4754/YK054

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, its Trustee, Ted Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual, and Lisa S. Friedstein, an Individual,

Plaintiffs,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant.

Case No.: 13 CV 3643

Honorable Amy J. St. Eve
Magistrate Mary M. Rowland

HERITAGE UNION LIFE INSURANCE COMPANY,

Counter-Plaintiff,

v.

SIMON BERNSTEIN IRREVOCABLE INSURANCE 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 Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN,

Third-Party Defendants.

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 BENEIFT 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.

MOTION TO DISMISS THIRD-PARTY COMPLAINT

Now come Third-Party Defendants Tescher & Spallina, P.A., Donald Tescher, and Robert Spallina (collectively "Tescher & Spallina"), and respectfully move pursuant to Rule 12(b)(1), (2), and (6), to dismiss with prejudice the Third-Party Complaint filed by Eliot Ivan Bernstein ("Eliot"), and in support thereof state as follows:

I. INTRODUCTION

Despite attempting to file multiple pleadings in two probate proceedings in the Circuit Court of Palm Beach County, Florida, *In re Estate of Shirley Bernstein*, cause number

502011CP000653XXXXSB, and *In re Estate of Simon L. Bernstein*, cause number 502012CP004391XXXXSB ("the Florida Probate Actions"), Eliot has filed a rambling 70-page, 163-paragraph Third-Party Complaint against Tescher & Spallina and others in this interpleader action filed by Defendant/Third-Party Plaintiff Jackson National Life Insurance Company ("Jackson"), as successor in interest to Heritage Union Life Insurance Company ("Heritage"). Eliot's pleading should be dismissed as to Tescher & Spallina because it is not a true third-party complaint at all under Rule 14, but simply a wrongful attempt to expand the scope of this interpleader action to encompass matters that come within the probate exception to federal subject-matter jurisdiction, as well as parties who do not come within the scope of this Court's personal jurisdiction, such as Florida attorneys Tescher & Spallina. Moreover, even if the Court had jurisdiction over the matters and parties in Eliot's pleading, his claims should be dismissed pursuant to the doctrine of *Colorado River* abstention because he improperly seeks to litigate matters that are pending in the Florida Probate Actions. Finally, despite its bulk, Eliot's pleading fails to state a claim upon which relief can be granted as to Tescher & Spallina.

II. BACKGROUND

Heritage had issued a life insurance policy to Simon Bernstein, who is deceased. (Doc. 17, ¶ 15.) The Simon Bernstein Irrevocable Insurance Trust and four of decedent Simon Bernstein's five adult children filed this suit seeking the proceeds of the Heritage life insurance policy. (*See generally* Doc. 17, Doc. 73.) Jackson, which was responsible for administering the life insurance policy after inheriting it from Heritage, did not dispute that it owed someone the proceeds of the insurance policy. (Doc. 17, ¶¶ 23–27.) Rather, Jackson alleged that it did not know who was entitled to receive the proceeds. (*Id.*) Jackson therefore deposited the insurance proceeds with the Clerk of the Court and sought to be dismissed from this matter. (Doc. 94.)

Eliot, one of Simon Bernstein's sons, is among the potential beneficiaries of the policy, either as a beneficiary of the purported Bernstein Trust or as a named beneficiary of the policy. (Doc. 73, ¶ 8; Doc. 35, ¶ 5.) Rather than joining as a plaintiff or simply properly answering Jackson's interpleader action, Eliot filed his own cross-claims and third- or fourth-party claims against a number of persons including, but not limited to, his siblings, his siblings' attorney, and Tescher & Spallina. (*See generally* Doc. 35.) Eliot alleges a multitude of imagined claims relating to the administration of the Florida Probate Actions. (*Id.*) Eliot's claims should be dismissed because they are not proper third-party claims, do not come within this Court's subject-matter or personal jurisdiction, seek to litigate matters already before the courts hearing the Florida Probate Actions, and fail to state a claim upon which relief can be granted.

III. THIS COURT SHOULD DISMISS TESCHER & SPALLINA FROM THIS LAWSUIT

A. Eliot's Third-Party Complaint Is Unrelated To The Original Complaint

This Court should dismiss Eliot's Third-Party Complaint pursuant to Rule 12(b)(6) because it is not a proper third-party claim. Rule 14 governs when a defendant seeks to assert claims against third-party defendants, providing in relevant part: "A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1). A third-party complaint presupposes liability on the part of the original defendant which it is attempting to pass onto the third-party defendant. *Parr v. Great Lakes Express Co.*, 484 F.2d 767, 769 (7th Cir. 1973); *MetLife Investors USA Ins. Co. v. Zeidman*, 734 F.Supp.2d 304, 310 (E.D.N.Y. 2010).

This case is exactly like *Zeidman*, where the court denied a defendant permission to file a third-party complaint in an interpleader action. Here, Jackson filed an interpleader action against Eliot, and therefore, Eliot is not facing any liability. Rather, as the *Zeidman* court observed, Eliot

"has the opportunity to seek to be awarded to the interpleaded funds," *Zeidman*, 734 F.Supp.2d 304, 310, and therefore Tescher & Spallina cannot be said to be liable for the claims asserted against Eliot. *Id*. As a result, Eliot's Third-Party Complaint must be dismissed.

B. <u>There Is No Subject-Matter Jurisdiction</u>

This Court should dismiss Eliot's Third-Party Complaint against Tescher & Spallina pursuant to Rule 12(b)(1) because federal courts have no jurisdiction to probate a will or administer an estate. *Marshall v. Marshall*, 547 U.S. 293, 308 (2006); *Markham v. Allen*, 326 U.S. 490, 494 (1946). Even a case that meets the requirements of diversity jurisdiction cannot be heard by the federal court if it is a probate matter. *Storm v. Storm*, 328 F.3d 941, 943 (7th Cir. 2003). The probate exception applies when the matter is actually part of a probate proceeding or ancillary to a probate proceeding. *Id. See also Struck v. Cook County Public Guardian*, 508 F.3d 858, 859–60 (7th Cir. 2007). Excluding probate matters from federal jurisdiction ensures that the outcomes of such disputes will be consistent by limiting their litigation to a single court system. *Storm*, 328 F.3d at 944. State courts have nearly exclusive jurisdiction over such probate and probate-related matters, and therefore state judges develop a greater familiarity with such legal issues. *Id.* The probate exception also avoids unnecessary interference with the state system of probate law. *Id.*

Here, one of the few matters that is possible to decipher from Eliot's pleading is that he is seeking to litigate in this Court matters relating to the administration of the estates of his parents, Simon Bernstein and Shirley Bernstein, and that he already has raised in the Florida Probate Actions. For instance, Eliot cites to various pleadings that he filed in the *Estate of Simon L. Bernstein* matter, as well as to testimony in a hearing from the *Estate of Shirley Bernstein* matter (Doc. 35, ¶¶ 17(i)–17(vii), 18–20, Ex. 1), to support his criticisms about how the estates are being handled, how the proceeds are being divided among the heirs, and whether certain persons

were (or should be) disinherited (Doc. 35, ¶¶ 40, 57–74). In fact, Eliot believes that the proceeds of the insurance policy at issue should flow to one of the estates where "the Probate court would then rule on whom [sic] the final beneficiaries of the insurance proceeds would be." (Doc. 35, ¶ 94; *see also* Doc. 35, ¶¶ 92–93, 110.) What's more, Eliot seeks, among other things, the removal of Tescher & Spallina and others from their responsibilities in the Florida Probate Actions. (Doc. 35, pg. 69 at ¶ (iii).) In sum, the goal of Eliot's Third-Party Complaint is to have this Court involve itself in the administration of his parents' estates and the existing Florida Probate Actions, which is a role outside the jurisdiction of the federal courts. Therefore, this Court should dismiss the Third-Party Complaint.

C. <u>This Court Should Abstain From Hearing the Third-Party Complaint</u>

Even assuming Eliot presented a proper third-party complaint over which the Court had jurisdiction, this Court should decline to invoke that jurisdiction pursuant to *Colorado River* abstention, named for *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). In that case, the Supreme Court reviewed the principles that make it appropriate for district courts to abstain from exercising jurisdiction "in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)); *see also Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 700 (7th Cir. 1992).

Drawing from *Colorado River* and subsequent Supreme Court cases such as *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23–26 (1983), the Seventh Circuit has developed a two-part test for courts to determine whether abstention is appropriate. First, the court must determine whether the state and federal suits are parallel: that is, whether

they include substantially the same parties and are contemporaneously litigating substantially the same issues in another forum. *Ingalls v. AES Corp.*, 311 Fed.Appx. 911, 914 (7th Cir. 2008); *Caminiti*, 962 F.2d 698, 700. Second, if the suits are parallel, the court must balance several non-exclusive factors to determine if the circumstances exist to justify abstention, including (1) whether the state has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) the source of governing law, state or federal; (6) the adequacy of state-court action to protect the federal plaintiff's rights; (7) the relative progress of state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; (9) the availability of removal; and (10) the vexatious or contrived nature of the federal claim. *Ingalls*, 311 Fed.Appx. 911, 914; *Caminiti*, 962 F.2d 698, 700. The *Colorado River* Court also emphasized the importance of considering the extent to which there is any overriding federal policy in favor of or against abstention. 424 U.S. at 819. No one factor is necessarily determinative, and abstention should be based on weighing these considerations "in a pragmatic, flexible manner with a view to the realities of the case at hand." *Caminiti*, 962 F.2d at 702.

Considering the policies underlying *Colorado River* and the relevant factors demonstrates that abstention is appropriate in this case. The bedrock principles that are the foundation of *Colorado River*—conservation of judicial resources and providing for comprehensive disposition of litigation—support abstention, as Eliot is merely recycling the meritless allegations that he has already made against Tescher & Spallina and others in the Florida Probate Actions. Litigating those matters here would be an unnecessary waste of judicial resources, not to mention Tescher & Spallina's resources in defending against Eliot's claims. Moreover, exercising jurisdiction here would give rise to the possibility of a decision inconsistent with the Florida Probate Actions,

undercutting the desire for comprehensive disposition. These concerns dovetail with courts' desire to avoid piecemeal litigation, which "occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *LaDuke v. Burlington Northern R.R. Co.*, 879 F.2d 1556, 1560 (7th Cir. 1989). The results of simultaneous litigation of identical issues in state and federal courts "may be both unseemly and a grand waste of the efforts of the parties and the courts." *Id.* (quotations omitted).

Additionally, the order in which each court obtained jurisdiction and the source of governing law heavily favor abstention. The Florida Probate Actions were filed prior to the improper third-party complaint in this case, and the Florida courts have exercised jurisdiction over the matters and parties in those actions. Even assuming this Court had jurisdiction over those same matters and parties, it would have acquired jurisdiction after the courts in the Florida Probate Actions, and this Court should refrain from exercising jurisdiction. Moreover, the Florida courts will decide the matters before them in accord with Florida law, as probate matters arise under state law and are a special proficiency of state courts. *Struck v. Cook County Public Guardian*, 508 F.3d 858, 860 (7th Cir. 2007). The Florida courts are substantially more familiar with the application of Florida law relating to probate and estate planning—and, more particularly, with the long history of Eliot's attempts to assert the meritless claims of his Third-Party Complaint—and are therefore in the best position to decide the issues within the Florida Probate Actions.

The vexatious and contrived nature of Eliot's claims also weighs heavily in favor of abstention. In light of the prior pendency of the Florida Probate Actions, it is difficult to conceive of this proceeding as anything other than reactive or vexatious. Only after having filed several pleadings in the Florida Probate Actions did Eliot bring his Third-Party Complaint here, which

appears to be little more than a transparent attempt to gain leverage. Courts have noted a number of questionable desires that may motivate such reactive litigation, such as delaying the progress of a case, imposing travel burdens on one's adversary, and seeking to obtain strategic advantages based on forum-shopping. *See Lumen Constr., Inc. v. Brandt Constr. Co.*, 780 F.2d 691, 693–94 (7th Cir. 1985). As stated in *Lumen*, judicial economy is not the only casualty of such suits: "The legitimacy of the court system in the eyes of the public and fairness to the individual litigants are also endangered by duplicative suits that are the product of gamesmanship or that result in conflicting adjudications." *Id.* at 694.

Eliot already has burdened Tescher & Spallina (as well as the entire Bernstein family) with his abuse of the legal system in Florida. This Court should not allow him to do the same here, but should dismiss Eliot's Third-Party Complaint based on *Colorado River* abstention.

D. <u>No Personal Jurisdiction Over Tescher & Spallina</u>

Pursuant to Rule 12(b)(2), this Court should dismiss the Third-Party Complaint because there is no personal jurisdiction over Tescher & Spallina who, as Eliot alleges, are residents and citizens of Florida. (Doc. 35, ¶¶ 7–9.) The Court must turn to the laws of Illinois to determine whether there is personal jurisdiction over a defendant. *See, e.g.*, *Kinslow v. Pullara*, 538 F.3d 687, 690 (7th Cir. 2007). The Illinois long-arm statute, 735 ILCS 5/2-209, permits the exercise of jurisdiction on any basis permitted by the Constitutions of Illinois and the United States. 735 ILCS 5/2-209(c). A court may exercise personal jurisdiction over a party only when it is fair, just and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois. *Rollins v. Ellwood*, 141 Ill.2d 244, 275, 565 N.E.2d 1302, 1316 (1990).

There are two bases for establishing personal jurisdiction: general and specific. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984). Eliot offers no

suggestion that Tescher & Spallina have such extensive contacts with Illinois so as to render it permissible to exercise general jurisdiction. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1996). Eliot therefore is left with attempting to establish specific jurisdiction.

A non-resident defendant cannot be forced to litigate in a jurisdiction as a result of some random contacts with the forum or the unilateral activity of the plaintiff. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985). Rather, the court must review the defendant's acts directed toward the forum state because the court may assert specific jurisdiction over a non-resident defendant only if that defendant has certain minimum contacts with the state such that the suit does not offend the traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The court may exercise jurisdiction over a defendant only if it is fundamentally fair to require the defendant to submit to the court's jurisdiction with respect to the present litigation. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). Crucial to this analysis is proof that the defendant purposefully availed itself of the privilege of conducting activities in the forum state such that it should reasonably anticipate being haled into the state's courts. *Kinslow*, 538 F.3d 687, 690–91.

Eliot fails to offer any allegations to support Tescher & Spallina's connections with the State of Illinois. Rather, Eliot (himself a resident and citizen of Florida (Doc. 35, ¶ 5)) alleges that Tescher & Spallina are citizens and residents of Florida who practice law in that state. (Doc. 35, ¶¶ 7–9.) All of Tescher & Spallina's imagined wrongful acts relate to the Florida Probate Actions pending in Palm Beach County, Florida. As a result, Eliot cannot satisfy the due-process requirements for personal jurisdiction over Tescher & Spallina, and the Third-Party Complaint should be dismissed.

E. Eliot's Third-Party Complaint Does Not State a Claim Upon Which Relief Can Be Granted

Finally, Eliot fails to state a proper cause of action against Tescher & Spallina. When deciding a motion to dismiss pursuant to Rule 12(b)(6), all well-pleaded facts in the complaint must be taken as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). The court need not, however, accept as true conclusions of law. *Id*. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. A complaint will not suffice if it merely contains naked assertions devoid of factual enhancement: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A motion will be granted where the pleadings do not "plausibly give rise to an entitlement to relief." *Id.* at 679.

Additionally, where a claim for fraud is made the pleading requirements are heightened. Fed. R. Civ. P. 9(b). The circumstances surrounding the fraud must be pled with particularity, including the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff. *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 680 (7th Cir. 1992). Simply stated, to plead with particularity, the "who, what, where, when and how" of the fraud must be contained in the pleading. *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).

Here, despite the irrelevant, pernicious rhetoric found throughout Eliot's Third-Party Complaint, Eliot fails to state a claim for which this Court can grant him relief. For example, he fails to allege how Tescher & Spallina owed him any professional or fiduciary duties, much less how they breached those duties or caused him any injury. He also fails to explain with particularity how, when, and in what way he was defrauded by any act of Tescher & Spallina, or

how he was injured. Instead, Eliot presents nothing more than his own rambling speculations, which cannot satisfy the Court's pleading requirements. The Third-Party Complaint should therefore be dismissed with regard to Tescher & Spallina.

IV. CONCLUSION

For the reasons stated, this Court should dismiss Eliot's Third-Party Complaint against Tescher & Spallina. Eliot's pleading is not a proper third-party complaint under Rule 14 because he is not facing any liability in the interpleader action. Additionally, even assuming Eliot's pleading stated a proper third-party complaint, this Court has no subject-matter jurisdiction over the claims under the probate exception to federal subject-matter jurisdiction or personal jurisdiction over Tescher & Spallina who are citizens of Florida. Further, this Court should dismiss Eliot's claims pursuant to the doctrine of *Colorado River* abstention because Eliot improperly seeks to litigate matters that are pending in the probate court of Palm Beach County, Florida. Finally, for all of its bulk, Eliot's rambling 70-page, 163-paragraph pleading fails to state a claim upon which relief can be granted.

WHEREFORE, Third-Party Defendants Tescher & Spallina, P.A., Donald Tescher, and Robert Spallina respectfully move this Court to enter an order dismissing the Third-Party Complaint as to them with prejudice, and granting them such other further relief that the Court deems proper.

Respectfully Submitted,

By: __/s/ Thomas B. Underwood_____
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