ins. Co.*, 51 AD3d at 884 *citing MDW Enters v. CNA Ins. Co.*, 4 AD3d 338, 340-341 (2d Dept 2004)]. Further, the courts state that the "focus of the test is on 'the reasonable expectations of the average insured upon reading the policy.'" [*NIACC, LLC v. Greenwich Ins. Co.*, 51 AD3d at 884 *citing Penna v. Federal Ins. Co.*, 28 AD3d 731, 732 (2d Dept 2006)].

In considering the ambiguous terms in the subject life insurance policy, the Court finds that even construing the ambiguity against the Defendant, it is clear that the intent of the parties

was to comply with the formula for the determination of the amount owed for a lapse notice set forth in the New York Insurance Statutes. For this Court to find the terms of the Grace Notice calculation as sought by the Plaintiff would render an amount that would be inconsistent with the amounts required by New York State Insurance Law. In determining how to interpret an ambiguous portion of a contract, the Court will not find for a meaning that contradicts with valid law over an illegal interpretation. As such, the Court finds that the Defendants interpretation of the contract terms in the Grace Notice are consistent with New York State Insurance Law. As such, the amount calculated as to the formula set forth in the Grace Notice section included in the subject Lapse Notice was correctly determined by the Defendant and does not require the Court to reinstate the properly cancelled life insurance policy for Agi Weiss.

The Court has considered the remainder of the factual and legal contentions of the parties, and finds them to be either without merit or rendered moot by other aspects of this Decision and Order.

Counsel for Plaintiff shall retrieve from the Part Clerk of the Court any exhibits introduced into evidence within twenty (20) days from the date of this Decision and Order.

Accordingly it is hereby,

ORDERED that all of the First, Second and Third causes of action raised in the Amended Complaint are all dismissed; and it is further

ORDERED that the instant action is dismissed after trial after a finding for the Defendants; and it is further

ORDERED that all future court appearance are vacated and the matter is marked

disposed.

The foregoing constitutes the Decision and Order of the Court after trial.

Dated: New City, New York
February 11, 2019

Hon. Thomas E. Walsh II, J.S.C.

TO:

LIPSIUS-BENHAIM LAW, LLP
Attorney for Plaintiff
80-02 Kew Gardens Road
Suite 1030
Kew Gardens, New York 11415

KELLEY DRYE & WARREN LLP
Attorney for Defendant
101 Park Avenue
New York, New York 10178