SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

----------X

LEVI KATZ,

Plaintiff,

**DECISION/ORDER**
**Index No. 150473/2015**

-against-

PHOENIX LIFE INSURANCE COMPANY,
FIFTH SEASON FINANCIAL CORP,
FIFTH SEASON HOLDING CO. LLC,
FIFTH SEASON FINANCIAL L.P.,
FIFTH SEASON FINANCIAL ASSISTANCE LLC,
REISS SHEPPE LLP, ISAAC JACOBOVITS,
Individually, and as Trustee of LITE TRUST I,
JOSEPH NIEDERMAN Individually, and as Trustee of
JMA INVESTORS LLC REVOCABLE TRUST,
John and/or Jane Does 1 - 100, ABC ENTITIES 1 – 100,

Defendants.

----------X

HON. SALIANN SCARPULLA, J.:

In this action, Isaac Jacobovits ("Jacobovits"), individually, and as trustee of Lite Trust I, cross-moves for an order dismissing the complaint pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7); to disclose and preserve information pursuant to CPLR § 3102(c); and for an undertaking by plaintiff pursuant to CPLR § 6312(b).

Plaintiff Levi Katz ("plaintiff" or "Katz") commenced this action on January 15, 2015 by filing his summons and verified complaint. Unless otherwise noted, the following facts are drawn from the verified complaint. In or around October 5, 2007, Phoenix Life Insurance Company ("Phoenix") issued a five million dollar life insurance

policy (the "Policy") to the Saniar Schmool 2007 Irrevocable Trust (the "Trust") to insure the life of Saniar Schmool ("Schmool").

Katz makes the following allegations regarding assignments of the Policy:

> 14. Upon information and belief, Phoenix received an assignment of the Policy from the Trust to Collateral Holdings LLC, dated July 9, 2007, and on May 21, 2008, Phoenix received a release of said assignment from CFC Collateral Holdings LLC.
>
> 15. Upon information and belief, on June 2, 2008, Phoenix received an assignment of the Policy from the Trust to Premium Finance Collateral Trust. On April 9, 2010 Phoenix received a release of said assignment from Premium Finance Collateral Trust.
>
> 16. Upon information and belief, on April 12, 2010, Phoenix received an assignment of the Policy from the Trust to defendant [Joseph Niederman ("Niederman") individually and as trustee of JMA Investors LLC Revocable Trust (collectively, "JMA")]. On June 28, 2010, ownership of the Policy was transferred from the Trust to JMA and Phoenix received a release of the said assignment to JMA.

On June 27, 2011, Fifth Season Financial Corp., Fifth Season Holding Co. LLC, Fifth Season Financial L.P., and Fifth Season Financial Assistance LLC (collectively, "Fifth Season") and JMA entered into an Open-End Life Insurance Line of Credit Agreement ("LILOC Agreement"). According to the complaint, in accordance with the LILOC Agreement, Fifth Season lent to JMA $1.1 million, along with interest and fees, and JMA agreed that Fifth Season would be repaid from the Policy's proceeds.

Katz alleges that Fifth Season agreed that JMA would collect the remainder of the Policy's proceeds once Fifth Season had been reimbursed. The LILOC Agreement itself assigned the Policy to Fifth Season and required that JMA "execute and deliver to the Insurance Company . . . a Transfer of Ownership form covering the Insurance Policy" but

stated "that such action is intended solely to protect Fifth Season's security interest in the Insurance Policy as collateral to secure [JMA's] obligations under this Credit Line Agreement and is not intended to be a sale of the Insurance Policy to Fifth Season."

Katz alleges "[o]n December 20, 2011, JMA transferred and assigned all of JMA's interests in the balance of the proceeds of the Policy, to the plaintiff" ("alleged assignment"). Plaintiff additionally avers that "[a]t all relevant times, the Assignment remains in full force and effect and plaintiff has not cancelled or transferred his interest in the Policy."

Plaintiff alleges that on January 14, 2015, he became aware of a lawsuit filed in New York County entitled *Phoenix Life Insurance Company v. Reiss Sheppe LLP, Isaac Jacobovits, Individually, and as Trustee of Lite Trust I, and Fifth Season Holding Co., LLC* (the "Phoenix Lawsuit"). Allegedly, in the Phoenix Lawsuit, Reiss Sheppe LLP ("Reiss") staked a claim in the Policy due to a December 17, 2012 assignment, and Jacobovits, individually and as a trustee of Lite Trust I (collectively, with Jacobovits "LITE") alleged a stake in the Policy due to a March 18, 2013 assignment. Katz further alleges that "[b]oth Reiss and LITE wrongfully claim adverse interests through Fifth Season in the Policy," and also argues that "[s]uch purported interests are nullities, in light of plaintiff's prior Assignment and the LILOC agreement."

In or around December 12, 2014, Schmool, the person on whose life the insurance policy was based, died.

Katz avers that "[b]y letters dated December 18, 2014, plaintiff notified Phoenix and Fifth Season that defendants should not disburse any of the insurance monies with

respect to the Policy until the present matter is resolved." Plaintiff alleges upon belief "that defendants are presently engaged in the dissipation of the insurance proceeds, and that the defendants have no intention of honoring the Assignment executed in favor of plaintiff."

In the verified complaint, plaintiff requests a declaration regarding the rights of plaintiff and defendants "to the Policy, including, without limitation, the rightful owner, beneficiary and assignee thereof, and that this Court declare the obligation of Phoenix to pay any portion of the Policy proceeds to plaintiff and any other person or entity." Katz also seeks specific performance of the terms of the alleged assignment, and preliminary and permanent injunctive relief against defendants to prevent them from disbursing money from the Policy without an order from the Court.

On January 15, 2015, plaintiff filed a proposed Emergency Order to Show Cause Seeking a Temporary Order of Restraint and Preliminary Injunction (mot. seq. no. 001). LITE, Niederman, Fifth Season, and Reiss opposed Katz's motion for preliminary injunction, and LITE cross-moved for dismissal pursuant to CPLR § 3211(a)(1) and (a)(7); an order to disclose and preserve information pursuant to CPLR § 3102(c); and an order for an undertaking pursuant to CPLR § 6312(b).

Pursuant to a stipulation amongst Phoenix, Katz, Fifth Season, Reiss, and LITE (Dkt. No. 126), the parties agreed that Phoenix would disburse certain payments for the benefit of Fifth Season Holding Co., LLC and Reiss. The parties also agreed that once the aforementioned disbursements were made, Phoenix would present the New York County Clerk with a certified check containing the remainder of the Policy proceeds,

along with interest (the "Deposit"), to be deposited with the New York City Department of Finance. All parties agree that the Deposit will remain on deposit until this Court issues an order. Additionally, the stipulation specifically states that the TRO within the January 16, 2015 the Order to Show Cause is vacated. Therefore, Katz's request for relief in motion sequence number 001 is moot. Moreover, in light of the stipulation between the parties, that portion of LITE's cross-motion seeking an undertaking is now moot.

In the stipulation, the parties also agreed to discontinue the action with prejudice as against Phoenix, Fifth Season, and Reiss only. Accordingly, this Court issued an Interim Order, dated May 20, 2015, which noted that the motion was resolved pursuant to the parties' stipulation and that the cross-motion was submitted for decision.

In support of the cross-motion, LITE relies on the insurance contract, the alleged assignment and the LILOC Agreement, and the Statement of Values. Regarding LITE's request for dismissal on the basis of the insurance contract, LITE highlights two portions of sections 17 and 18 in the Policy:

> You may change the beneficiary by written notice filed with us at our Main Administrative Office. When we receive it, the change will take effect as of the date it was signed by you. However, the change will be subject to any payments made or actions taken by us before we received the notice at our Main Administrative Office.
>
> . . .
>
> [Y]ou may, by written notice, assign any interest in this policy without the consent of any person other than an irrevocable Beneficiary. The assignment or a certified copy of it must be filed with us at our Main Administrative Office. When filed, it will bind us as of the date of the assignment, subject to any action taken by us before such filing.

LITE contends that Katz failed to allege that someone filed notice with Phoenix's Main Administrative Office to change the owner or beneficiary of the Policy to Katz or that someone filed the alleged assignment or a certified copy thereof with Phoenix's Main Administrative Office. Moreover, LITE argues that Katz does not aver "that any party made any affirmative act to change the owner or beneficiary to the name of Plaintiff in more than three (3) years since he alleged[ly] obtained ownership and designation as beneficiary of the Policy."

LITE additionally argues that the alleged assignment and the LILOC Agreement provide documentary evidence sufficient to dismiss. The alleged assignment references paragraph 10(c) of the LILOC Agreement, which states,

> [w]e agree that any amount received from the Insurance Company remaining after payment of all sums due under this Credit Line Agreement shall be paid by us to the persons you designate in our form you submit to us for such purpose. You may change your designation at any time by submitting a new form to us. A change in designation will be effective only upon our receipt of such form.

LITE argues, "Plaintiff has not alleged that he recorded such a change with Fifth Season or otherwise made any effort to preserve his rights as provided for in the LILOC [Agreement]."

LITE also maintains that I must dismiss the complaint because Katz has not alleged that Fifth Season consented to the alleged assignment in accordance with paragraph 13 of the LILOC Agreement. LITE argues that the documentary evidence of the Statement of Values is sufficient to warrant dismissal. The Statement of Values lists the primary beneficiary, owner, and payor as Lite Trust.

Finally, LITE argues that Katz cannot obtain specific performance against non-JMA defendants because the alleged assignment is solely between Katz and Niederman as trustee of JMA Investors LLC Revocable Trust, and the other defendants do not have the ability to perform under the agreement. LITE also contends that Katz cannot obtain specific performance against JMA either because plaintiff has not alleged that he lacks an adequate remedy at law.

In support of that portion of its cross-motion seeking an order pursuant to CPLR § 3102(c), LITE requests that plaintiff be ordered to preserve the alleged assignment and to produce the original version of it to the Court and/or have it available for inspection. LITE argues that preservation and production/examination of the document will better enable it to "frame[]" a fraud counterclaim.

Katz opposes LITE's cross-motion on the basis that LITE's proffered documentary evidence is not documentary pursuant to CPLR 3211(a)(1) and does not meet the standard for dismissal under that section. Plaintiff additionally argues that LITE's request for pre-action discovery pursuant to CPLR § 3102 is inappropriate.

Katz also submits an affirmation, which recounts how he came to hold the alleged assignment. Katz alleges that at a certain time he began working for an individual named Mark Stern ("Stern") and his fund, which has allegedly been known as JMA Investors LLC Revocable Trust. According to Katz, at a certain point, the fund allegedly needed financing to pay insurance policy premiums, so Katz told Stern that if he was assigned the Policy, then he could use the Policy as collateral to receive financing and lend that money to the fund. Katz claims that he hired an attorney to create the assignment; that he

faxed the assignment to Stern at the beginning of 2012; and that "Stern faxed the signature page bearing the Niederman signature to [him] on or about January 5, 2012." Katz additionally alleges that "[he] requested that Stern arrange that the Fifth Season entities be notified of the assignment. . . . Upon information and belief, Stern never complied with the terms of the assignment which required him to do so."

**Discussion**

**I. Motion to Dismiss**

In analyzing a § 3211 motion to dismiss, "the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (internal citations omitted). A court may dismiss a complaint pursuant to CPLR § 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88. In reviewing a CPLR § 3211(a)(7) motion to dismiss, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Id.* at 88 (citations omitted).

***Documentary Evidence***

LILOC Agreement[1]

Paragraph 13 of the LILOC Agreement states, in pertinent part, "[y]our rights under this Credit Line Agreement belong to you only and may not be transferred or assigned without our written consent, which may be withheld for any reason whatsoever." LITE argues that Katz fails to allege that Fifth Season consented to the alleged assignment.[2]

---

[1] The LILOC Agreement has a choice of law clause, which states,

> This Credit Line Agreement and its interpretation will be governed by federal law and by the laws of the State of Texas, without giving effect to principles of conflicts of law. If there is any conflict between any of the terms and conditions of this Credit Line Agreement and applicable federal or state law, this Credit Line Agreement will be considered changed to the extent necessary to comply with any such law. The Credit Line Account that is the subject of this Credit Line Agreement has been applied for, considered, approved, made, and accepted in the State of Texas.

Both parties only cite New York law in their memoranda of law, thus both parties have agreed that New York law, rather than Texas law, be applied.

[2] LITE's argument regarding paragraph 13 of the LILOC Agreement was made for the first time in its cross-motion reply affidavit. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415, 417 (1st Dep't 1992). However, I can properly review this argument because Katz's response to LITE's argument was recorded in its opposition to motion sequence number 002 and functioned as a surreply, and the parties discussed their positions regarding paragraph 13 of the LILOC Agreement at oral argument. *See Kennelly v. Mobius*, 33 A.D.3d 380, 382 (1st Dep't 2006) (finding respondent was not prejudiced by affidavit submitted in reply because respondent submitted a surreply and addressed affidavit at oral argument); *Basile v. Grand Union Co.*, 196 A.D.2d 836 (2d Dep't 1993).

Similarly, Katz's argument that LITE lacks standing to assert its argument about paragraph 13 of the LILOC Agreement was raised for the first time in surreply despite the fact that that argument was available to him earlier in opposing LITE's argument

"[W]hile the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom to contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited." *Allhusen v. Caristo Const. Corp.*, 303 N.Y. 446, 452 (1952). Contracts may prohibit assignments "[w]hen 'clear language is used, and the 'plainest words * * * have been chosen.'" *Id.* (citation omitted). "On the other hand, where the language employed constitutes merely a personal covenant against assignments, an assignment made in violation of such covenant gives rise only to a claim for damages against the assignor for violation of the covenant." *Sullivan v. Int'l Fid. Ins. Co.*, 96 A.D.2d 555, 556 (2d Dep't 1983). "A basic rule of construction of nonassignability clauses is that in the absence of language explicitly barring assignment of a contract right so as to provide that any assignment of it shall be void, a clause prohibiting assignment will be interpreted as a personal covenant not to assign." *Belge v. Aetna Cas. & Sur. Co.*, 39 A.D.2d 295, 297 (4th Dep't 1972).

Here, the applicable portion of paragraph 13 "'contained no provision that an assignment made without ... consent ... should be void, nor does it provide that an assignee would acquire no rights by reason of any such assignment, nor d[o]es it provide that the contractor shall not be required to recognize or accept any such assignment.'" *Sullivan*, 96 A.D.2d at 556 (citation omitted). *Compare Allhusen*, 303 N.Y. at 449, 452 (finding clause which stated that "'the assignment by the second party . . . without the

---

regarding paragraph 10(c) of the LILOC Agreement. Accordingly, I do not address that argument in this motion.

written consent of the first party . . . shall be void'" prohibited assignment), *and Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 400, 402 (1957) (finding that provision prohibited assignments when the provision stated, in part, that "neither party hereto shall assign this agreement . . . without the prior written consent of the other party," and "that [defendant] shall not be required to recognize any assignments; and that if [defendant] shall receive notice of the existence of any assignment, *it shall have the right to withhold payments* until the assignment is cancelled or withdrawn"), *with Almeida Oil Co., Inc. v. Singer Holding Corp.*, 51 A.D.3d 604, 606 (2d Dep't 2008) ("As the throughput agreement only contained a covenant not to assign, and did not provide that any assignment would be void or invalid, the assignment was not void, but only gives rise to a claim for damages against Petroleum Corp. for violation of the covenant not to assign."). Therefore, because paragraph 13 of the LILOC does not specifically state that an assignment without consent is void, the alleged assignment here simply provides a personal covenant on behalf of JMA Investors LLC Revocable Trust not to assign.

Change of Beneficiary Provisions in the Policy and LILOC Agreement

Paragraphs 17 and 18 of the Policy, quoted above, provide how the insured may change the beneficiary of the Policy and notify Phoenix of an assignment. LITE argues that Plaintiff failed to allege that someone noticed Phoenix of a change in beneficiary or the alleged assignment.

Similarly, paragraph 10(c) of the LILOC Agreement, also quoted above, which is referenced within paragraph five of the alleged assignment, provides for how a change of

beneficiary could be effectuated for the balance of Policy proceeds. LITE argues that "Plaintiff has not alleged that he recorded such a change with Fifth Season or otherwise made any effort to preserve his rights as provided for in the LILOC." However, in opposition Katz affirms that "[he] requested that Stern arrange that the Fifth Season entities be notified of the assignment." Plaintiff attaches a copy of a purported email to Stern, dated January 31, 2012, stating "We need the doc fro[m] fifth season to put someone else as beneficial interest. Could you pls get that." Katz also affirms "[u]pon information and belief, Stern never complied with the terms of the assignment which required him to do so."

"As a general rule, under . . . New York law, the method prescribed in the insurance contract must be followed in order to effect a change of beneficiary." *McCarthy v. Aetna Life Ins. Co.*, 92 N.Y.2d 436, 440 (1998). However, a party need not show exact conformity with aforementioned rule in all cases. *Id.* "Instead, 'there must be an act or acts designed for the purpose of making the change, though they may fall short of accomplishing it.'" *Id.* (citation omitted). While "'[t]he paramount factor in resolving the controversy is the intent of the insured,'" intent must also be coupled with "'some affirmative act or acts on [the part of the insured] to accomplish the change.'" *Id.* (citation omitted). Therefore, "if the decedent has 'done all that was reasonably possible to do to show his intention' or has made 'every reasonable effort' to comply with the policy requirements, then substantial compliance with the terms of the policy will suffice to demonstrate the policyholder's intent." *Id.* (internal citations omitted).

Here, plaintiff has produced the alleged assignment showing that JMA Investors, LLC Revocable Trust assigned its interest in the balance of proceeds from the Policy following the LILOC Agreement. Plaintiff has also produced an email, requesting that Stern obtain a document to inform Fifth Season of the new beneficial interest. At this stage of the proceeding, there is at least a question of fact regarding "substantial compliance" that evidences the intent of JMA Investors, LLC Revocable Trust. *See id.* As such, Katz's claim will not be dismissed on this ground at this time.

Statement of Values

The Statement of Values is not a document which "definitely dispose[s] of plaintiff's claim." *Bronxville Knolls v. Webster Town Ctr. P'ship*, 221 A.D.2d 248, 248 (1st Dep't 1995). As articulated above, "[s]trict compliance with the [Policy's provided mechanism for changing a beneficiary] is not always required." *McCarthy*, 92 N.Y.2d at 440. Thus, a table within the Statement of Values, generated by Phoenix, listing LITE as the primary beneficiary, owner, and payor, is not documentary evidence sufficient to dismiss Katz's claim.

***Failure to State a Claim***

LITE additionally argues that specific performance and declaratory relief are unavailable to Katz. Katz does not submit opposition to either of these arguments.

A plaintiff seeking specific performance must allege, amongst other requirements, "that it is within defendant's power to perform [the contract]." *Delisi v. Mastros*, 5 Misc.3d 1024(A), 2004 N.Y. Slip Op. 51524(U), at *2 (Sup Ct, Queens County 2004) (citation and internal quotation marks omitted). Here, the alleged assignment is between

JMA Investors, LLC Revocable Trust and Katz, and LITE, the only remaining and appearing defendant, does not have the ability to perform under that contract. *See id.*[3] Accordingly, Katz's request for specific performance is dismissed.

LITE argues that plaintiff may not obtain a declaratory judgment because he did not allege that anyone filed a notice with Phoenix to change the beneficiary to Katz or that anyone filed the alleged assignment, or a copy thereof, with Phoenix, in accordance with the sections of the Policy quoted above. As stated above, I decline to dismiss the complaint at this time on the basis of Katz's alleged failure to file a notice with Phoenix to change the beneficiary, thus LITE's motion, insofar as it seeks dismissal of Katz's request for declaratory relief, is denied.

## II. Motion for Relief Pursuant to CPLR § 3102(c)

CPLR § 3102(c) states, in pertinent part, "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." "[W]hile a preaction examination may be appropriate to facilitate accurate pleading, it is not permissible as a fishing expedition to

---

[3] The alleged assignment states that it "shall be construed in accordance with the laws of the State of New Jersey." This provision, however, does not change the Court's conclusion regarding the availability of a specific performance remedy, despite the fact that LITE only cites New York law in support of its argument, and Katz makes no argument in opposition. For specific performance to be awarded, New Jersey similarly requires that a defendant be able to perform. *See Marioni v. 94 Broadway, Inc.*, 374 N.J. Super. 588, 605 (N.J. Super. Ct. App. Div. 2005) (internal citation omitted) ("While it is frequently said that a party seeking specific performance must show that he or she was 'ready, desirous, prompt and eager' to perform as required by the contract on the date specified, by the same token there is a concomitant obligation on the other party to be ready, willing and able to perform on the date chosen.").

ascertain whether a cause of action exists." *Liberty Imports, Inc. v. Bourguet*, 146 A.D.2d 535, 536 (1st Dep't 1989).

Here, the action has obviously been commenced. LITE purports to have a counterclaim against Katz for tortious interference with performance of a contract and a fraud claim, "which can be more properly framed if the Defendant knows the circumstances of the alleged execution of the purported assignment."

As Katz notes, LITE cites no cases in which a court allowed a defendant pre-action discovery once an action had been commenced but prior to a defendant filing its counterclaim. Moreover, the information that LITE seeks will undoubtedly be available to it during ordinary discovery because, as LITE concedes, "Plaintiff's entire case turns on the existence of the purported Assignment and its validity." (Emphasis removed). Accordingly, LITE's request for pre-action disclosure under CPLR § 3102(c) is denied.

In accordance with the foregoing, it is hereby

ORDERED that the cross-motion of Isaac Jacobovits, individually and as trustee of Lite Trust I, to dismiss Levi Katz's complaint is granted only insofar as Levi Katz's request for specific performance is dismissed, and the remainder of the motion to dismiss is denied; and it is further

ORDERED that Isaac Jacobovits, individually and as trustee of Lite Trust I, is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross-motion of Isaac Jacobovits, individually and as trustee of Lite Trust I, for disclosure and preservation of information pursuant to CPLR § 3102(c) is denied; and it is further

ORDERED that the cross-motion of Isaac Jacobovits, individually and as trustee of Lite Trust I, for an undertaking by plaintiff pursuant to CPLR § 6312(b) is denied as moot; and it is further

ORDERED that the caption be amended to reflect the change in parties evidenced in the stipulation filed at Docket Number 126, wherein the parties agreed to discontinue the action with prejudice as against Phoenix Life Insurance Company, Fifth Season Financial Corp., Fifth Season Holding Co., LLC, Fifth Season Financial, L.P., Fifth Season Financial Assistance, LLC, and Reiss Sheppe LLP; and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on February 24, 2016, at 2:15 P.M.

This constitutes the Decision and Order of the Court.

DATE : 1/20/16

SALIANN SCARPULLA, JSC