

**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 )

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

**Simon Bernstein Irrevocable  
Insurance Trust Dated 6/21/95,  
Ted Bernstein, as Trustee and  
Individually,  
Pamela B. Simon  
("Plaintiffs")**

**COUNTER-DEFENDANTS, CROSS-  
DEFENDANTS, AND THIRD-PARTY  
DEFENDANTS' REPLY TO  
ELIOT BERNSTEIN'S RESPONSE TO  
MOTION FOR  
SUMMARY JUDGMENT**

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 Counter-defendants, Cross-defendants, and Third-Party Defendants, by and through their undersigned counsel, Adam M. Simon (“Movants”), and respectfully submit this memorandum of law in reply to Eliot Bernstein’s opposition to Movants’ motion for summary judgment.

**I. ELIOT'S LAST DITCH ATTEMPT TO CO-OPT THE 1995 BERNSTEIN TRUST'S CLAIMS TO THE POLICY PROCEEDS UNDERMINE HIS OPPOSITION TO THIS MOTION FOR SUMMARY JUDGMENT.**

Over three years into this litigation and in a desperate attempt to further his obstructionist campaign, Eliot has essentially co-opted the very claims he has been trying so desperately to refute. And as a result, Eliot's brazenly disingenuous allegations of fraud against his siblings and their attorneys are thoroughly debunked by Eliot's recent enlightenment that the claims asserted by the 1995 Bernstein Trust may in fact be correct. Eliot has the temerity to argue that Movants should somehow be sanctioned for moving for summary judgment because Plaintiffs' claims name Eliot as one of the beneficiaries of the 1995 Bernstein Trust. **(Dkt. #261, Eliot's opposition to summary judgment, p.6).**

Eliot's co-option of the 1995 Bernstein Trust's position is entirely *inconsistent* with his prior posture, but totally *consistent* with his perpetual disrespect for and abuse of the courts and opposing parties in both this litigation and the Probate Actions. The 1995 Bernstein Trust, on the other hand, has *consistently* asserted a claim to the proceeds on behalf of all five siblings, *including* Eliot. No party to this litigation has ever taken an action to prevent Eliot from dismissing his opposing pleadings in order to adopt the claims asserted by the 1995 Bernstein Trust and, if he so desires, appearing pro se' solely in his capacity as a beneficiary of the 1995 Bernstein Trust and on the Plaintiff side of the ledger.

Co-opting the position that Eliot's standing is derived from his status as a beneficiary of the 1995 Bernstein Trust belies all of his allegations that Movants have somehow tried to deny him his right to the Policy Proceeds. Since day one, the 1995 Bernstein Trust's complaint has alleged Eliot is one of the beneficiaries of the 1995 Bernstein Trust.

Conversely, nowhere in Eliot's response does he point to a single pleading he filed that alleges he has standing in the instant litigation by virtue of his beneficial interest in the 1995 Bernstein Trust. But at this late date to avoid being terminated from this litigation, Eliot's has made a sudden U-turn, and by doing so, Eliot is taking a position that is diametrically opposed to his own counterclaims, cross-claims and third-party claims. The logical inconsistency between Eliot's new position, and his prior claims, counterclaims, cross-claims and third-party claims, make Eliot's current posture in this case a *non sequitur*.

It is patently unjust to allow Eliot to take diametrically opposed positions, straddle the fence, and hope everyone else somehow perishes in the cross-fire. To effectuate the immediate stoppage of Eliot's obstructionism, but allow Eliot to formally adopt this new position, Movants propose an Order to be entered that includes the following:

- a. Granting Movants' motion for summary judgment as to all of Eliot's purported claims to the Policy Proceeds that are independent of the 1995 Bernstein Trust claims; and
- b. Entering summary judgment in favor of the 1995 Bernstein Trust, Ted Bernstein, Pamela B. Simon, David B. Simon, Adam M. Simon, The Simon Law Firm, and STP Enterprises, Inc. as Counter-defendants, Cross-Defendants, and/or Third-Party Defendants and against Eliot as to all of Eliot's cross-claims, counter-claims and third-party claims; and
- c. Granting Eliot ten days to file a motion for leave to file an amended pleading joining Plaintiff's First Amended Complaint, as a Co-Plaintiff and seeking distribution of the Policy Proceeds to the 1995 Bernstein Trust.

**II. THE FLORIDA PROBATE COURT HAS RULED, AFTER TRIAL AND HEARINGS, THAT ELIOT HAS NO INTEREST OR STANDING AS A BENEFICIARY OF THE ESTATE EITHER ON HIS OWN BEHALF OR AS PARENT/GUARDIAN FOR HIS MINOR CHILDREN. THESE PROBATE ORDERS RESOLVE ISSUES THAT ARE GERMANE TO THE ISSUE OF ELIOT'S STANDING IN THE INSTANT LITIGATION.**

In its motion for summary judgment and statement of undisputed facts movants set forth the Probate Orders that found: (i) Simon Bernstein's testamentary documents at issue in the Probate Actions are valid and enforceable, (ii) Ted Bernstein as personal representative and trustee for certain of the testamentary trusts is qualified and authorized to so act, (iii) Ted Bernstein did not engage in any wrongdoing in the administration of the Estates and Trusts at issue in the Probate Actions, (iv) Eliot Bernstein is not a beneficiary of the Estate, and (v) appointing a *guardian ad litem* to manage the affairs of Eliot Bernstein's children in the Probate Actions. (SoF, ¶31-¶35).

Eliot is also wrong about the preclusive effect of these orders pursuant to the doctrines of *collateral estoppel* and *res judicata*. First, Movants' answer and affirmative defenses did assert the doctrines of collateral estoppel and *res judicata* with regard to the Probate Actions and the Estate of Simon Bernstein. (See **Plaintiff's Answer and Aff. Defenses to Eliot's Claims, Dkt. #47, pg. 9 at ¶9**).

Also, this court can and should apply the doctrine of collateral estoppel to preclude any re-litigation of one very pertinent issue that was previously determined in the Probate Actions -- that Eliot has no interest in the Estate. The Probate Orders also stripped Eliot of any authority to represent the interests of his children by appointing a *guardian ad litem* to represent their interests in the Estate and Probate Actions. Since the Florida Probate Court already determined that Eliot is not a beneficiary in the Estate, and no longer has any authority to represents the interests of his own children, the Probate Orders are preclusive as to any relief Eliot seeks here

based on an interest in the Estate. Also, a pending appeal does not bar the application of either the doctrine of collateral estoppel or *res judicata*. *Black and Decker, Inc. v. Robert Bosch Tool Corp.*, 500 F. Supp.2d 864 (2007), *Prymer v. Ogden*, 29 F.3d 1208 (7<sup>th</sup> Cir.), *cert denied*, 513 U.S. 1057, 115 S.Ct. 1808, 149 L.E.2d 599 (1994).

**III. ELIOT’S COUNTERCLAIMS IN THE INSTANT LITIGATION DO NOT SET FORTH AN AFFIRMATIVE CLAIM TO AN INDEPENDENT INTEREST IN THE POLICY PROCEEDS.**

Eliot’s claims of a conspiracy to deprive him of his interest in the Policy Proceeds – that ironically Eliot otherwise denies exist – must be based on something more than vague allegations. At this stage, Eliot must provide factual support for a claim that he possesses an independent interest in the Policy Proceeds of which he was allegedly deprived. Since he has failed to do so, his claims of interference or conversion fail as a matter of law. *Edwards v. City of Chicago*, 389 Ill. App. 3d 350, 353, 905 N.E.2d 897, 900, 329 Ill.Dec. 59, 62 (1st Dist. 2009).

Eliot, in his opposition, has the temerity to argue that Movants’ should be sanctioned by moving for summary judgment when the 1995 Bernstein Trusts’ own claims name Eliot as one of its beneficiaries. In order for one to claim something was stolen or converted, one must first prove an immediate right of possession ownership interest in the property at issue. *General Motors Corporation v. Douglass*, 206 Ill.App.3d 881, 565 N.E.2d 93, 151 Ill.Dec. 822 (1<sup>st</sup> Dist., 1990). What is central to this motion for summary judgment is that Eliot has failed to set forth any affirmative evidence of his own legal or beneficial claim to the Policy Proceeds – independent of the 1995 Bernstein Trust. And what follows is that all of Eliot’s claims, counterclaims and cross-claims fail as a matter of law since Eliot has not and cannot prove such possessory interest. The dispositive undisputed issue is that Eliot has failed to set forth any

evidence of one essential element to all his claims -- that he has actually been *deprived* of the Policy Proceeds.

In his opposition, Eliot cites to two paragraphs of his counterclaims – Par. 115 and Pa. 136 – and then declares that these allegations are sufficient to defeat Movants’ motion for summary judgment. [Dkt. #261, p.3 of 13]. Eliot has it wrong. At this late stage, to survive summary judgment, Eliot must do more than make unsupported, conclusory allegations. Eliot must submit some actual evidence in support of his allegations. Eliot has failed to offer any such evidence, and his reliance on the substance of his own pleading simply does not suffice.

Eliot’s attempt to rely on this court’s own findings in denying Plaintiffs’ earlier motion for summary judgment also falls short. In its prior Order, the court merely pointed out certain factual issues that the court found prevented Plaintiffs from obtaining judgment as to the existence of the 1995 Bernstein Trust by virtue of a summary judgment motion, as opposed to after a trial on the merits.

But, none of the courts’ findings pertain to the issue central to this motion for summary judgment which is whether Eliot has an independent claim to the Policy Proceeds. And since Eliot’s response is devoid of any evidence supporting his independent claim of a possessory interest in the Policy Proceeds, there remains no triable issue of fact as to both Eliot’s purported independent claims to the Policy Proceeds, and his counterclaims, cross-claims and third-party claims which all rely on a showing that he has an independent interest in the Policy Proceeds. Since Eliot has failed to submit evidence of any such interest, the Counter-defendants. Cross-defendants and Third-Party defendants that Eliot countersued did not and could not have deprived Eliot of anything.

**CONCLUSION**

For all of the foregoing reasons, Movants' motion for summary judgment as to Eliot's claims, counterclaims, cross-claims and third-party claims should be granted in its entirety.

Respectfully Submitted,

*/s Adam M. Simon*

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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, et. al.

PAMELA B. SIMON, DAVID B.SIMON,	)
both Professionally and Personally	)
ADAM SIMON, both Professionally and	)
Personally, THE SIMON LAW FIRM,	)
TESCHER & SPALLINA, P.A.,	)
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NATIONAL SERVICE ASSOCIATION	)
(OF ILLINOIS) AND JOHN AND JANE	)
DOES	)
	)
Third-Party Defendants.	)
_____	)

**NOTICE OF FILING**

To: SEE CERTIFICATE OF SERVICE ATTACHED

PLEASE TAKE NOTICE that the following documents, copies of which are attached, were filed with the clerk of the court and are hereby served upon you:

- Movants’ Reply to Eliot Bernstein’s Opposition to Motion for Summary Judgment

RESPECTFULLY,

/s/Adam Simon  
Adam M. Simon  
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(312) 819-0730

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that he caused a copy of the documents set forth below to be served upon the undersigned via the Northern District's ECF filing system, and by U.S. mail if indicated, proper postage prepaid to the following on October 6, 2016:

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