

**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
PLAINTIFFS’ LOCAL RULE
56.1(b)(3)(C) STATEMENT OF
ADDITIONAL FACTS

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

**INTERVENOR’S REPLY TO PLAINTIFFS’
LOCAL RULE 56.1(b)(3)(C) STATEMENT OF ADDITIONAL FACTS**

Intervenor Brian M. O’Connell, Personal Representative of the Estate of Simon L. Bernstein (the “Estate”), pursuant to Local Rule 56.1(a), for his Reply to Plaintiffs’ Local Rule 56.1(b)(3)(C) Statement of Additional Facts, states as follows:

PREFACE

There are three preliminary issues related to ECF No. 255 (“Plaintiffs’ Statement of Additional Facts”).¹ First, that pleading cannot serve to dispute any of the material facts presented by the Estate. Pursuant to Local Rule 56.1(a)(3), the Estate filed a separate statement of facts in support of its motion for summary judgment. *See Intervenor’s L.R. 56.1(a)(3) Statement of Undisputed Material Facts* (“SoF”) (ECF No. 247). In order to dispute those statements, Plaintiffs were required to file “a response to each numbered paragraph in the moving party’s statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon.” *See* L.R. 56.1(b)(3)(a)-(b). “Unless controverted in this manner, ‘all material facts set forth in movant’s statement are deemed admitted.’” *Koursa, Inc. v. manroland, Inc.*, 971 F. Supp. 2d 765, 770 (N.D. Ill. 2013).

While it is unclear whether Plaintiffs’ Statement of Additional Facts was intended to serve this purpose, that document does not satisfy Local Rule 56.1(b)(3). *See* SoAF. Therefore, all material facts set forth in the Estate’s statement are deemed admitted and summary judgment in favor of the Estate is appropriate. *See* L.R. 56.1(b)(3)(C); *Malec v. Sanford*, 191 F.R.D. 581, 584 (N.D. Ill. 2000) (“Essentially, the penalty for failing to properly respond to a movant’s 56.1(a) statement is usually summary judgment for the movant (at least if the movant has done his or her job correctly) because the movant’s factual allegations are deemed admitted. *** We cannot stress

¹ Citations herein to ECF No. 255 will use the following format: “SoAF ¶ __.”

the importance of this document enough: a nonmovant's failure to adhere to these requirements is equivalent to admitting the movant's case.").

The second preliminary issue is that the averments in the Affidavit of Robert Spallina are not properly considered in deciding the Estate's motion for summary judgment. Plaintiffs' Statement of Additional Facts is insufficient to put before the Court any "additional" facts not contained therein, as it is settled law that Local Rule 56.1(b)(3)(C) "provides the *only* acceptable means of presenting additional facts" and "[s]imply providing additional facts in one's responsive memorandum is insufficient to put those facts before the Court." *Malec*, 191 F.R.D. at 584 (emphasis in original) (quoting *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1317 (7th Cir. 1995)). Plaintiffs' Statement of Additional Facts does not contain any of the averments in the Affidavit of Robert Spallina, which are only addressed in Plaintiffs' brief. Compare Affidavit of Robert Spallina (ECF No. 255-2) with SoAF ¶¶ 76-78 and Plfs.' L.R. 56.1(b)(2) Memorandum of Law ("Resp.") at 6-7, 14-15 (ECF No. 256).² That is inadequate. As the Seventh Circuit explained in holding that the district court properly rejected additional facts that were presented only in the party's brief:

The rule ... provides the only acceptable means ... of presenting additional facts to the district court. Midwest chose not to employ these means, instead presenting the facts in a way it believed adequate. However, as the district court noted, it is not the parties prerogative to determine when a rule can be satisfied by other than what the rule requires. Hence, Midwest must suffer the consequences, harsh or not[.]

Midwest Imports, 71 F.3d at 1317. Thus, nothing in the Spallina Affidavit is properly considered in deciding the Estate's motion for summary judgment.

The third preliminary issue to be addressed is that a significant portion of Plaintiffs' Statement of Additional Facts does not consist of short numbered paragraphs setting forth facts

² Plaintiffs' Local Rule 56.1(b)(2) memorandum is inaccurately titled "*Plaintiffs' Supplemental Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment.*" See ECF No. 256.

and specifically-citing evidence in support, as required by Local Rule 56.1(b)(3)(C). *See* SoAF. Therefore, the Estate's reply to those portions cannot be set forth in "numbered paragraphs ... corresponding to" Plaintiffs' (non-existent) numbered paragraphs, as contemplated by the Local Rule. Notwithstanding Plaintiffs' failure to comply with any part of Local Rule 56.1(b), in order to comply with the spirit of the Local Rule and effectuate its purpose, the Estate's reply to the unnumbered portions of Plaintiffs' Statement of Additional Facts mirrors the general order and structure of those portions.

REPLY TO STATEMENT OF ADDITIONAL FACTS

I. INTRODUCTION

On March 27, 2015, Plaintiff's filed their initial statement of undisputed facts numbered 1-75, in support of their motion for summary judgment. [**Dkt. #150, Pltf's Statement of Undisputed Facts**].

REPLY: Disputed that ECF No. 150 does or ever did set forth "undisputed facts." Many of the facts set forth in that pleading were disputed, and the statements in that pleading were not limited to "facts" but also included opinions and legal conclusions. *See Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* (ECF No. 192). Otherwise, undisputed.

... Plaintiff [sic] is incorporating by reference its [sic] initial statement of undisputed facts and then filing this supplemental statement in order to set forth the additional undisputed facts contained in the Affidavit of Robert Spallina.

REPLY: Disputed that Plaintiffs' "supplemental statement" sets forth anything "contained in the Affidavit of Robert Spallina." *Compare* SoAF ¶ 76 *with* Affidavit of Robert Spallina (ECF No. 255-2). For its reply to the statements in ¶¶ 1-75 of Plaintiffs' "initial statement of undisputed facts" (ECF No. 150), the Estate incorporates by reference as if fully set forth herein its responses thereto set forth in *Intervenor's Response to Plaintiffs' Statement of Undisputed Material Facts* (ECF No. 192), including all evidentiary materials cited in support of those responses.

Furthermore, pursuant to Fed. R. Civ. P. 56(c)(2), the Estate objects that the averments in paragraphs 5-6, 8-11, 13-19 of the Spallina Affidavit cannot be presented in a form that would be admissible in evidence.

Plaintiffs recognize that its [sic] Initial Statement of Undisputed Facts contains references to certain testimony involving conversations between Plaintiffs (and interested persons) and the decedent that this court [sic] ruled were inadmissible under the Illinois Dead Man's Act. Plaintiffs' memorandum in opposition to the Estate's motion for summary judgment does not rely upon such excluded testimony.

REPLY: The first sentence is undisputed. The second sentence is disputed in that Plaintiffs' memorandum does rely on the testimony of David Simon and Plaintiffs that this Court held was barred by the Dead Man's Act. *See Resp.* at 8, 10-11, 15. Specifically, Plaintiff rely on the barred testimony as direct evidence attempting to satisfy the elements they must prove to establish the 1995 Trust. *See, e.g., id.* at 10-11 (arguing that affidavit and deposition testimony of David Simon and Ted Bernstein constitutes parol evidence of, *inter alia*, Simon Bernstein's intent to form the 1995 Trust and designate Ted successor trustee). Plaintiffs also implicitly rely on the barred testimony to authenticate documents that they contend establish certain of the elements they must prove to establish the 1995 Trust. *Intervenor's Reply to Plfs.' Resp. in Opposition to Motion for Summary Judgment* at 9 and n.6, contemporaneously filed herewith as ECF No. 267. *See also Resp.* at 10 (relying on purported drafts of the 1995 Trust); Fed. R. Evid. 901; *Estate of Brown v. Thomas*, 771 F.3d 1001, 1005-06 (7th Cir. 2014) (affirming summary judgment for defendant because plaintiff's evidence in opposition was inadmissible due to "fatal procedural error by its lawyer: failing to authenticate Gaut's expert report"); SoF ¶ 45 (David Simon's inadmissible testimony which is the only evidence through which the purported drafts can be authenticated).

II. PLAINTIFFS' SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS

76. In October of 2013, and then again in 2014 after the Estate intervened, Plaintiffs served all parties with Rule 26 disclosures which disclosed Donald Tescher and Robert Spallina (erroneously referred to at times as Ronald Spallina) and the law firm of Tescher & Spallina as potential witnesses in this matter. On July 15, 2016, Plaintiff served all parties in this litigation with the Affidavit of Robert Spallina who was Simon Bernstein's final estate planning attorney in the years before his death. Also, attached to the Affidavit of Robert Spallina are his contemporaneous notes from his 2012 estate planning meetings with Simon Bernstein to which he makes reference in his Affidavit. (**Ex. 37, Affidavit of Robert Spallina**).

REPLY: The first and second sentences are undisputed. Disputed that Mr. Spallina's notes "from his 2012 estate planning meetings with Simon Bernstein" are attached to Exhibit 37 in that Mr. Spallina avers that the attached notes are only "of a meeting with Simon Bernstein on February 1, 2012." Affidavit of Robert Spallina ¶ 5 (ECF No. 255-2) (emphasis added). The third sentence is otherwise undisputed. Furthermore, pursuant to Fed. R. Civ. P. 56(c)(2), the Estate objects that the averments in paragraphs 5-6, 8-11, 13-19 of the Spallina Affidavit cannot be presented in a form that would be admissible in evidence.

77. Currently and for the past several years, there have been several actions pending in the Palm Beach County Court, Probate Division. Certain testamentary trusts (not the insurance trusts at issue here) and the Will of Simon Bernstein have been filed with and submitted to the Probate Court.

REPLY: Disputed. Plaintiffs cite no evidence to support these statements of fact. Thus, those statements are a nullity. *See Malec*, 191 F.R.D. at 584.

78. On December 15, 2015, after a bench trial was held, and where Eliot Bernstein appeared and represented himself *pro se*, Judge John L. Phillips entered an Order including the following:

REPLY: Disputed to the extent that the citation to Plaintiffs' Exhibit 38 does not support the statement that "Eliot Bernstein appeared and represented himself *pro se*." Furthermore, the Estate objects to Plaintiffs' Exhibit 38 in that it is inadmissible due to Plaintiffs' failure to offer evidence

to authenticate it, and therefore should not be considered in deciding the Estate's motion for summary judgment. *See* Fed. R. Evid. 901; *Estate of Brown*, 771 F.3d at 1005-06.

- a. This was a "Final Judgment" on Count II of the Amended Complaint;

REPLY: Undisputed, but the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

- b. A trial was held on December 15, 2015 pursuant to the Court's Order setting trial on Amended Complaint Count II;

REPLY: Undisputed, but the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

- c. The Court received evidence in the form of documents and testimony of witnesses;

REPLY: Undisputed, but the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

- d. The Court heard argument from counsel and pro se parties who wished to argue;

REPLY: Undisputed, but the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

- e. The Court found that five testamentary documents, including the Will of Simon Bernstein and a Simon Bernstein Amended and Restate Trust Agreement dated July 25, 2012 are "genuine and authentic, and are valid and enforceable according to their terms."

REPLY: Undisputed, but the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

- f. That based on evidence presented, "Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents . . . Ted S. Bernstein played no role in any questioned activities of the law firm of Tescher & Spallina, P.A., who represented Simon and Shirley when they were alive. There is no evidence to support the assertion of Eliot Bernstein that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided or abetted others in forging or fabricating documents. The evidence shows that

Ted Bernstein played no role in the preparation of any improper documents, the presentation of any improper documents to the Court, or any other improper act, contrary to the allegations of Eliot Bernstein.

REPLY: Disputed in that the citation to Plaintiffs' Exhibit 38 does not support the presentation of these statements as affirmative facts. Undisputed that these statements are findings of fact that were made by Judge John L. Phillips and that Plaintiffs' Exhibit 38 contains the quoted material. Furthermore, the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

- g. This ruling is intended to be a Final Judgment under Rule 9.170 of the Florida Rules of Appellate Procedure..." (**Ex. 38, Probate Order of 12/15/15, *Ted Bernstein, as Trustee of Shirley Bernstein Trust Agreement v. Alexandra Bernstein...Eliot Bernstein, et al. No. 502014CP00369.***)

REPLY: Undisputed that Plaintiffs' Exhibit 38 contains the quoted material, but the Estate objects in that Plaintiffs' Exhibit 38 is inadmissible as set forth above.

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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