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. 1:13-cv-3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland

INTERVENOR'S REPLY TO ELIOT BERNSTEIN'S RESPONSE IN OPPOSITION TO 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 REPLY TO ELIOT BERNSTEIN'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Intervenor Brian M. O'Connell, Personal Representative of the Estate of Simon L. Bernstein (the "Estate"), for his Reply to Eliot I. Bernstein's ("Eliot") response in opposition to the Estate's motion for summary judgment, states as follows:

INTRODUCTION

In support of its motion for summary judgment ("Motion"), the Estate set forth separate statements of material fact and supported each with admissible evidence as required by Local Rule 56.1(a). *See Intervenor's L.R. 56.1(a)(3) Statement of Undisputed Material Facts* ("SoF") (ECF No. 247). The Estate also provided a detailed explanation of the reasons Plaintiffs' evidence, even assuming its truth and making all justifiable inference in Plaintiffs' favor, is "of insufficient caliber or quantity" so "as to lead to only one conclusion" regarding each element Plaintiffs must prove to establish the existence of the 1995 Trust as the valid designated beneficiary of the Policy. *See Intervenor's L.R. 56.1(a)(2) Mem. of Law in Support of Summary Judgment* ("*MSJ*") at § I (ECF No. 246).

Eliot does not respond to the Motion by arguing that a reasonable jury could conclude from the evidence that Plaintiffs have satisfied their burden, nor does he respond with any actual evidence to dispute a single material fact identified by the Estate. Instead, Eliot opposes the Estate's Motion by relying upon arguments that range from misguided to entirely inapposite and unsupported, *see Memorandum of Law in Opp'n to Intervenor's Mot. for Summary Judgment* ("*Resp.*") (ECF No. 259), and he purports to "dispute" the Estate's material facts with mere argument and claims of insufficient knowledge alone, *see L.R. 56.1(b)(3) Resp. to Intervenor Statement of Undisputed Martial Facts and L.R. 56.1(b)(3)(C) Statement of Additional Facts Requiring the Denial of Intervenor Motion for Summary Judgment* ("Resp. to SoF") (ECF No.

257).[1] Eliot's arguments and claimed factual disputes cannot defeat the Estate's Motion which, as further explained below, should be granted.

ARGUMENT

First, Eliot opposes the Estate's Motion by relying on the fact that this Court denied Plaintiffs' prior motion for summary judgment, quoting the following portion of the Order:

> [T]he Court finds that there are genuine issues of material fact as to whether the Trust was executed and, if so, upon what terms. There remains a triable issue of fact such that a "reasonable jury could return a verdict for the non-moving party."

Resp. at 1-2 (quoting *Order* at 6 (ECF No. 220)). Eliot complains that the Estate has done "nothing to remove those Triable issues of fact" and has "brought nothing more to the Court in the way of evidence or affidavit despite the fact that this Court found … that Plaintiffs had provided some evidence to support their position." *Resp.* at 2. These arguments misunderstand the Estate's Motion.

In denying Plaintiffs' summary judgment motion, the Court held that a reasonable jury could return a verdict for "the non-moving party," which non-moving party was *the Estate*. The Court's ruling perforce did not address the quality of Plaintiffs' evidence, as it was not at issue. *See Order* at 2.

[1] Notwithstanding the title of Eliot's pleading, it does not actually set forth any "additional facts." *See id.* It does purport to incorporate by reference Eliot's "responses in [his] filing of Undisputed Facts for the Opposition of Summary Judgment I filed with this Court as additional support herein, see Exhibit 2," *id.* at 23, but there was no "Exhibit 2" to any of Eliot's filings related to the Estate's Motion now before the Court, *see* ECF Nos. 257-259, or to Eliot's response to Plaintiffs' prior summary judgment motion, *see* ECF No. 186. More importantly, however, nowhere in any of those pleadings is there "a statement, consisting of short numbered paragraphs, of … additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon," as required by Local Rule 56.1(b)(3)(C). Thus, Eliot's "additional facts" are a nullity to the extent they actually exist. *See Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000) ("We emphasize … that Rule 56.1(b)(3)(B) [sic] 'provides the *only* acceptable means of … presenting additional facts.'") (emphasis in original) (quoting *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1317 (7th Cir. 1995)).

Next, Eliot argues that there are "issues of material fact" regarding "the existence of the Primary Beneficiary which was LaSalle National Trust, NA ('LaSalle') and the failure of the parties to properly determine from a proper successor to LaSalle their interest as primary beneficiary," reiterating that "there is [sic] presently material issues of fact as to the Primary Beneficiary's claim to the proceeds." *Resp.* at 2-3, 4. These arguments are without merit.

The Estate has provided the Court with undisputed evidence that the Primary Beneficiary of the Policy was "LaSalle National Trust, N.A., *as Trustee of the S.B. Lexington, Inc. Employee Death Benefit Trust*" and that both S.B. Lexington, Inc. and its Employee Death Benefit Trust ceased to exist in 1998. *See* SoF ¶¶ 19-21 (emphasis added). Although Eliot claims these facts are "disputed," he offers nothing but argument and claims of insufficient knowledge to support his denials. *See* Resp. to SoF ¶¶ 19-21. Thus, those facts are deemed admitted. *See* L.R. 56.1(b)(3); *Sec. & Exch. Comm'n v. Nutmeg Group, LLC*, 162 F. Supp. 3d 754, 763 (N.D. Ill. 2016) ("'When a responding party's statement fails to dispute the facts set forth in the moving party's statement in the manner dictated by the rule, those facts are deemed admitted for purposes of the motion.' … That is true even when a litigant is *pro se*."); *Apex Med. Research, AMR, Inc. v. Arif*, 145 F. Supp. 3d 814, 821 (N.D. Ill. 2015) ("To the extent that a party denies a statement of fact because it lacks knowledge, these facts will be deemed admitted."); *Koursa, Inc. v. manroland, Inc.*, 971 F. Supp. 2d 765, 770 (N.D. Ill. 2013) ("a Rule 56.1(b)(3) response 'is not the place for purely argumentative denials'").

Eliot does not even purport to dispute the fact that neither the Death Benefit Trust nor any trustee of the Death Benefit Trust has made a claim to the Policy proceeds in this litigation or otherwise. *See* SoF ¶ 22 (and exhibits cited therein); Resp. to SoF ¶ 22. Therefore, the evidence conclusively shows that there was no "successor" to LaSalle National Trust, N.A.'s interest as

primary beneficiary of the Policy because that interest, which was held only in its capacity as trustee of the Death Benefit Trust, ceased to exist concurrently with the trust. Thus, there is no primary beneficiary of the Policy who possesses a "claim" to the proceeds. As such, this factual dispute Eliot relies upon simply does not exist.

Eliot then makes a number of arguments about what a reasonable jury "could" and "most likely" would find, which conspicuously omits any argument that such a jury could find that Plaintiffs have proven each element required to establish the 1995 Trust by clear and convincing evidence. For instance, Eliot argues that:

> [T]he most likely finding of a reasonable jury at this stage is … that collusion and conspiracy exist specifically designed to suppress and deny from this Court and the true beneficiaries the proper, actual policy, the proper actual Trust and the proper, actual terms of both.

Resp. at 3. He apparently bases that argument on his Affidavit-Declaration, *see id.* at 4, which he relies on together with certain pleadings in further arguing that:

> [A] reasonable Jury could conclude that the Estate, acting through Illinois trial counsel Stamos and PR Brian O'Connell has colluded with Ted Bernstein and others to suppress and deny from this Court the actual policy (Policies), the actual true Trusts and who the proper beneficiaries are.

Id. at 5.

As an initial matter, Eliot cannot rely on his pleadings to defeat the Estate's Motion. *See*, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading") (internal quotations omitted). Furthermore, Eliot's arguments and Affidavit-Declaration utterly fail to present facts or to address the issue posed by the Estate's Motion—*i.e.* whether a rational finder of fact can conclude that the available evidence is "so unequivocal and unmistakable as to lead to only one conclusion" regarding Simon Bernstein's intent to create the

1995 Trust, the identities of the trustees, the specifications how it was to be performed, and whether the Policy proceeds are even the property of the 1995 Trust. *Compare Eliot I. Bernstein's Affidavit-Declaration* ("*Bernstein Aff.*") (ECF No. 259-3) *with Eychaner v. Gross*, 779 N.E.2d 1115, 1131 (Ill. 2002) and *MSJ* § I(A)-(B).

In addition, the only paragraphs of Eliot's Affidavit-Declaration that even *refer* to the 1995 Trust or Policy proceeds are inadmissible hearsay as to the Estate, are conclusory, and in any event, have nothing to do with any elements of an express trust put at issue by the Estate's Motion. Specifically, Eliot avers that: (i) "my sister and brother both claimed to have copies of his insurance policy involved in this litigation and when I demanded they turn them over they suddenly claimed that did [sic] not possess them and also then claimed not to have the trust that they were alleging was the beneficiary," *Bernstein Aff.* ¶ 14; and (ii) "what a reasonable jury could conclude in this case is that … the absence of such … actual policy and actual Trust from this Court is the product of conspiracy, collusion and intentional design by a variety of parties to keep proper proceeds from the rightful beneficiaries," *id.* ¶ 19(d). The out of court statements made by Eliot's siblings do not seem to controvert any of the undisputed facts the Estate offers. Eliot's averment as to what a reasonable jury could find is conclusory speculation, not "made on personal knowledge" and "facts that would be admissible in evidence," as required by Fed. R. Civ. P. 56(c)(4).

Eliot spends the remainder of his brief quoting extensively from the Deposition of Ted Bernstein and the Court's Order denying Plaintiffs' motion for summary judgment. *Resp.* at 6-12. While it is unclear whether this material is intended to be support for Eliot's speculative conspiracy theory of collusion to suppress evidence or a separate argument of its own, either way it cannot defeat the Estate's Motion because it is not evidence creating a genuine dispute as to any material

fact identified by the Estate and it has absolutely no bearing on the legal issue presented by that Motion.

CONCLUSION

For the foregoing reasons, the Estate respectfully requests that the Court grant summary judgment in favor of the Estate on its Complaint for Declaratory Judgment (ECF No. 112) and on Plaintiffs' First Amended Complaint (ECF No. 73).

Dated: October 27, 2016

Respectfully submitted,

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

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the foregoing **Intervenor's Reply to Eliot Bernstein's Response in Opposition to 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:

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on this 27th day of October, 2016.

/s/ James J. Stamos