UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, et al., Plaintiffs, v. Heritage Union Life Insurance Co., et al., Defendants.	Case No. 13-cv-3643 Judge John Robert Blakey Filers: Eliot Ivan Bernstein, Pro Se

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DISMISSING THIRD-PARTY DEFENDANT'S COUNTERCLAIMS

Third-party Defendant, Eliot I. Bernstein, pro se, for his Memorandum of Law in Opposition to the Plaintiffs' Motion for Summary Judgment dismissing Third-Party Defendant's Counterclaims, pursuant to Local Rule 56.1(b)(2), states as follows:

INTRODUCTION

Plaintiffs have moved for Summary Judgment seeking to dismiss the Counterclaims filed by Third-party Defendant Eliot I. Bernstein. As this Court has recently been through one round of Summary Judgment motions denying Summary Judgment to the Plaintiffs in an Opinion and Order dated March 15, 2016 finding triable issues of fact, Third-party Defendant Eliot I. Bernstein relies that this Court is already aware of the essential facts and pleadings herein. The Plaintiffs' motion to seek dismissal of Third-party Defendant's counterclaims must be denied for failure to meet their burden of proof. In many respects, their motion is simply factually incorrect and then in other respects, the motion is erroneous by attempting to apply

alleged collateral estoppel and res judicata from actions in the Florida Probate Courts that simply have no bearing or relevance or application to the Counterclaims in this insurance litigation in Illinois.

The Plaintiffs filed an Answer and Affirmative Defenses to the Counterclaims herein on or about Nov. 4, 2013 under ECF Document No. 47. See ECF No. 47. The Plaintiffs have failed to move to Amend their Answer and Affirmative Defenses of res judicata and to that extent, the present arguments are not only inapplicable to the claims in this insurance case but also procedurally improper before this Court. The Plaintiffs have not filed a motion to dismiss for failure to state a cause of action nor any other motion attacking the pleadings but instead, wrongfully moved for Summary Judgment while not meeting their burden of proof. Plaintiffs motion must be denied.

ARGUMENT

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Spurling v. C & M Fine Pack, Inc., 739 F.3d 1055, 1060 (7th Cir.). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Further, summary judgment is not appropriate "if the evidence is such that a reasonable jury could return a verdict for the non-moving party," and the Court must "construe all facts and reasonable inferences in the light most favorable to the nonmoving party." Liberty Lobby, 477 U.S. at 255; see also Carter v. City of Milwaukee, 743 F.3d 540, 543 (7th Cir. 2014).

Plaintiffs' motion herein not only fails to demonstrate the absence of material issues of fact but also is largely misplaced and factually incorrect. Plaintiffs' wrongfully claim that Third-Party Defendant has not made a claim for the policy proceeds and therefore has not shown damages.

Then Plaintiffs' wrongly try to claim that an alleged Court Judgment from a Florida Probate Court bars the Counterclaims under principles of res judicata and collateral estoppel. Both arguments are misplaced and insufficient to dismiss the Counterclaims at this time.

Third-Party Defendant Eliot Bernstein makes an Express Claim to the Policy Proceeds within the 4 Corners of the Counterclaims

Plaintiffs' motion is misplaced and improper and this Court should consider sanctions at this time and or use of its "inherent powers" as previously petitioned in a Petition for Injunction under the All Writs Act under ECF No. 35. . A claim to the policy proceeds and damages from an illegal scheme to deny and suppress the proper Policies, trusts and information is made throughout the Counterclaims filed herein. See ECF No. 35. Not only was this Answer and Counterclaim filed pro se, but the Court must "construe all facts and reasonable inferences in the light most favorable to the nonmoving party." Liberty Lobby, 477 U.S. at 255; see also Carter v. City of Milwaukee, 743 F.3d 540, 543 (7th Cir. 2014).

Moreover, the Counterclaims have express language seeking claims to the proceeds and damages from the wrongful conduct. Just 2 examples are shown here:

> "Par. 115 That ELIOT alleges the copies of the Policy(ies) are instead suppressed and denied to the beneficiaries, in order to perfect their insurance and trust fraud scheme and deny the true and proper beneficiaries of the "Simon Bernstein Trust, N.A." of the Policy(ies) proceeds and convert them to themselves and others" and;
>
> "131 . That Cross Defendants and Third Party Defendants filed this case without the knowledge and information of ELIOT, certain beneficiaries and interested parties of the estate of SIMON, with the intention allegedly to fraudulently convert ELIOT and other beneficiaries Policy(ies) Proceeds.:" See ECF No. 35.

Clearly third-party defendant has made a claim to the proceeds and damages from the wrongful fraudulent conduct of Plaintiffs and those acting in common.

This Court's Opinion and Order referenced certain key factual matters when denying Plaintiffs' original motion for Summary Judgment \showing likely collusion and a clear scheme to manipulate how the claims to the proceeds were filed showing as follows:

> "In fact, the Intervenor has presented argument and evidence casting material doubt on whether: (1) the Trust was actually created; and (2) the terms of the Trust are as explained by Plaintiffs. The Intervenor argues as follows:
>
> - The results and timing of the Plaintiffs search for the Trust raise doubts about their version of events. Plaintiffs claim that David Simon found both a hard copy and an electronic version of the Trust in his office. David Simon has offered testimony here that he aided Simon Bernstein in creating the Trust, and then kept both versions of the unexecuted Trust.
>
>   However, David Simon's search for the Trust documents occurred approximately a year after Simon Bernstein had died. Almost a year earlier, immediately after Simon Bernstein's death, the family had conducted an "exhaustive search" for the Trust, and none was found.
>
>   Between the two searches, the Bernstein siblings and their former attorney exchanged many emails addressing how best to obtain the insurance proceeds. Intervenor's Ex. A, Dep. Exs. 1-5, 8-18. Many of the emails reference the inability to locate the Trust document. Id. David Simon was a participant in those emails, but he did not relate a recollection of the critical facts from his affidavit regarding his memory of Simon Bernstein executing the Trust. Nor did those emails cause David Simon to search his own office for the missing documents. That search did not occur until after David Simon's brother (Adam Simon) and his firm were retained as counsel in this matter.
> - In the course of their attempts to obtain the policy proceeds, the Bernstein siblings discussed using a different trust that had been established by Simon Bernstein – the "2000 Trust." Intervenor's Ex. A at 37:4-18; 48:21-49:19; Dep. Ex. 1. That option was rejected because Pam Simon was not included as a beneficiary of that trust. Id. The 2000 Trust is important, however, in that it identifies the proceeds of the policy at issue here as an asset of that trust. Intervenor's Ex. A, Dep. Ex. 23 at

Schedule A. The 2000 Trust does not refer to an alleged 1995 trust, which the 2000 trust would have superseded.

- The original complaint in this matter does not refer to a written trust. Despite David Simon's statement that he recalls having created the trust on his own computer and having seen it after execution, the original Complaint in this matter makes no reference to the execution of a written trust. Instead, it refers only to the existence of a "common law trust." [1].
  It makes no mention of the trust documents from Exhibits 15 and 16.
- Plaintiffs have offered testimony that, when Simon Bernstein took his trust to be executed at his law firm (then Hopkins & Sutter), the firm changed the identity of the successor trustee. This implies that the firm would have had an electronic version of the Trust, and possibly a hard copy. David Simon testified that the firm was contacted to see if it had a copy of the executed trust and did not; but David Simon could not recall who contacted the firm, which attorneys were contacted, or if he himself reached out to the firm at all. Intervenor's Ex. B at 44:12-45:15; 46:22-47:15.
- David Simon also testified that when Simon Bernstein returned from executing the Trust he helped Mr. Bernstein prepare documents to be submitted to the insurance company in order to give effect to the Trust.
  He also testified that he would have expected the insurance company to retain copies. David Simon does not remember any details about who contacted the insurance company. But it is clear that the company retained no copies of documents relevant to the Trust. Intervenor's Ex. B at 43:10-44:2.
- The purported trust documents, Exhibit 15 and 16, contain inconsistencies as to who would serve as the trustee. Exhibit 16 lists the potential trustees as "Shirley," "David," and an illegible name. It then lists the successor trustees as "Pam, Ted." Exhibit 15 lists Shirley as the trustee, and David B. Simon as the successor trustee. However, when the Trust first made a claim to the insurance company, it represented that an attorney by the name of Spallina was the trustee. Intervenor's Ex. B at 59:13-60:3; 81:15-83:12. Despite all of this, in the current proceeding the Plaintiffs claim that Ted Bernstein is the trustee.

> Based on the evidence in the record, and "construing all facts and reasonable inferences in the light most favorable to the nonmoving party," the 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," Liberty Lobby, 477 U.S. at 255, and therefore summary judgment is inappropriate. Plaintiffs' motion is denied with regard to Count II". See ECF No. 220."

Said references show actions in common by more than one of the parties sued in the counterclaims, shows attempts to use different versions of documents, casts doubts on the searches to find the actual documents, and even shows the wrongful conduct of Plaintiff Ted Bernstein's attorney Spallina originally attempting to get the proceeds paid to his office as Trustee and then the Trustee switches to Ted for the filing of the instant lawsuit.

Plaintiffs' own Amended Complaint shows Eliot Bernstein's standing in the Illinois case and claim to policy proceeds

Plaintiffs' motion should be viewed as even further suspect and sanctionable when simply reviewing the very Amended Complaint that Plaintiffs have filed in this matter. What this Court may conclude is consistent with the allegations not only made in the Counterclaims filed, that is is a scheme at play, but further as shown in the Petition for an Injunction under the All Writs under ECF No. 214 and 215 in that Plaintiffs have repeatedly taken action to barrage and occupy Third-party Defendant in one action while attempting to improperly gain advantage in another. In this case, it is Plaintiffs occupying substantial time by an improper Summary Judgment motion in this case while moving to close up and gain advantage in the Estate and Trust cases in Florida.

Plaintiffs own Amended complaint shows as follows under ECF No. 73:

> "Par. 8. ***Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the***

BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter." (Emphasis added).

Moreover, in Paragraph C of the Wherefore clause under Count II of the Amended Complaint, Plaintiffs plead:

> "c) ***declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;"*** (Emphasis added). Plaintiffs admit that Eliot Bernstein is one of the five children of Simon Bernstein.

Thus, under their own pleadings Eliot Bernstein has a claim to the proceeds, is a beneficiary of the insurance proceeds and has standing. Plaintiffs' motion for Summary Judgment dismissing the counterclaims must be dismissed.

Plaintiffs have failed to Plead and Prove application of res judicata or collateral estoppel and their motion to dismiss the Counterclaims must be denied

The US Supreme Court has consistently held, "Claim preclusion, like issue preclusion, is an affirmative defense. See Fed. Rule Civ. Proc. 8(c); Blonder-Tongue, 402 U. S., at 350. Ordinarily, it is incumbent on the defendant to plead and prove such a defense, see Jones v. Bock, 549 U. S. 199, 204 (2007), and we have never recognized claim preclusion as an exception to that general rule, see 18 Wright & Miller §4405, p. 83 ("[A] party asserting preclusion must carry the burden of establishing all necessary elements.")", See TAYLOR v. STURGELL, 553 U. S. ____ (2008)

Plaintiffs have failed to seek to Amend their Answer and affirmative defenses and procedurally any claim based upon res judicata is improperly before this Court on summary judgment and should be deemed waived. See, Plaintiffs' Answer and Affirmative Defenses, ECF No. 47. Issue preclusion, or collateral estoppel is somewhat different, although the proponent of the estoppel still bears the burden of proof to show use of the doctrine is warranted.

In the Taylor v. Sturgell US Supreme Court case above, in Footnote 4 the US Supreme Court made it clear that "4 For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits. See Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U. S. 497, 508 (2001). "

Thus, in the instant case it would be the law of Florida that applies for determining if the preclusion doctrines are valid.

In **E.C., individually and as parent and natural guardian of the minor J.K.C., Petitioner, v. Lorne KATZ, M.D., et al.** 731 So. 2d 1268 (1999), the Florida Supreme Court upheld a strict identity and mutuality of parties finding, The question of whether Florida law requires mutuality of parties under the doctrine of collateral estoppel was answered by this Court in Stogniew, wherein this Court held that "Florida has traditionally required that there be a mutuality of parties in order for the doctrine to apply. . . . . This Court further explained that the sole exception "in which this Court has not strictly adhered to the requirement of mutuality of parties is Zeidwig [v. Ward, 548 So.2d 209 (Fla.1989)]." In that case, a criminal defendant who had unsuccessfully brought an ineffective assistance of counsel claim in a postconviction proceeding was held to be collaterally estopped from raising the same claim in a legal malpractice action against his former lawyer. . . . . .This Court explicitly rejected the "contention that as a result of Zeidwig there is no longer a requirement of mutuality for purposes of collateral estoppel," explaining that Zeidwig constitutes a "narrow exception" in which collateral estoppel is permitted in a defensive context "and then only under the compelling facts of that case." 1 . . . . . Two things are clear pursuant to a fair reading of Stogniew: (1) the requirement of mutuality of parties is a general rule that applies to its defensive use; and (2) the sole exception to this rule carved out in attorney malpractice suits following resolution of ineffective assistance of counsel

claims is to be read as narrowly as possible-this Court could not have made its limitation of Zeidwig any greater. See Stogniew, 656 So.2d at 919."

The Florida Supreme Court allowed the litigation in the E.C. case to go forward and collateral estoppel did not apply,

Florida law further provides that "'[C]ollateral estoppel prevents identical parties from relitigating identical issues that have been determined in a prior litigation.'" See, *Bradenton Group, Inc. v. State*, 970 So. 2d 403, 408 (Fla. 5th D.C.A. 2007) (quoting *Hicks v. Hoagland*, 953 So. 2d 695, 698 (Fla. 5th D.C.A. 2007)).

Further, In *Holt v. Brown's Repair Service, Inc.*, 780 So. 2d 180, 182 (Fla. 2d DCA 2001), the Second District Court of Appeal explained collateral estoppel as follows:

"[F]or the doctrine of collateral estoppel to apply, an identical issue must be presented in a prior proceeding; the issue must have been a critical and necessary part of the prior determination; there must have been a full and fair opportunity to litigate that issue; the parties in the two proceedings must be identical; and the issues must have been actually litigated."

In the instant motion, Plaintiffs have failed to meet their burden that the parties in the two proceedings are identical as required under Florida law and clearly the parties are not identical. Nor have the Plaintiffs plead and proven that identical issues have actually been litigated that were critical and necessary to the judgment or that there was a full and fair opportunity to litigate.

To the contrary, none of the Counterclaims made in this Insurance case were litigated in Florida, nor are these shown to be identical to anything that allegedly took place in an alleged "Validity" trial. Plaintiffs have not plead nor proven that any Trust applicable in this case was heard or

decided in Florida, nor any policy heard or decided in Florida, nor any claim of suppression and fraud concerning the policies and trusts at issue here were ever heard in Florida.

Further, the US Supreme Court has held that the doctrines of preclusion are subject to Due process limitations. “The federal common law of preclusion is, of course, subject to due process limitations. See Richards v. Jefferson County, 517 U. S. 793, 797 (1996).” See Taylor v. Sturgell.

This Court is respectfully referred to the following exhibits for a more detailed statement of the due process, fraud and other problems such as denial of full and fair opportunity to litigate that should prevent any application of res judicata or collateral estoppel at this time. See, Exhibit 1, Eliot Bernstein’s Initial Brief on the Merits challenging the “Validity” Trial of Florida Judge John Phillips, and Petition for All Writs Act Injunction, ECF No. 214, 215, showing collusion to rush to “judgment” in Florida to gain collateral advantage.

Still, this US District Court has discretion to determine the use of preclusion principles as held by the US Supreme Court in Taylor v Sturgell, stating, **“**See 526 U. S., at 168. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U. S. 313, 334 (1971), which stated that estoppel questions turn on “the trial courts’ sense of justice and equity.” See Brief for Respondent Fairchild 20. This passing statement, however, was not made with nonparty preclusion in mind; it appeared in a discussion recognizing district courts’ discretion to limit the use of issue preclusion against persons who were parties to a judgment. See Blonder-Tongue, 402 U. S., at 334. “ This Court should exercise its discretion to deny any application of these doctrines at this stage of litigation.

Further, this Court is referred to the Affidavit-Declaration of Eliot I. Bernstein opposing the Intervenor’s motion for Summary Judgment as further showing of material issues of fact that

should deny Summary Judgment and that a reasonable jury could reach a different conclusion in favor of the non-moving party and thus Summary Judgment must be denied to Plaintiffs on this motion. See ECF No. 259-3.

Further, to the extent this Court even considers the Plaintiffs' argument on res judicata and collateral estoppel, Eliot I. Bernstein respectfully seeks application of Federal Rules of Civil Procedure 56(f) to obtain either a continuance or Deposition and Discovery from counsel Peter Feaman who has represented the Creditor William Stansbury herein. Eliot Bernstein was on multiple conference calls with Peter Feaman and Stansbury prior to the alleged "Validity" Trial in the Probate Courts whereby Counsel Feaman a) Admitted - stated there was a "Conspiracy" amongst the parties against Eliot's claims; b) that Florida in fact has standard Pre-Trial Procedures which had not been followed leading up to the Validity Trial; c) repeatedly assured Eliot Bernstein that PR O'Connell would in fact be Appearing and Litigating at the Validity Trial as O'Connell had filed papers showing Ted Bernstein as not a Valid Trustee[1], yet Ted Bernstein, Alan Rose and O'Connell made a "last minute" agreement whereby the Estate was Abandoned and had No Representation at the Validity trial; and d) has repeatedly reported Ted and Alan Rose both have conflicts of interest in this proceeding, the conflicts and collusion are clearly set out in counsel Peter Feaman's opposition to the motion. See ECF Docket #259 Exhibit 2 - August 26, 2016 Filing of Attorney at Law Peter Feaman, Esq.

The absence of the Estate from the Validity Trial itself is a basis to deny any form of res judicata or collateral estoppel as identical parties are not present in both cases.

[1] February 17. 2015 PR O'Connell Answer and Affirmative Defense stating Ted is not a validly serving Trustee of the Simon Bernstein Trust
http://iviewit.tv/Simon%20and%20Shirley%20Estate/20150217%20Answer%20%20Affirmative%20Defenses%20O'Connell%20States%20Ted%20is%20NOT%20VALID%20TRUSTEE.pdf

Eliot Bernstein has diligently been seeking a Voluntary Affidavit from Counsel Feaman on a variety of issues but has yet to obtain such. A continuance should either be granted or a Deposition of Counsel Feaman and Discovery ordered.

Thus, Plaintiffs have failed to meet their burden of proof to show the absence of genuine issues of material fact and summary judgment seeking to dismiss the counterclaims must be denied.

Plaintiffs Arguments on behalf of other 3rd parties are inappropriate

This Court should summarily reject any arguments submitted by Plaintiffs on behalf of 3rd parties as lacking authority and standing to make same and that such arguments are misplaced by the St. Eve Order referenced. Fraud in the very filing of this lawsuit has been alleged and Eliot Bernstein should not be further damaged by artificially being boxed into some Interpleader rule particularly where other Federal Rules of Civil Procedure and law would allow such claims to go forward.

CONCLUSION

WHEREFORE, Plaintiffs have failed to meet their burden of proof to show the absence of genuine issues of material fact entitling them to judgement, a reasonable jury could find in favor of the non-moving party and summary judgment seeking to dismiss the counterclaims must be denied and non-moving party Eliot Bernstein respectfully prays for an Order denying Summary Judgment to Plaintiffs, ordering limited Discovery as appropriate and for such other and further relief as may be just and proper.

DATED: August 26, 2016

/s/ Eliot Ivan Bernstein
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2016 I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

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