

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SIMON BERNSTEIN IRREVOCABLE)
INSURANCE TRUST DTD 6/21/95,)
by Ted S. Bernstein,)

Plaintiff,)

v.)

HERITAGE UNION LIFE INSURANCE)
COMPANY,)

Defendant,)

-----)
HERITAGE UNION LIFE INSURANCE)
COMPANY)

Counter-Plaintiff)

v.)

SIMON BERNSTEIN IRREVOCABLE)
TRUST DTD 6/21/95)

Counter-Defendant)

and,)

FIRST ARLINGTON NATIONAL BANK)
as Trustee of S.B. Lexington, Inc. Employee)
Death Benefit Trust, UNITED BANK OF)
ILLINOIS, BANK OF AMERICA,)
Successor in interest to LaSalle National)
Trust, N.A., SIMON BERNSTEIN TRUST,)
N.A., TED BERNSTEIN, individually and)
as purported Tstee of the Simon Bernstein)
Irrevocable Insurance Trust Dtd 6/21/95,)
and ELIOT BERNSTEIN)
Third-Party Defendants.)

_____)
)

**Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland**

**PLAINTIFFS MEMORANDUM OF LAW
IN OPPOSITION TO WILLIAM
STANSBURY'S MOTION TO
INTERVENE**

ELIOT IVAN BERNSTEIN,)
)
 Cross-Plaintiff)
)
 v.)
)
 TED BERNSTEIN, individually and)
 as alleged Trustee of the Simon Bernstein)
 Irrevocable Insurance Trust Dtd, 6/21/95)
)
 Cross-Defendant)
 and,)
)
 PAMELA B. SIMON, DAVID B.SIMON,)
 both Professionally and Personally)
 ADAM SIMON, both Professionally and)
 Personally, THE SIMON LAW FIRM,)
 TESCHER & SPALLINA, P.A.,)
 DONALD TESCHER, both Professionally)
 and Personally, ROBERT SPALLINA,)
 both Professionally and Personally,)
 LISA FRIEDSTEIN, JILL IANTONI)
 S.B. LEXINGTON, INC. EMPLOYEE)
 DEATH BENEFIT TRUST, S.T.P.)
 ENTERPRISES, INC. S.B. LEXINGTON,)
 INC., NATIONAL SERVICE)
 ASSOCIATION (OF FLORIDA),)
 NATIONAL SERVICE ASSOCIATION)
 (OF ILLINOIS) AND JOHN AND JANE)
 DOES)
)
 Third-Party Defendants.)
 _____)

NOW COMES Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, by TED BERNSTEIN, as Trustee, (collectively referred to as “BERNSTEIN TRUST”), and states as its Memorandum of Law in Opposition to Stansbury’s Motion to Intervene as follows:

INTRODUCTION

1. Stansbury’s motion and complaint for declaratory relief fail to allege any facts which would entitle Stansbury to the life insurance proceeds at issue in the instant litigation “Policy proceeds” or “Stake”). Instead, Stansbury seeks a declaration that the Policy proceeds should be paid to the Estate of Simon Bernstein, at a time when Stansbury has no interest in the Estate. More telling, Stansbury’s motion fails to show that he is a potential claimant of the Policy proceeds which is the “Stake” at issue in this litigation.

Stansbury’s motion attempts to conjure a basis for his standing to intervene that simply does not exist. This court should deny Stansbury’s motion as his allegations of a potential claim are far too speculative.

FACTUAL BACKGROUND

2. Stansbury’s motion claims he has standing to intervene in the instant action as a result of a lawsuit he filed in Palm Beach County, Florida (the “Florida Action”) against “Simon Bernstein, Ted Bernstein and several corporate defendants to collect compensation and corporate distributions purportedly due to Stansbury arising out of a business venture in which Stansbury, Simon Bernstein and Ted Bernstein were principals.” (Dkt. #56, Stansbury Motion to Intervene at ¶1).

3. Stansbury's motion alleges that following the death of Simon Bernstein, Stansbury substituted the Estate of Simon Bernstein (the "Estate") as a defendant in place of Simon Bernstein, individually. (Dkt. #56, Stansbury Motion to Intervene at ¶2).

4. Stansbury alleges in his complaint in the Florida Action, attached to his motion to intervene, that "In 2006, Plaintiff received his agreed salary as an employee.....from ARBITRAGE INTERNATIONAL MARKETING, INC., and from ARBITRAGE INTERNATIONAL HOLDINGS, INC., which later became Defendant ARBITRAGE INTERNATIONAL MANAGEMENT, INC." (Dkt. #56-5, Stansbury Florida Complaint at ¶17).

5. To manufacture a basis for his standing to intervene in the instant action, Stansbury alleges in his Motion to Intervene as follows: "Stansbury also asserted claims against the Estate in the Probate Court of Palm Beach County, Florida. As a result, Stansbury is a creditor of the Estate." (Dkt. #56, Stansbury Motion to Intervene at ¶3).

6. Stansbury attached a copy of his statement of claim filed in the Probate Court in Palm Beach County against the Estate as "Exhibit C" to his motion to intervene. (Dkt. #56, Ex. C, statement of claim by William Stansbury).

7. In his Statement of Claim which is verified under penalties of perjury, Stansbury states as follows: "The claim is *contingent or unliquidated and uncertain* to the extent that the Claimant's claim is dependent on the outcome of the Pending Action [the "Florida Action"]. The specific amount of Claimant's [Stansbury's] claim will be determined in the Pending Action and the Claimant expects to recover \$2.5 million dollars in damages, as well as, but not limited to, treble damages, pre-judgment and post-judgment interest, and costs. The claim is not secured." (Dkt. #56-5, Ex. C, Statement of Claim of William Stansbury at ¶4 and ¶5). (emphasis added).

8. As to the source of the proceeds from which Stansbury alleges he was to paid, his complaint in the Florida Action alleges as follows: “The bank accounts into which any of the commissions received by Defendants as to which Plaintiff was to receive a share of commissions received, and the operating accounts and other accounts of the corporate Defendants into which said commission checks were deposited were intended for Defendants and by Plaintiff to be the source out of which Plaintiff would be paid, and they therefore were intended to be, and therefore, should be, charged by this Court with the obligations of being the source of all amounts Plaintiff was and is to be paid, including amounts not yet paid.” (Dkt. 56-5, Ex. A to Stansbury’s Motion to Intervene, Stansbury’s Complaint in the Florida Action).

9. Stansbury has provided no evidence or allegations in his motion that the Estate was ever named a beneficiary of the Policy. For that matter, neither has any other party to this litigation.

STANDARD OF REVIEW

A trial court must grant a motion to intervene as a matter of right if: (1) the petition is timely filed; (2) the representation by the parties already in the suit is inadequate; and (3) the party seeking intervention has a sufficient interest in the suit.

In order to show inadequacy of representation, for purposes of a motion to intervene as of right, one must not engage in speculation, but rather allege specific facts demonstrating a right to intervene. *In re Marriage of Vondra*, 2013 Ill. App. (1st) 123025, 373 Ill. Dec. 620, 994 N.E.2nd 105 (1st Dist., 2013)

ARGUMENT

A. Stansbury's motion to intervene fails because the facts alleged in an effort to manufacture an interest in the in the Stake are mere speculation.

Stansbury's motion to intervene is based on his alleged standing as a creditor of the Estate. However, Stansbury's statement of claim filed against the Estate belies this assertion. In the statement of claim Stansbury states under penalties of perjury that "The claim is contingent or unliquidated and uncertain to the extent that the Claimant's claim is dependent on the outcome of the Pending Action [Florida Action]." (see ¶6 supra). Stansbury's own statement which was made a part of his motion to intervene illustrates the speculative nature of his claim against the Estate.

More importantly, the instant action does not involve assets of the Estate but rather only involve the Policy proceeds from a life insurance policy insuring Simon Bernstein's life. Stansbury's motion to intervene is devoid of any allegations or evidence showing that the Estate was named a beneficiary of the Policy.

Instead, Stansbury makes a bald, unsupported assertion that since the Bernstein Trust agreement cannot be located "...the Trust no longer exists" (Dkt. #56, Stansbury Motion to Intervene at ¶5). Stansbury's assertion that the trust no longer exists contains no cite to any legal authority to support Stansbury's pronouncement. The Insurer's own action for interpleader did not name the Estate as an interested party because none of the documents the Insurer has disclosed contain any reference to the Estate being named beneficiary of the Policy.

It is also essential to examine the substance of Stansbury's complaint in the Florida Action. The complaint admits that Stansbury was a principal and ten percent shareholder in a corporate entity named LIC Holdings, Inc. Stansbury's complaint in the Florida Action further admits that during his tenure working at LIC Holdings, Inc. his compensation was paid by two

affiliated corporate entities, National Service Association and Arbitrage International Marketing, Inc. Count I of Stansbury's complaint in the Florida Action is for an accounting against corporate defendants, LIC Holdings, Inc. and Arbitrage International Marketing, Inc. for the compensation Stansbury is allegedly owed. (See ¶4 and ¶8, supra). (Dkt. 56-5, Ex. A to Stansbury's Motion to Intervene, Stansbury's Complaint in the Florida Action).

Some of the remaining counts in Stansbury's Complaint in the Florida Action represent his attempts to pierce the corporate veil to impose personal liability against Simon Bernstein and Ted Bernstein for the compensation he is owed. The true nature of the Florida Action is to seek recovery of compensation and distributions he is owed from the two *corporate defendants*. (emphasis added).

So, in fact, this represents yet another degree of separation from the Stake which Stansbury mischaracterizes as an asset of the Estate. Stansbury's need to prevail not only against the corporate defendants, but then also pierce the corporate veil in the Florida Action to then become a creditor of the Estate (not the Stake) further illustrate that he is far too removed to have a real interest in the instant litigation.

Stansbury is not a secured creditor of Simon Bernstein, nor is he a judgment creditor because as Stansbury admits his claim against the Estate is "contingent, unliquidated and uncertain."

B. Assuming arguendo that Stansbury's Motion Establishes that he is a creditor of the estate of Simon Bernstein, Ted Bernstein and the Corporate Defendants, the motion still fails to establish Stansbury's claim or interest in the Stake.

Even if Stansbury's motion establishes that he is a creditor of the Estate -- it does not -- the motion wholly fails to establish that Stansbury has an interest at the stake at issue in the instant action which are the Policy proceeds (the "Stake"). In fact the allegations of Stansbury's

Complaint assert that the source of funds from which he was to be paid are the corporate accounts of the defendants in the Florida Action. (See ¶7 supra).

Stansbury's Florida Complaint fails to provide a single source of documentation that Stansbury is a creditor or claimant of the Stake. In contrast, his motion and Complaint in the Florida Action prove that at most he is a contingent, general creditor of the two corporate defendants. If one were to stretch even further -- that Stansbury may actually succeed in piercing the corporate veils and may be a creditor of Simon Bernstein and Ted Bernstein, individually -- Stansbury's allegations are still insufficient to establish that he has a potential claim or interest in the Stake.

Stansbury either misapprehends or deliberately mischaracterizes the Stake as an asset of the Estate. At the moment of Simon Bernstein's death, the Policy proceeds immediately vested in the beneficiary of the Policy, and neither Stansbury, the Insurer, Plaintiff nor Eliot Bernstein have put forth a shred of evidence that the Estate was ever named a beneficiary of the Policy.

Stansbury's motion attempts to conjure a purported claim by relying on its tenuous status as a potential claimant of the Estate of Simon Bernstein, BUT not the Stake. In so doing, Stansbury has attached to his motion to intervene the Petition filed by the Executors of the Estate admitting the Will to Probate in Palm Beach County, Florida, and the Petition includes a copy of the Last Will of Simon Bernstein (the "Will").

The Will is incorporated as an Exhibit in support of Stansbury's motion yet the Will itself contains a provision wherein Simon Bernstein reaffirms his beneficiary designations. The Will states in pertinent part as follows:

Other Beneficiary Designations. Except as otherwise explicitly and with particularity provided herein (a) no provision of this Will shall revoke or modify any beneficiary

designation of mine made by me and not revoked by me prior to my death under any individual retirement account, other retirement plan or account, or annuity or *insurance contract*; (b) I hereby reaffirm any such beneficiary designation such that any assets held in such account, plan, or contract shall pass in accordance with such designation, and (c) regardless of anything herein to the contrary, any such assets which would otherwise pass pursuant to this Will due to the beneficiary designation not having met the requirements for a valid testamentary disposition under applicable law or otherwise shall be paid as a gift made hereunder to the persons in the manner provided in such designation which is incorporated herein by reference. (Dkt. 56-5, at pg. 35 of 41, Stansbury's Intervenor Complaint, Exh. B, Will of Simon Bernstein at p.6)

Here, each designation of the ultimate beneficiary of the Policy proceeds continues to lead directly to one beneficiary which is the Bernstein Trust. Simon Bernstein designated the Bernstein Trust as beneficiary of the VEBA, and the VEBA Trustee was always designated as the primary beneficiary of the Policy proceeds. The contingent but sole surviving beneficiary of the Policy proceeds as of the date of Simon Bernstein's Death was the Bernstein Trust itself. Since the VEBA had been previously dissolved, the Policy proceeds are payable to the Bernstein Trust. The sole reason for this litigation is the Insurer's desire to avoid duplicitous liability because the executed Bernstein Trust agreement cannot be located, and one of the beneficiaries of the Bernstein Trust has chosen to make a contested claim to the Policy proceeds on his own behalf.

Since the Estate has no claim to the Stake, Stansbury's speculative claim against the Estate has no bearing upon the litigation to determine the rightful owner of the Stake. And conversely, even if the Estate had a potential claim to the Policy proceeds, and even if Stansbury has a potential claim against the Estate, that does not provide Stansbury with standing to intervene because he has failed to articulate his own potential claim to the Stake.

C. As set forth above, Stansbury's motion to intervene is not based on any actual claim he has upon the Stake, instead it is based solely on his efforts to negate the claims of the true beneficiary of the Stake.

As stated above, Stansbury's motion to intervene is not based on any allegation of his own claim to the Stake. Rather, Stansbury attempt to negate the claim of the Bernstein Trust by balding asserting that the trust does not exist because a trust agreement cannot be located.

In an interpleader action each claimant has the burden of establishing its entitlement to the Stake, and it is insufficient to negate or rely on the weakness of the claims of others. *Eskridge v. Farmers New World Life Ins. Co.*, 250 Ill.App.3d 603 at 608-609, 190 Ill.Dec. 295, 621 N.E.2d 164 (1st Dist., 1983). Here, Stansbury argues that no one is representing the claims of the Estate. But, Stansbury fails to articulate what facts support a claim by the Estate to the Stake.

It appears Stansbury is arguing if all other claims are negated and thus fail then the Estate would have a claim by default. If that is Stansbury's position, then the Estate needs no representation because under Stansbury's theory the Estate would simply be the beneficiary of last resort. Even this potential claim fails, as the Policy proceeds would likely pass by virtue of the laws of intestacy to the children of Simon Bernstein, as a last resort, and not through the Estate.

D. Stansbury's unsupported assertion that the court should grant his motion to intervene based on Permissive Intervention under FED. R. CIV. P. 24(b)(1)(B) fails for similar reasons.

Stansbury's request for permissive intervention is based on his assertion that "Stansbury has a claim that shares with the main action a common question of law and fact, to wit, the proper disposition of the life insurance proceeds that are the subject of this action." (Dkt. #56, Stansbury motion to intervene at ¶10.)

But, Stansbury's own motion and his complaint in the Florida Action negate his own arguments in favor of permissive intervention. Stansbury's underlying claim in the Florida

Action makes absolutely no mention of the Policy proceeds at issue in this matter. The outcome and determinations of law in this case will have absolutely zero impact on the proceedings in the Florida Action which arise out of an alleged breach of contract and failure to pay compensation and distribution from two corporate entities.

As stated in ¶8 supra, Stansbury's complaint in the Florida Action specifically states that corporate accounts of the corporate defendants are the sources of the funds to which he is allegedly entitled. Once again, the Florida Action shares no commonality of fact or law that would entitle Stansbury to intervene under a theory of permissive intervention.

E. Public policy concerns mitigate against Stansbury's motion.

Should the court grant Stansbury's motion to intervene it will provide precedent to other similarly situated claimants whose potential claims are far too removed from the Stake. Allowing spurious claimants to participate in such litigation will only drive up costs, create needless delay and obfuscate matters for those with truly viable claims to the Stake.

CONCLUSION

For all of the foregoing reasons, this court should deny Stansbury's motion to intervene.

By: s/Adam M. Simon
Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 210
Chicago, IL 60601
Phone: 313-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorneys for Plaintiffs and Third-Party
Defendants
*Simon L. Bernstein Irrevocable
Insurance Trust Dtd 6/21/95; Ted
Bernstein as Trustee, and individually,
Pamela Simon, Lisa Friedstein and Jill
Iantoni*

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a copy of the Plaintiff's Memorandum in Opposition to William Stansbury's Motion to Intervene to be served upon the following persons and entities electronically by ECF notification or by US Mail (if so indicated):

Alexander David Marks
Frederic A. Mendelsohn
Burke Warren MaCkay & Serritella
330 N. Wabash Ave.
22nd Floor
Chicago, IL 60611
312-840-7000
*Attorneys for Heritage Union Life Insurance Company
And Jackson National Insurance Company*

Eliot Ivan Bernstein
2753 NW 34th St.
Boca Raton, FL 33434
Appearing Pro Se
(Served by U.S. Mail)

John M. O'Halloran
McVey & Parsky, LLC
30 N. LaSalle Street
Ste. 2100
Chicago, IL 60602
Attorney for Intervenor – William E. Stansbury

Glenn E. Heilizer
Law Offices of Glenn E. Heilizer
Five N. Wabash Ave.
Ste. 1304
Chicago, IL 60602
*Attorney for Third-Party Defendant
JPMorgan Chase Bank, N.A.*

on the 6th day of January, 2014.
/s/ Adam Simon
Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 210
Chicago, IL 60601
Phone: 313-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorneys for Plaintiffs