

<b>HCFP, LLC v Rosenfeld</b>
2021 NY Slip Op 32725(U)
December 17, 2021
Supreme Court, Kings County
Docket Number: Index No. 505964/2014
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17<sup>th</sup> day of December, 2021.

**P R E S E N T:**

**HON. DEBRA SILBER,**  
**Justice.**  
-----X

**HCFP, LLC,**  
**Plaintiff,**

**-against-**

**AVINOAM ROSENFELD as Trustee of the  
ALEXANDER KLEIN FAMILY TRUST and as  
Trustee of the PINK ROSE TRUST,**  
**Defendants.**  
-----X

**DECISION / ORDER**

**Index No.: 505964/2014  
Mot. Seq. No.: 12**

The following e-filed papers were read herein:

NYSCEF Doc Nos.

Notice of Motion and Affidavits (Affirmations) \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

213-226, 228  
229-239, 241  
244-247, 249

Upon the foregoing papers, defendant/counterclaimant Avinoam Rosenfeld, as Trustee of the Pink Rose Trust, moves (in motion sequence [mot. seq.] #12) for an order, pursuant to CPLR 3212, granting it summary judgment against plaintiff HCFP, LLC (HCFP) on its counterclaim (Doc 76) for a declaratory judgment that HCFP is not entitled to a 20% beneficial interest in a certain life insurance policy, but rather, that co-defendant Alexander Klein Family Trust (the Klein Trust) is the party that is entitled to such funds. For the reasons that follow, the motion is granted.

### Background

This action involves a \$5 million life insurance policy, no. U0594970 (the Policy) issued by American National Ins. Co. (ANICO), pursuant to which nonparty Alexander Klein's life was insured. In March 2008, the Klein Trust was formed, with Alexander Klein's wife, Betty Klein, serving as its trustee, and the Policy was purchased on July 15, 2008. The Klein Trust apparently made the premium payments for some time thereafter. This action was commenced on June 30, 2014.

On May 9, 2013, Betty Klein and Avinoam Rosenfeld signed a document (Doc 234) which states that she was resigning as Trustee of the Alexander Klein Family Trust, and Avinoam Rosenfeld was immediately to become the successor Trustee.

In the amended complaint, plaintiff asserted that, on December 21, 2010, Joel Wertzberger agreed to pay \$28,575 (two monthly premiums)<sup>1</sup> with an agreement that Wertzberger would make the subsequent monthly premium payments, and, if the Policy was sold by the Trust within 60 days, Wertzberger would receive \$100,000. If the Policy was not sold within 60 days, Wertzberger would become the Policy's owner. The complaint also alleged that Wertzberger, pursuant to the terms of the agreement, became the Policy's owner because it was not sold within 60 days of December 21, 2020. Wertzberger was then, he claims, the managing member of HCFP.

The initial complaint was brought against the Klein Family Trust, but leave was given to amend the caption and to add the Pink Rose Trust as a co-defendant on March 16, 2017

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<sup>1</sup> The Court has previously decided a motion in this case, MS #2, in 2015, and that decision provides some additional facts.

(Doc 69). Each defendant then answered the amended complaint, (Docs 74 and 76) and both asserted counterclaims for a declaratory judgment that the Alexander Klein Family Trust is entitled to a 20 percent interest in the death benefit, either when Alexander Klein dies or, if he dies before this action is resolved, which will be then held in escrow by the Pink Rose Trust. The Klein Trust also asserted a counterclaim for unjust enrichment.

HCFP further alleged in the amended complaint that as the Policy was not sold within 60 days, that Wertzberger became the owner of the Policy and that he then transferred it to HCFP, and that HCFP continued to make the premium payments on the policy, which total in excess of \$100,000. HCFP commenced this action in June 2014, and on July 11, 2014, HCFP sent a letter to ANICO “request[ing] that ANICO refrain from taking any action which will affect the title [ownership of the Policy] until this [action] is resolved” because the title was being challenged herein (Doc 10 [HCFP’s letter submitted by ANICO in support of its motion to intervene, which was denied]).

The purported December 21, 2010 handwritten agreement (Doc 231) states:

“Agreement between Alex Klein [and Yoli] Wertzberger on Policy # U0594970  
From ANICO is as follows.

Y.W. will pay the [\$28,575] tomorrow 12/22 for the Policy, in return if we sell policy within 60 days Y.W. will get \$100,000 – from sale, if we don’t sell in 60 days YW will become owner and when he sells it YW will get 90% and AK will get 10%, if after 120 days YW will get 90 % and AK’s estate 10%, if he goes within 60 days YW is 50% partner in death benefit.

AK has agreed to meet institutional buyers and co-operate and provide required documents.”

The 2010 agreement is signed by Alexander Klein, Betty Klein as trustee of the Klein Trust, and a third signature [illegible] is presumably that of Wertzberger. On what appears to

be the second page, there is a sentence stating, “I received 28600 Dec. 21 – 2010 from Mr. Wertzberger,” and signed by Betty Klein. The court notes that this alleged agreement is so poorly written that its exact meaning cannot be determined.

Notwithstanding Wertzberger’s alleged agreement with Betty Klein and the Klein Trust, and Wertzberger’s alleged ownership of the policy and his transfer of the ownership of the Policy to HCFP, which was not perfected by any document sent to the insurance company, (ANICO), after 60 days had elapsed from the signing of the agreement, the Klein Family Trust found a purchaser for the Policy, nonparty Advanced Life Settlement Portfolio 2013-3, LLC (Advanced Life).

The Klein Trust and Advanced Life apparently executed a written contract, known as a viatical settlement agreement, and Alexander Klein signed ANICO’s forms to change the ownership and the beneficiary of the policy (Doc 62). The ownership of the policy was then disputed by plaintiff, by commencing (on 6/30/14) and maintaining, this declaratory judgment action. The parties (plaintiff HCFP, defendant Klein Family Trust by Avinoam Rosenfeld as Trustee, and co-defendant Pink Rose Trust, by Trustees Avinoam Rosenfeld and Edward Pinkesz), subsequently entered into a “Settlement Agreement” on or around June 26, 2015 (Doc 236). In the Settlement Agreement, HCFP, the Klein Trust, and the Pink Rose Trust agreed that the Klein Trust would sell the policy to Advanced Life in exchange for an undisclosed sum, and that the parties would proceed to litigate whether the contested 20% of the [\$5 million] death benefit to be distributed under the Policy upon Mr. Klein’s death (the Policy’s “maturation”) should be distributed to HCFP or to the Klein Trust. They further agreed that, pending the resolution of this action, the contested 20% interest would be held in

escrow by Pink Rose Trust, should Alexander Klein pass away before the litigation was resolved. Specifically, they agreed that:

“ANICO shall . . . change ownership of the ANICO Policy to Advanced Life Settlement Portfolio. Concurrently, Pink Rose Trust shall be named as an irrevocable beneficiary to 20% of the policy proceeds unencumbered upon maturity” and that

“HCFP and the Klein Trust agree to litigate, the rights to the 20% death benefit due to Pink Rose Trust upon maturity. Such litigation shall determine whether the death benefit due the Pink Rose Trust accrues to the benefit of the Klein Trust or HCFP” (Doc 236).

Accordingly, neither the transaction between the Klein Trust and Advanced Life, the sum for which the Policy was sold to Advanced Life, nor the distribution of such sale proceeds are at issue here. The parties have agreed that the counterclaim in this declaratory judgment action will solely determine whether the Klein Trust or HCFP is entitled to receive the contested 20% beneficial interest in the \$5 million Policy, that is, of the death benefit, which is approximately \$1,000,000. The court notes that this action has been narrowed to exclude HCFP’s claims in its complaint, as a result of an order striking its amended complaint; therefore, the cause of action that is at issue on this motion for summary judgment is the Pink Rose Trust’s counterclaim for a declaration that HCFP is not entitled to any interest in the death benefit from the Policy.

A “Release and Transfer Agreement” (Doc 60) was executed to effectuate this settlement and was signed in June 2015 by the Klein Trust (by Rosenfeld as trustee), Grapefruit Holdings (by Rosenfeld as trustee and settlor), the Pink Rose Trust (by Rosenfeld as trustee and settlor, and by Pinkesz as co-trustee), HCFP (by Jack Wolcowitz as managing member), Advanced Life (by Matt Redding as managing agent), and Montage Financial

Group (by Mike Lutterloh as manger). On June 8, 2015, Rosenfeld as Trustee of the Klein Family Trust executed a change of beneficiary form with ANICO, (Doc 62) designating the following as beneficiaries of the Policy: (1) nonparty Advanced Life (65%); (2) Pink Rose Trust (20%); and (3) nonparty Grapefruit Holdings Trust (Grapefruit Holdings) (15%). On the same day, the Klein Trust also executed a change of ownership form (Doc 62 Page 4) designating Advanced Life as the Policy's sole owner.

### **The Instant Motion**

The court notes that plaintiff's amended complaint (Doc 73) was stricken, and plaintiff was precluded from offering various documents as evidence, by order dated July 17, 2019 (Doc 129). The order specifically states that Pink Rose Trust's counterclaim survives and directs the EBTs to proceed. The complaint and the counterclaim at issue are effectively mirrored claims on the issue of which party is entitled to a 20% beneficial interest in the death benefit from the policy.

Documents provided by HCFP in May of 2013 indicate that, in April of 2013, Alexander Klein executed a new trust as Grantor, called the Alexander Klein Life Insurance Trust, with Avinoam Rosenfeld as Trustee. Doc 232 is a copy of the new Trust Agreement, which is signed by Avinoam Rosenfeld and Alexander Klein, but not by Betty Klein, the trustee of the Alexander Klein Family Trust. The document states that the life insurance policy listed on Schedule A was to be transferred to the Trust, but this schedule is not provided. The beneficiary listed in the Trust agreement is a corporation.

Doc 233, also provided by HCFP, is a copy of an ANICO form dated 5/8/13 which transferred the ownership of the policy at issue herein from Betty Klein as Trustee of the Klein

Trust, and Owner of the Policy, to Avinoam Rosenfeld, as Trustee of the Alexander Klein Life Insurance Trust, and new Owner of the Policy. The third page of this document is the form to change the beneficiary, which Betty Klein signed, changing the beneficiary to be the Alexander Klein Life Insurance Trust, with Avinoam Rosenfeld as Trustee.

It is not known whether any of these ANICO forms provided by HCFP were submitted to ANICO. If they had been submitted before this action was commenced against Betty Klein as Trustee of the Alexander Klein Family Trust in 2014, the Klein Family Trust would not have owned the policy. When the complaint was amended to add the Pink Rose Trust as a defendant and to change the trustee from Betty Klein to Avinoam Rosenfeld, that too would have been incorrect, as in 2014, the owner would have been Avinoam Rosenfeld as Trustee of the Alexander Klein Life Insurance Trust. On June 12, 2014, Avinoam Rosenfeld (who is an attorney) apparently executed an ANICO transfer of ownership form, transferring ownership of the Policy to Wells Fargo Bank as “securities intermediary” (Doc 235). It does not say which trust he signed the transfer of ownership as trustee for, and it is not known whether this document was submitted to ANICO. The plaintiff also provides this document with its papers. As these documents were only submitted by plaintiff, and as the contents of these documents are inconsistent with all of the other documents in this action, and have not been authenticated by defendants, the court must not, and has not, considered these documents in connection with this motion.

On April 30, 2021, the Pink Rose Trust filed the instant summary judgment motion on its counterclaim, seeking a declaration that HCFP is not entitled to any part of the Policy’s death benefit, which is sometimes described as the “policy proceeds,” and that the proceeds



be turned over to the Klein Family Trust. It is not clear from the record whether Mr. Klein has passed away. However, as all the arguments discuss his death as a future event, it seems that he is still alive. In any event, this fact would not change the outcome of the motion, which HCFP opposes.

The Pink Rose Trust contends that it is entitled to summary judgment on its counterclaim and a declaration that HCFP is not entitled to any part of “the Policy proceeds” when paid because HCFP has not offered any evidence to support its contention that it had an ownership interest in the Policy, and because HCFP is now precluded from offering proof of an ownership interest as a result of the order striking its complaint. The Pink Rose Trust submits an affidavit from Edward Pinkesz, who claims that Wertzberger has never offered any proof of payment of the Policy premiums by him, or any change of ownership forms executed by the Klein Trust demonstrating that he was to become the Policy’s owner, and that no consideration for such transfer of ownership has ever been pled or proven.

The Pink Rose Trust also submits the deposition testimony of three claimed managing members of plaintiff HCFP: Wertzberger, Wolcowitz, and Angela Quinn. The Pink Rose Trust argues that Wertzberger has never established that he purchased the Policy from the Klein Trust, never offered proof of payment of any Policy premiums, and never produced an ANICO change of ownership form demonstrating that he was the new owner. The Pink Rose Trust further argues that Wertzberger could not even recall when he purchased the Policy, when he transferred it to HCFP, or what the consideration was for that transfer. The Pink Rose Trust contends that Wolcowitz could not recall when or if HCFP made any premium payments on the Policy, how many payments were made, whether HCFP had a bank account,

or whether any consideration was given for the Policy, and if given, when it was given. The Pink Rose Trust also points out that Quinn signed an affidavit stating that she conducted a search for ownership documents, but later testified at her deposition that she did not recall what records she allegedly searched for, where the records were located, or if any records existed at all. The Pink Rose Trust further notes that Quinn could not recall what business HCFP was engaged in, when the Policy was allegedly purchased and for how much, whether HCFP had any source of funds, or whether HCFP ever paid any premiums for the Policy.

The Pink Rose Trust also argues that summary judgment is warranted as a matter of law because the amended complaint was stricken. In addition, the Pink Rose Trust contends that the Klein Family Trust was the owner of record of the Policy from the time that it was issued until the date of its sale to Advanced Life. To that end, Pink Rose Trust and its co-trustee, Pinkesz, assert that the change of ownership forms necessary to effectuate the Policy's sale to Advanced Life demonstrate that as of June 8, 2015, the Klein Family Trust owned the Policy when the change of ownership forms for the Policy were executed.

### **HCFP's Opposition**

In opposition, HCFP contends that material issues of fact preclude awarding the Pink Rose Trust summary judgment as a matter of law, and that the true owner of the Policy at the time it was sold to non-party Advanced Life cannot be determined on this motion. In response to the Pink Rose Trust's contention that HCFP failed to produce any evidence of ownership, plaintiff points to Wertzberger's deposition testimony and affirmation, and the exhibits submitted in opposition, arguing that they demonstrate that Wertzberger entered into an agreement with Alexander Klein and Betty Klein wherein Wertzberger lent the Klein Trust

\$28,600 in order for it to make an upcoming premium payment on the Policy. HCFP also contends that Wertzberger acquired ownership of the Policy pursuant to the terms of the 2010 agreement when the Policy failed to sell within 60 days of December 21, 2010. HCFP further argues that Wertzberger testified that he gave Betty Klein cash toward the premiums and points out that Wertzberger stated at his deposition, and in his affirmation that, after becoming the Policy's owner, he transferred his ownership interest to HCFP, that any transfer made by the Klein Trust thereafter was invalid and unlawful, since the Klein Trust no longer owned the Policy. HCFP contends that Wertzberger's testimony and affirmation regarding the transfer of ownership create issues of material fact and that summary judgment on the counterclaim is not appropriate.

HCFP also argues that the Pink Rose Trust lacks standing to make the instant motion, as the Pink Rose Trust is solely the anticipated future escrow agent for the 20% contested beneficial interest. HCFP points to the provision in the Settlement Agreement wherein Pink Rose Trust agreed not to intervene in the instant case, and argues that by moving for summary judgment, Pink Rose has breached the agreement.

In addition, HCFP argues that the Pink Rose Trust's motion is defective because the Pink Rose Trust failed to timely include a statement of material facts, pursuant to 22 NYCRR 202.8-g (a) (it was filed two weeks later) and contends that the late statement of material facts is deficient because it does not contain a citation to evidence in support of the motion, as required by 22 NYCRR 202.8-g (d).

### **Pink Rose Trust's Reply**

In reply, the Pink Rose Trust reiterates its contention that HCFP is precluded from

offering any evidence in support of its claims and that it fails to raise any triable issue of fact. The Pink Rose Trust argues that by submitting Wertzberger's affirmation in opposition to the instant motion, HCFP has violated the court's preclusion order.

The Pink Rose Trust also argues that it has offered evidence, namely, the change of ownership forms filed with ANICO, that demonstrates that the Klein Trust owned the Policy when it was sold to Advanced Life. The Pink Rose Trust contends that Betty Klein, as the initial trustee of the Klein Trust, paid the premiums on the Policy until Rosenfeld became the trustee, at which time Rosenfeld paid the premiums. In support of that contention, the Pink Rose Trust submits copies of checks dated from 2009 to 2012, made out to ANICO and signed by Betty Klein for the Policy. The Pink Rose Trust further contends that HCFP's own witness, Quinn, has previously stated in an affidavit that Rosenfeld became the Klein Trust's trustee on May 9, 2013, and submits Rosenfeld's bank statements demonstrating that he made premium payments on the Policy.

The Pink Rose Trust argues that Wertzberger has not shown any proof of premium payments to ANICO or of monies paid to Betty Klein so that she could pay the premiums. The Pink Rose Trust also contends that Wertzberger has manufactured claims in his affidavit in opposition to this motion which contradict his prior testimony at his deposition. Specifically, it notes that in his affidavit, Wertzberger now characterizes his payment to Betty Klein in 2010 as a loan, rather than an agreement with respect to a sales transaction for the Policy which entitled him to ownership of the Policy.

The Pink Rose Trust also argues that it has standing to make this motion, and that HCFP's claims to the contrary were waived when HCFP named it as a defendant in this action.

The Pink Rose Trust also argues that pursuant to the Agreement, it is only HCFP and the Klein Trust that may seek the 20% death benefit at issue and which is to be held in escrow by the Pink Rose Trust, and that, if HCFP is not determined to have been the owner of the Policy at the time that it was sold to Advanced Life, the Klein Family Trust must be given the Policy proceeds.

### Discussion

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Initially, the court finds that the Pink Rose Trust has standing to bring the instant motion. Contrary to HCFP's contention, the Pink Rose Trust did not "intervene" in this legal action in contravention of the 2015 Settlement Agreement. Rather, the Pink Rose Trust filed an answer and a counterclaim in response to being named as a defendant in this action after the Settlement Agreement was executed. After it was named as a defendant, the Pink Rose Trust had the right to defend itself by fully litigating its claims. Thus, HCFP waived its right to enforce the contractual provision when it named the Pink Rose Trust as a defendant (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). HCFP has not submitted any case law supporting its contention that the Pink Rose Trust was not entitled to participate in this action under these circumstances.

The sale of life insurance policies to third parties come in two varieties. In the first, an insured purchases a policy on his or her own life and then assigns it to the third party. New York law approves such transactions, even when the assignee is a complete stranger, and even when the insured purchases the policy with the sole purpose of immediately assigning it (see *Kramer v Phoenix Life Ins. Co.*, 15 NY3d 539, 545, 940 NE2d 535, 914 NYS2d 709 (2010). See also, N.Y. Ins. Law § 3205(b)(1)). In the second variety, the third party directly purchases a policy on the life of the insured. The law's approval of this variety is more cautious: the beneficiary named at the time of purchase must be someone with an "insurable interest" in the insured's life and the insured must consent, in writing, to the purchase. See *Kramer v Phoenix Life Ins. Co., Berkshire Settlements, Inc. v Ashkenazi*, 2011 U.S. Dist. LEXIS 136663 [USDC, EDNY 2011]. See also, N.Y. Ins. Law § 3205(b)(2), § 3205(c). This policy is clearly of the first variety.

In 2009, a revised Article 78 of the Insurance Law was enacted, and the prior law was repealed. The revised Article, entitled “Life Settlements,” which became effective on May 18, 2010, has specific requirements for the sale of life insurance policies, unless the transaction is exempt, as described in § 7802(k)(3). The court is not asked to determine whether the transactions herein were or were not covered by this statute but notes that this statute was in effect at all relevant times herein.

Turning to the portion of this motion seeking summary judgment on the counterclaim, the court finds that the Pink Rose Trust has met its burden of making a prima facie showing that the Klein Family Trust, rather than HCFP, owned the Policy at the time of its sale to Advance Life, and that, therefore, HCFP is not entitled to the contested 20% beneficial interest in the Policy (*see Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). The Court finds no issue of fact whether Betty Klein was trustee of the Klein Family Trust and that Rosenfeld later became its trustee. The Pink Rose Trust has submitted the change of ownership form that the Klein Family Trust filed with ANICO on June 8, 2015, which states that the Klein Trust, by Rosenfeld as trustee, owned the Policy at the time that it was sold. The Pink Rose Trust also points to evidence that Quinn, HCFP’s own witness, acknowledged that Rosenfeld became the Klein Trust’s trustee on May 9, 2013, which is evidence supporting the claim that Rosenfeld had authority to enter into a contract for the sale of the Policy on the Klein Trust’s behalf. In addition, HCFP admits to the Pink Rose Trust’s assertion, made in its statement of material facts, that Rosenfeld as the Klein Trust’s trustee, and Pinkesz as the Pink Rose Trust’s co-trustee, entered into an agreement to sell the Policy to Advanced Life. Finally, the Pink the Rose Trust submits the deposition testimony of Wertzberger, Wolcowitz, and Quinn,

which contains no testimony regarding any premium payments purportedly made for the policy, or when a change of ownership occurred, to either Wertzberger or HCFP, apart from Wertzberger's self-serving and generally unsupported assertion that he made certain cash payments to Betty Klein, which he now characterizes as a "loan."

In opposition, HCFP has failed to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). As a result of HCFP's noncompliance with the court's discovery orders, another judge of the court issued the preclusion order dated July 17, 2019 prohibiting HCFP from offering any proof of the items not turned over pursuant to the May 10, 2019 order, including proof of its policy payments, or proof of the purchase or sale of the policy to HCFP, as well as any receipts, bank withdrawals or corporate resolutions. By its terms, the preclusion order prevents plaintiff from offering any documentary evidence regarding its alleged purchase of the Policy. However, the court notes that while this motion seeks the inverse relief to that sought in the now-stricken amended complaint [a declaration that HCFP is not entitled to the contested 20% interest], the July 17, 2019 order does not say that plaintiff could not offer the precluded evidence in connection with opposing a counterclaim.

In any event, neither Wertzberger's self-serving (and internally defective) affirmation (Doc 229) nor his deposition testimony create an issue of fact regarding the ownership of the Policy (*see Simmons v City of New York*, 146 AD2d 624, 624 [2d Dept 1989]). Moreover, at his deposition, Wertzberger never testified that he loaned the Klein Trust money in 2010 for a premium payment, as he states in his affirmation. At his deposition, Wertzberger gave



vague testimony that he did not recall when he became the owner of the Policy, which does not create an issue of fact sufficient to defeat the Pink Rose Trust's motion.

In reply, the Pink Rose Trust submits copies of checks written by Betty Klein to ANICO from 2009 to 2012 as premium payments for the Policy, and copies of Rosenfeld's bank account statements demonstrating wire transfers made to ANICO from 2013 to 2015 for the Policy. "Although a party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court, exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers" (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015] [internal citations omitted]). Here, the Pink Rose Trust has apparently submitted this evidence to refute HCFP's contention in its opposition, made through the Wertzberger affirmation, that he paid the premiums on the Policy through a "loan" to Betty Klein. There is no admissible evidence that Wertzberger loaned Betty Klein money for the premiums. Rather, the evidence demonstrates that Betty Klein and Rosenfeld had money withdrawn from their accounts to make the premium payments for the Policy, with the possible exception of the \$28,600 which Betty Klein allegedly acknowledged receipt for on page two of the handwritten agreement. However, plaintiff has no claim in the amended complaint for repayment of this sum, and, in any event, his complaint was stricken, leaving only the counterclaims.

With respect to HCFP's contention that the Pink Rose Trust's motion is defective because it failed to include a statement of material facts, pursuant to 22 NYCRR 202.8-g (a), HCFP acknowledges, and the court notes, that the Pink Rose Trust did file the statement of

material facts, albeit two weeks after filing the initial motion, and HCFP filed a response to the statement of facts with its opposition papers. HCFP also contends that the statement of material facts is deficient because it does not contain a citation to evidence in support of the motion, as required by 22 NYCRR 202.8-g (d). There is no evidence that any of HCFP's substantial rights have been prejudiced by the moving party's failure to include citations to the record. The Court notes that HCFP has filed a counterstatement and has thus cured Pink Rose's alleged defect (*see Priority 1 Sec., LLC v Children's Community Services Inc.*, 2021 WL 4523600 [Sup Ct, NY County Oct. 4, 2021], docket No. 452500/2020, Frank, J.) and also notes that the Pink Rose Trust filed an amended statement of material facts with citations to the record. While the better practice would have been to timely file the statement, and to include citations to the record, the court finds it was not a substantive or prejudicial defect, as the Pink Rose Trust included all of the documentary evidence it relied on as exhibits to its motion.

### **Conclusion**

There are no triable issues of fact with regard to movant's motion for summary judgment on its counterclaim for a declaratory judgment that HCFP has never owned the subject Policy and has no right to any part of the death benefit. Thus, defendant, Pink Rose Trust's motion for summary judgment on its counterclaim is granted. The court has reviewed the parties' remaining contentions and finds them to be unavailing.

Accordingly, it is

**ORDERED**, that defendant Pink Rose Trust's motion (mot. seq. #12) for an order,

pursuant to CPLR 3212, awarding it summary judgment against HCFP on its counterclaim for a declaratory judgment is granted; and it is

**ORDERED, ADJUDGED and DECLARED**, that HCFP has never been the owner of the Policy, and is not entitled to a 20% beneficial interest, or any interest, in the proceeds of life insurance Policy no. U0594970 (as beneficiary) issued by ANICO on Alexander Klein's life as the insured, and it is

**ORDERED, ADJUDGED and DECLARED**, that the Klein Family Trust is the party entitled to the 20% beneficial interest (death benefit) in Policy no. U0594970, and that the 20% beneficial interest shall, upon the maturation of the Policy, that is, upon the death of Alexander Klein, be distributed to The Klein Family Trust, and it is

**ORDERED, ADJUDGED and DECLARED**, that the Klein Trust's counterclaims (Doc 74) are dismissed, as they are academic in light of the court's determination herein.

All relief requested and not expressly granted in this order is denied.

This constitutes the decision, order, and judgment of the court.

E N T E R :



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Hon. Debra Silber, J.S.C.