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

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, Plaintiff, v. HERITAGE UNION LIFE INSURANCE COMPANY, Defendant, 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	**Case No. 13 cv 3643** **Honorable John Robert Blakey** **Magistrate Mary M. Rowland** **Filers**: **Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95, Ted Bernstein, as Trustee and Individually, Pamela B. Simon, Jill Iantoni, Lisa Friedstein, David Simon, Adam Simon, The Simon Law Firm, and STP Enterprises, Inc. ("Plaintiffs" or "Movants")** **RESPONSE IN OPPOSITION TO INTERVENOR'S MOTION TO STAY DISCOVERY**

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 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, and Co-Plaintiffs, Ted Bernstein, individually, Pamela Simon, Jill Iantoni, Lisa Friedstein, by and through their undersigned counsel, and states as their response in opposition to Intervenor's motion to stay discovery as follows:

INTRODUCTION

Intervenor's motion to stay discovery should be denied. In filing the motion, Intervenor once again attempts to delay proceedings solely to save itself from the time and expense required to litigate a case in which it voluntarily inserted itself. The motion to stay discovery is devoid of any of the procedural history necessary for the court to make an informed decision. Further, the motion is deficient on its face because it fails to allege that it was brought in good faith or because of excusable neglect. And, the content of the motion—or lack thereof -- indicates it was not.

The sum total of Intervenor's efforts in this case consists of taking one deposition and filing multiple motions for extensions of time. After intervening, Intervenor provided no documentation in response to Rule 26 disclosure requirements because it admittedly has no affirmative evidence that it is the beneficiary of the Policy Proceeds at issue.

On the other hand, Plaintiffs' counsel delivered a compact disc to Intervenor's counsel in August of 2014 containing all of the documents exchanged up to that date by all parties. Intervenor's assertion that it does not intend to delay the proceedings is completely contradicted by the docket in this case which shows that stalling has been the extent of Intervenor's efforts to date.

PROCEDURAL HISTORY

Two years ago, Plaintiffs originally brought an action against Heritage Union Life Insurance Company seeking payment of proceeds from a life insurance policy issued on the life of Simon Bernstein, as Insured. Simon Bernstein passed away in September of 2012. Heritage Union removed the action to the Northern District, and filed an interpleader action serving potential competing claimants to the Policy Proceeds. Heritage Union did not serve the Estate of Simon Bernstein as a potential claimant or name the Estate in the interpleader litigation.

In 2013, William Stansbury, a potential creditor of the Estate of Simon Bernstein sought to intervene in the instant litigation, and Plaintiffs opposed that motion to intervene. On January 14, 2014, this court entered an Order denying the motion to intervene of William Stansbury. In so doing, the court found that allowing Stansbury to intervene would (i) "not serve the interests of judicial economy and would unduly prejudice the present parties to this lawsuit", and (ii) "unduly delay the determination of the beneficiaries of the life insurance policy at issue in this lawsuit."

Five to six months later, Stansbury took a second bite at the apple by filing a petition in the Probate Court in Florida to have an administrator ad litem appointed on behalf of the Estate of Simon Bernstein to intervene in the instant litigation. At the conclusion of the hearing, the Florida Court ultimately appointed Benjamin Brown to act as administrator ad litem and specifically ordered that the legal fees and costs be borne not by the Estate but by William Stansbury. (*See* Probate Court Order attached as Ex. 1 to Intervenor's Motion to Stay). Subsequently, Kevin O'Connell was appointed and substituted in Benjamin Brown's stead as administrator ad litem.

Before the Estate filed its motion to intervene, Judge St. Eve had set a fact discovery deadline of June 13, 2014 **[Dkt. #96].** After Judge St. Eve granted Intervenor's motion to intervene, she extended the fact discovery deadline until January 9, 2015 and set a deadline for filing dispositive motions on March 6, 2015. **[Dkt. #123].**

On March 2, 2015, Intervenor filed a motion to extend time for filing of dispositive motions, and the court granted the extension setting a dispositive motion deadline for April 3, 2015. On the date of the deadline for filing dispositive motions, and after Plaintiffs filed and served their motion for summary judgment on all parties, Intervenor filed this motion for a stay of discovery.

ARGUMENT

As a matter of procedure, Intervenor's motion must be denied because it seeks a stay of discovery three months after fact discovery closed by prior order of the Court. On the date of the deadline for filing dispositive motions, and after Plaintiffs filed and served their motion for summary judgment on all parties, Intervenor filed the instant motion for a stay of discovery.

Intervenor overlooks the fact that discovery closed months ago, and that its request for a stay is untimely. The Order transferring this cause from Judge St. Eve to this court specifically ordered that all discovery deadlines remain intact unless otherwise ordered by the court. **[Dkt. #133].** Since the date the case was transferred to Judge Blakey, no order has been entered extending fact discovery, and so the January 9, 2015 deadline remained intact. Clearly, Intervenor's request for a stay of discovery months after the discovery deadline passed is untimely.

Under Fed.R.Civ.P. (6)(b)(2), the court's discretion to grant a tardy motion for an extension of discovery is limited to situations where a party shows that "excusable neglect" justified its failure to comply with the district court's discovery deadline.

Intervenor fails to acknowledge the existence of the expired discovery deadline at all. In the absence of excusable neglect, the court has no discretion to grant Intervenor's motion to stay discovery since the discovery deadline passed months before the motion to stay was filed.

Had Intervenor's motion been timely, District courts usually have extremely broad discretion to control discovery. (cites omitted). In accordance with the Federal Rules "for good cause," the court may limit the scope of discovery or control its sequence to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *New England Carpenters Health and Welfare Fund v. Abbott Laboratories*, No. 12 C 1662, 2013 WL 690613 (N.D.Ill., 2013) citing Fed.R.Civ.P. 26(c)(1); *Crawford-El*, 523 .S. at 598, *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346 at *1 (N.D.Ill. Nov. 17, 2010).

But, "…..a stay of discovery is generally appropriate only when a party raises a potentially threshold issue such as a challenge to a plaintiff's standing….although Rule 26 gives the Court "authority to stay discovery, this authority must be exercised so as to 'secure the just, speedy and inexpensive determination of every action." "Where the Court finds that a stay of discovery is unlikely to significantly expedite the litigation, and may actually, slow it down, it will decline to interfere." *New England Carpenters Health and Welfare Fund, supra* citing *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988).

But, Intervenor makes no argument that a stay of discovery will expedite the litigation, because it won't. The only thing a stay of discovery would achieve is to bring this litigation to a screeching halt for no reason. And, the only interest that would be served by a stay would be Intervenor's self-interest in saving the cost and expense associated with litigating a case it voluntarily sought to join.

Also, Intervenor's motion to stay discovery lacks any factual basis for the relief it seeks. Right from the get-go the motion contains patently false statements of fact including the very reason for its intervention. Intervenor was not directed by the Florida Probate Court *sua sponte* to pursue its claims on behalf of the Estate in this litigation. The sole instigating factor for Intervenor's appearance here are the efforts of William Stansbury, a potential creditor of the Estate. In fact, Intervenor's own motion admits as much because Intervenor asserts that "the resolution of Mr. Stansbury's claim may, in fact, obviate the need for further litigation." (*See* Intervenor's Motion to Stay Discovery at ¶4 and Ex. 1).

Intervenor asserts that Plaintiff's motion for summary judgment raises issues of fact that "require additional discovery". But, Intervenor fails to set forth any description of what issues of fact require further discovery, or why discovery was not completed in compliance with the court deadlines.

And, for the sake of argument, assuming that Intervenor's version is true, and that the Estate intervened only upon the Probate Court's explicit order and direction to assert the Estate's rights in this litigation; then Intervenor's failure to diligently prosecute this litigation is simply a violation of the Probate Court's Order. Intervenor's prolonged inaction has not served to assert the rights of the Estate, it only serves to prejudice the rights of the true beneficiary to the Policy Proceeds.

This litigation is over the Policy Proceeds and is separate and apart from the probate litigation in Florida. The Policy Proceeds vested in the beneficiary at the instant of the insured's death. *Bank of Lyons v. Schultz,* 22 Ill.App.3d 410, 318 N.E.2d 52 (1st Dist., 1974).

Plaintiffs' motion for summary judgment raises no new evidence, and relies on evidence that has been in the hands of Intervenor for many months as the clocked ticked on discovery. For whatever reason, Intervenor made the strategic decision to take a single deposition during the five months it was granted for discovery after it intervened.

Intervenor has not alleged that there are any outstanding discovery requests or subpoenas for deposition that Intervenor issued within the time for discovery. In short, there is no showing of diligence, good faith or excusable neglect by Intervenor. This matter is ripe for determination as to whom is entitled to the Policy Proceeds and a ruling on Plaintiffs' motion for summary judgment will achieve just that.

Intervenor provides no just reason for any further delay in this litigation, and delay for no reason is by definition prejudicial to the true beneficiaries of the Policy Proceeds.

CONCLUSION

For all of the foregoing reasons, Intervenor's motion for a stay of discovery should be denied.

Dated: April 6, 2015

Respectfully Submitted,

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