

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. JOAN A. MADDEN  
J.S.C.

PART 11

PRESENT: \_\_\_\_\_  
Justice

Index Number : 151111/2013  
LAMM, MICHAEL  
vs  
AVIVA LIFE AND ANNUITY COMPANY  
Sequence Number : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_


Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision, order and judgment.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: April 24, 2014

  
HON. JOAN A. MADDEN J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
MICHAEL LAMM and RONNIE LAMM,

Plaintiffs,

INDEX NO. 151111/13

-against-

AVIVA LIFE AND ANNUITY COMPANY, AVIVA LIFE  
AND ANNUITY COMPANY OF NEW YORK f/k/a  
BANKERS LIFE INSURANCE COMPANY OF NEW  
YORK, AVIVA USA CORPORATION, ATHENE  
HOLDING LTD., and APOLLO GLOBAL  
MANAGEMENT LLC,

Defendants.  
-----X

JOAN A. MADDEN, J.:

In this action for a declaratory judgment as to reinstatement of a life insurance policy, defendants Aviva Life and Annuity Company, Aviva Life and Annuity Company of New York f/k/a Bankers Life Insurance Company of New York and Aviva USA Corporation (collectively “Aviva” or the “Aviva defendants”) move for an order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action.<sup>1</sup> Plaintiffs oppose the motion and cross-move for an order pursuant to CPLR 3212 granting summary judgment on their claims for declaratory and injunctive relief reinstating the life insurance policy.

The following facts are not disputed unless otherwise noted. Aviva issued a 20-year term life insurance policy to plaintiff Michael Lamm, with a face value of \$750,000. The policy was

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<sup>1</sup>The additional motion to dismiss by co-defendant Apollo Global Management LLC (“Apollo”), has been rendered moot, as plaintiff filed a stipulation of discontinuance as to Apollo on April 10, 2013.

effective August 2, 2002 and named his wife, plaintiff Ronnie Lamm, as the primary beneficiary. The policy required quarterly premium payments, with a grace period of 31 days after the due date of each payment, during which time the “the policy will remain in force,” but “[i]f the premium is not paid by the end of the grace period this policy will lapse as of the Due Date.” The policy also provided for reinstatement “at any time within 5 years after lapse if: 1) we receive proof of insurability satisfactory to us; and 2) all overdue premium is paid together with compound interest at the reinstatement rate shown in the Schedule.”

By notice dated July 6, 2011, Aviva advised Michael Lamm that the quarterly premium in the amount of \$1,168.05 was due on August 2, 2011. In a second notice dated August 22, 2011, Aviva reminded Michael Lamm that the premium payment had not been received and provided a late payment offer that expired on September 23, 2011. On September 23, 2011, Aviva wrote to Michael Lamm, advising as follows: “We regret to inform you that your insurance protection has lapsed due to non-payment of the August 2, 2011 premium. Since your policy is a valuable asset, it is a concern when the coverage terminates. This rarely occurs because the protection is no longer needed. Your agent will be glad to help with reinstatement of this policy or offer suggestions for alternative coverage. Should your records indicate the premium has been paid, or if you need further assistance, please contact our Client Services Department.”

On October 7, 2011 plaintiff Ronnie Lamm wrote to Aviva, explaining the circumstances leading up to the lapse in her husband’s coverage, specifically that starting in July 2011, they had been frequently traveling to Florida on short notice to care for her mother-in-law whose health was deteriorating. Mrs. Lamm explained that their flight arrangements and departures “were

always hurried,” and that she “would check upcoming bills, go on-line, pay what had to be paid, stop mail and newspapers,” and that her “notes indicate that on September 1, 2011, that is what I did. Your bill is marked, as is my usual and customary habit, ‘e-m 9/1/11’ (which means to me paid on line through my checking account on September 1, 2011).” Mrs. Lamm states that this “routine” continued until her mother-in-law passed away on September 26, 2011; their mail “resumed” on September 30<sup>th</sup>, when “we received your letter, dated September 23<sup>rd</sup>, notifying us of a lapse in Michael’s insurance protection.” Mrs. Lamm explains that the “following Monday, I confirmed your information with my bank, that in fact there was no payment made. I immediately contacted your office and my broker, and after lengthy conversations and after your client service agents had multiple conferences with their supervisors, it was suggested that I send in the two payments to re-instate the policy without the need for my husband to sign your reinstatement application, as he is out of town for the foreseeable future (as mentioned earlier, with no access to computers or fax machines). Please accept this payment of \$2336.10 in satisfaction of the premium due.”

By letter dated October 12, 2011, Aviva acknowledged receipt of Mrs. Lamm’s October 7, 2011 letter and payment, and responded as follows: “We understand that this has been a difficult time for you,” but “[w]e do however require an application for reinstatement to be completed before we can consider your policy for reinstatement. I have enclosed the necessary form along with a return envelop for your convenience. . . . If the form is not received by October 26, 2011, your payment of \$2,336.10 will be returned to you.” By letter dated October 27, 2011, Aviva advised Michael Lamm that “[w]e have not received the completed application for

reinstatement that we requested in our letter dated October 12, 2011. Therefore your payment of \$2,336.10 that was received after the policy lapse will be refunded to you under a separate cover.” By check dated October 28, 2011, Aviva returned the \$2,336.10 payment.

Plaintiffs then retained an attorney, who wrote to Aviva on January 11, 2012, explaining that after his clients received Aviva’s September 23<sup>rd</sup> letter, “immediately thereafter, and following the suggestion of their broker and individuals they spoke to at Aviva, they sent premium payments totaling \$2,336.10 in the belief that you would reinstate the policy without the need to establish insurability. That was not to be and you insisted that the application be submitted and that has now been accomplished.” The attorney continued: “We are aware that until this moment, our client has not submitted the application for reinstatement with appropriate documentation. Thus, per your suggestion, we enclose herewith the ‘Application for Reinstatement and Insurability Statement,’ together with attached schedule listing the names of Mr. Lamm’s physicians, as well as the medications currently prescribed by his physicians. Additionally, we are enclosing a letter of explanation addressed to you from the insured. We urge you in the strongest terms not to reject this application in view of the compelling facts surrounding the missed premium payment. . . . The failure to pay the premium was both inadvertent and understandable considering all of the facts . . .”

Aviva responded by letter dated January 4, 2013 addressed to Mr. Lamm, which stated: “Regrettably, we have found it necessary to decline your application due to your change in medical history since the original issue date of the policy.”

On February 5, 2013, plaintiffs commenced the instant action. The complaint asserts eight cause of action for a declaration reinstating the policy, a permanent injunction reinstating

the policy, breach of contract, violation of section 3211 of the Insurance Law, waiver and/or estoppel, offer and acceptance, equity and bad faith.

In lieu of answering, Aviva moves to dismiss the complaint for failure to state a cause of action. Aviva argues the undisputed facts show that the July 6, 2011 notice complies with Insurance Law 3211(a)(1), and the August 22, 2011 notice was not required by law and therefore any ambiguity in that notice is irrelevant. Aviva also argues that there is no waiver based on acceptance of late premium payments, as those actions were consistent with termination of the policy, and temporary retention of an insurance premium does not bar rescission if the insurer repudiates the benefit within a reasonable time of receipt.

Plaintiffs oppose the motion and cross-move for summary judgment.<sup>2</sup> Plaintiffs argue that Aviva's payment notices were confusing and in violation of Insurance Law §3211(a)(1), and that Aviva previously accepted 33 late payments out of a total of 35 payments, which created an expectation that coverage would continue if payment was made within a reasonable period. Plaintiffs also argue that Aviva waived its right to cancel the policy by retaining their late payment check; Aviva is still holding a late payments from eight months ago; and equitable principles disfavor forfeiture of life insurance policies due to nonpayment of premiums.

The court turns first to plaintiffs' cross-motion for summary judgment, and the issue of whether Aviva satisfied the statutory notice requirements of Insurance Law §3211.

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<sup>2</sup>Although a summary judgment motion interposed prior to joinder of issue is ordinarily premature, where as here the action is for a declaratory judgment, the court has "exceedingly broad discretion in deciding the issues." Daley v. M/S Capital NY LLC, 44 NY3d 313 (1<sup>st</sup> Dept 2007) (quoting Cahill v. Regan, 5 NY2d 292, 298 [1959]).

It is well settled that ambiguities in an insurance contract are construed in favor of the insured and strictly against the insurer. See Mariano's Pizzeria Inc v. Associated Mutual Insurance Cooperative, 24 AD3d 206 (1<sup>st</sup> Dept 2005); Buchbinder Tunik & Co v. Manhattan National Life Insurance Co, 219 AD2d 463 (1<sup>st</sup> Dept 1995). Forfeiture of a life insurance policy "for non-payment of premiums is not favored in law and will not be enforced, absent a clear intention to claim that right." Matter of Preston, 29 NY2d 364, 378 (1972). Accordingly, Insurance Law § 3211 provides that a life insurance policy cannot lapse or be terminated due to non-payment of a premium until the insurer has mailed the insured a written notice in a form specified by statute. See Tracy v. William Penn Life Insurance Co, 234 AD2d 745 (3<sup>rd</sup> Dept 1996); Buchbinder Tunik & Co v. Manhattan National Life Insurance Co, *supra*; Speziale v. National Life Insurance Co, 328 FSupp2d 295 (NDNY 2004), *aff'd* 159 Fed Appx 253 (2<sup>nd</sup> Cir 2005).

Insurance Law §3211(a) (1) states in relevant part as follows: "No policy of life insurance . . . shall terminate or lapse by reason of default in payment of any premium . . . in less than one year after such default, unless, for scheduled premium policies, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due." The content of such notice is detailed in section 3211(b)(2), which provides that the notice "shall . . . state the amount of such payment, the date when due, the place where and the person to whom it is payable; and shall also state that unless such payment is made on or before the date when due or within the specified grace period thereafter, the policy *shall terminate or lapse* except as to the right to any cash surrender value or nonforfeiture benefit" (emphasis added).

The statutory notice requirements of section 3211 are construed strictly against the insurer, and favorably to the insured. See Buchbinder Tunik & Co v. Manhattan National Life Insurance Co, *supra*; Koeppel v. Prudential Life Insurance, 2007 WL 2175617 (Sup Ct, NY Co 2007) (n.o.r.); Speziale v. National Life Insurance co, 328 FSupp2d 295 (NDNY 2004), *aff'd* 159 Fed Appx 253 (2<sup>nd</sup> Cir 2005). Similarly, the “general public policy against discontinuing insurance policies,” mandates that a cancellation notice or a notice pursuant to Insurance Law §3211 is “ineffectual where it is equivocal or indefinite.” Buchbinder Tunik & Co v. Manhattan National Life Insurance Co, *supra* at 465.

Here, it is undisputed that Aviva sent Michael Lamm two separate premium notices with respect to the dates on which the quarterly payment was due, and a third notice that the policy had lapsed for non-payment. The first notice, dated July 6, 2011, is essentially a bill advising that the quarterly premium payment of \$1,168.05 is due August 2, 2011. On the reverse side, under the heading “Conditions,” the notice states in relevant part that “[y]our policy *may lapse or terminate* if you do not pay the premium described in this notice on or before the end of the policy’s grace period” (emphasis added).

The second notice, dated August 2, 2011, is a reminder and warning, with a late payment offer expiring on September 23, 2011. The notice warns, “Attention – Your Insurance *May Terminate*,” and advises that if the payment is not received by the “offer expiry date on this bill, your insurance coverage *may terminate*” (emphasis added). However, on the reverse side, under the heading “Conditions,” the second notice states as follows: “If the payment described is not made on or before the due date or within the grace period, and the net cash value on the monthly anniversary day is insufficient to pay the monthly deduction, the policy *will terminate* except as



to the right to any cash surrender value or non-forfeiture benefit.” The third notice, dated September 23, 2011, advises that the policy “lapsed due to non-payment of the August 2, 2011 premium.”

Construing the notices strictly against Aviva and favorably for plaintiffs, the court finds that neither the first nor second notice is sufficient to satisfy Insurance Law §3211(b)(2), which explicitly requires the notice to state that “the policy *shall terminate or lapse*” (*emphasis added*). The first notice does not use the word “shall,” and simply states that the policy “*may lapse or terminate.*” “Shall” and “may” are not synonymous, as the plain and ordinary meaning of “shall” is mandatory, and the plain and ordinary meaning of “may” is discretionary. The use of the word “may” is also inconsistent with the language in the policy which clearly states that “[i]f the premium is not paid by the end of the grace period this policy *will lapse* as of the Due Date” (*emphasis added*).

The second notice likewise fails to use the word “shall,” but uses both “may” and “will,” which have conflicting meanings, since “will” is mandatory and “may” is discretionary. The face of the second notices states in two different places that the “policy *may terminate*” if the premium is not paid; on the reverse side, the second notice states that the “policy *will terminate.*” Even if “will terminate” is synonymous with “shall terminate,” the second notice also uses the conflicting phrase “may terminate,” which renders the second notice ambiguous and ineffectual. See Buchbinder Tunik & Co v. Manhattan National Life Insurance Co, *supra*. The second notice is also misleading, as it cannot be disputed that Aviva intended the policy to actually lapse in accordance with its own terms if the premium was not paid by September 23, but the use of the indefinite phrase “may terminate” fails clearly to communicate such intent to plaintiffs.

Based on the foregoing, and construing the statutory notice requirements strictly against Aviva and favorably for plaintiffs, the court concludes as a matter of law that Aviva failed to provide plaintiffs with a notice that complied with the requirements of Insurance Law §3211(b)(2). Since Insurance Law §3211(a)(1) mandates such notice before a life insurance policy can lapse or be terminated for non-payment of a premium, plaintiff Michael Lamm's life insurance policy did not lapse and could not be terminated for nonpayment of the August 2, 2011 premium. Plaintiffs, therefore, are entitled to judgment as a matter of law declaring that Michael Lamm's life insurance policy has not lapsed and cannot be terminated for nonpayment of the August 2, 2011 premium, and that he is entitled to reinstatement of the policy retroactively, without any lapse in coverage due to nonpayment of the August 2011 premium. The court notes that Michael Lamm submits an affidavit that he is "prepared, willing and able to pay all the past due premiums to Aviva in order to make the policy 'current' and for it to be reinstated."

In view of the foregoing conclusions, the court need not address the balance of plaintiffs' arguments, and Aviva's motion to dismiss is denied as moot.

Accordingly, it is

ORDERED that plaintiffs' cross-motion for summary judgment is granted to the extent of the following declaratory judgment; and it is further

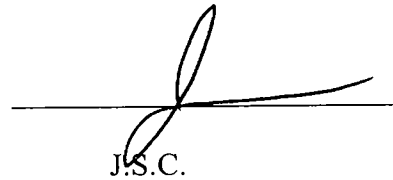
ORDERED, ADJUDGED AND DECLARED that plaintiff Michael Lamm's term life insurance policy number 1718598 with Aviva has not lapsed and cannot be terminated for nonpayment of the August 2, 2011 premium, and plaintiff Michael Lamm is entitled to reinstatement of his life insurance policy with Aviva, policy number 1718598, retroactively, without any lapse in coverage due to nonpayment of the August 2, 2011 premium, on condition

that plaintiff Michael Lamm pays all past due premiums to Aviva; and it is further

ORDERED that the motion to dismiss by defendants Aviva Life and Annuity Company, Aviva Life and Annuity Company of New York f/k/a Bankers Life Insurance Company of New York and Aviva USA Corporation, is denied as moot.

DATED: April 24, 2014

ENTER:

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line extending to the right.

J.S.C.

**HON. JOAN A. MADDEN  
J.S.C.**