

**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)
Irrevocable Insurance Trust Dtd 6/21/95,)
and ELIOT BERNSTEIN,)

Third-Party Defendants.)

Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

**INTERVENOR’S MOTION FOR
SUMMARY JUDGMENT**

Filer:
Brian O’Connell, as Personal Representative
of the Estate of
Simon L. Bernstein, Intervenor.

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.)

BRIAN M. O'CONNELL, as Personal)
Representative of the Estate of)
Simon L. Bernstein,)

Intervenor.)

INTERVENOR’S MOTION FOR SUMMARY JUDGMENT

Intervenor Brian M. O’Connell, Personal Representative of the Estate of Simon L. Bernstein (“Estate”), pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, respectfully moves the Court for summary judgment as to his Complaint for Declaratory Judgment (ECF No. 112) and Counts II and III of Plaintiffs’ First Amended Complaint (ECF No. 73). In support of this Motion, the Estate states as follows:

1. **This is an interpleader action** concerning the distribution of the proceeds from a life insurance policy which insured the life of Simon Bernstein (“Policy”). *Order* at 1 (ECF No. 220).

2. In the absence of a valid designated beneficiary under the Policy, the proceeds are payable to the Estate as a matter of both Illinois and Florida law. *See New York Life Ins. Co. v. RAK*, 180 N.E.2d 470, 470-71 (Ill. 1962); *Harris v. Byard*, 501 So.2d 730, 734 (Fla. Dist. Ct. App. 1987).

3. Plaintiffs claim that the Simon Bernstein Irrevocable Insurance Trust Dated June 21, 1995 (“1995 Trust”) is a valid designated beneficiary under the Policy.

4. Because Plaintiffs have produced no executed original or executed copy of the 1995 Trust, they must prove the 1995 Trust by clear and convincing evidence. *Order* at 3 (ECF No. 220).

5. In deciding this motion for summary judgment, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor, but the Court must then determine whether the evidence is of insufficient caliber or quantity for a rational trier of fact to find that Plaintiffs have proven the 1995 Trust by clear and convincing evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986).

6. Plaintiffs attempt to establish Simon Bernstein's intent to create the 1995 Trust and the terms of the 1995 Trust primarily through the testimony of David Simon and Ted Bernstein. Under Illinois' Dead Man's Act (735 ILCS 5/8-201), however, Plaintiff Ted Bernstein is an "adverse party" to the Estate, and both he and David Simon are "interested parties." As a result, their testimony is inadmissible in this proceeding. *Order* at 3 (ECF No. 220).

7. Without the testimony of David Simon and Ted Bernstein, the two materially-different documents which David Simon testified are unexecuted drafts of the 1995 Trust, along with the other circumstantial evidence, is of insufficient caliber and quantity to enable a reasonable trier of fact conclude that Plaintiffs have established an intent to create the 1995 Trust and the terms of the 1995 Trust by clear and convincing evidence.

8. In any event, even if their testimony were not barred by the Dead Man's Act, that testimony along with the other circumstantial evidence is inconsistent and contradictory to such a degree that it is *still* of insufficient caliber and quantity to enable a reasonable trier of fact conclude that Plaintiffs have established an intent to create the 1995 Trust and the terms of the 1995 Trust by clear and convincing evidence.

9. The Estate incorporates herein by reference all facts, arguments and authority in *Intervenor's Local Rule 56.1(a)(2) Memorandum of Law In Support of Summary Judgment* and *Intervenor's Local Rule 56.1(a)(3) Statement of Undisputed Material Facts*, both of which are being contemporaneously filed herewith.

10. Based on the foregoing, as further detailed in its statement of undisputed facts and memorandum of law, the Estate has established that there is no triable issue of fact and the Estate

is entitled to judgment as a matter of law on its Complaint for Declaratory Judgment and Counts II and III of Plaintiffs' First Amended Complaint.¹

WHEREFORE, Intervenor Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein, respectfully requests that the Court enter an Order:

- A. Granting summary judgment in in his favor and against Plaintiffs on Counts II and III of Plaintiffs' First Amended Complaint (ECF No. 73);
- B. Granting summary judgment in his favor and against Plaintiffs on his Complaint for Declaratory Judgment (ECF No. 112) in its entirety;
- C. Declaring that there is no valid beneficiary designated **under the Policy**;
- D. Declaring that the proceeds of the Policy are payable to the Estate of Simon L. Bernstein; and
- E. Providing for such other and further relief as the Court deems just and proper.

Dated: May 25, 2016

BRIAN M. O'CONNELL, PERSONAL REPRESENTATIVE
OF THE ESTATE OF SIMON L. BERNSTEIN, Intervenor

By: /s/ James J. Stamos
One of Intervenor's Attorneys

James J. Stamos (ARDC # 3128244)
Theodore H. Kuyper (ARDC # 6294410)
STAMOS & TRUCCO LLP
One East Wacker Drive, Third Floor
Chicago, Illinois 60601
(312) 630-7979
jstamos@stamostrucco.com
tkuyper@stamostrucco.com
Attorneys for Intervenor

¹ On February 18, 2014, Count I of the First Amended Complaint against Heritage Union Life Insurance Company was dismissed with prejudice. *Order* (ECF No. 101); *Order* at 1-2 (ECF No. 220).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing **Intervenor's Motion for Summary Judgment** to be served upon all registered E-Filers via electronic filing using the CM/ECF system, and to be served upon the following persons via U.S. mail, proper postage prepaid:

Lisa Sue Friedstein
2142 Churchill Lane
Highland Park, IL 60035
Lisa@friedsteins.com
Pro Se Litigant

Jill Marla Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
jilliantoni@gmail.com
Pro Se Litigant

on this 25th day of May, 2016.

 /s/ James J. Stamos