UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE: **MASTER LENDING GROUP, LLC,** **Debtor.**	**CHAPTER 7** **CASE NO. 23-40569-EJC**
TIFFANY E. CARON, Chapter 7 Trustee for the Bankruptcy Estate of Master Lending Group, LLC **Plaintiff,** **v.** **JUDITH HIRSCH,** **Defendant.**	**Adv. Pro. No. 23-04013-EJC**

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW Judith Hirsch ("Defendant" or "Mrs. Hirsch"), and files this, Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss, respectfully showing this Court as follows:

I. INTRODUCTION

Mrs. Hirsch moved this Court to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the Complaint fails to state a claim upon which relief can be granted. (Doc. No. 7). In the interest of conserving the time of the Court, Defendant will not reproduce here the Statement of Facts contained in Defendant's Memorandum of Law in Support of Motion to Dismiss. (Doc. No. 8). Mrs. Hirsch's Motion to Dismiss (Doc. No. 7) and Memorandum of Law in support thereof (Doc. No. 8) provide a complete discussion of the facts and legal issues in this case. Defendant will highlight the points made in Mrs. Hirsch's Motion to Dismiss that the Plaintiff

did not refute (or even address) in the Plaintiff's Response to Defendant's Motion to Dismiss (the "Response") (Doc. No. 16).

In her Response, Plaintiff largely ignores the arguments set forth in Mrs. Hirsch's Motion to Dismiss. Plaintiff's Response simply echoes allegations that the Trustee asserted in her Complaint. Plaintiff does not contradict Mrs. Hirsch's specific legal arguments that support dismissal of Plaintiff's claims. Plaintiff also does not address the law cited in support of Defendant's arguments. Plaintiff's lack of rebuttal validates Mrs. Hirch's arguments. As a result, the Court should grant Mrs. Hirsch's Motion to Dismiss.

II. LEGAL STANDARDS[1]

A. Consideration of Facts outside the Complaint on a Motion to Dismiss

Defendant disputes many of the factual allegations and legal conclusions in Plaintiff's Complaint. However, when considering a motion to dismiss, "the court is required to accept as true all well pleaded allegations in the plaintiff's complaint." Smedley v. Fulton Cty Sch. Dist., No. 1:09-CV-1715-HTW, 2011 U.S. Dist. LEXIS 164168, at *6-7 (N.D. Ga. June 23, 2011). Notably, this applies only to factual allegations "*in the plaintiff's complaint.*" Id. (emphasis added). Courts "do not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss." Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1284, 21 Fla. L. Weekly Fed. C 15 (11th Cir. 2007).

A "[p]laintiff cannot add facts bolstering its allegations within its Response to a Motion to Dismiss that are not contained in its Complaint." Brandywine Communs. Techs., LLC v. T-Mobile

[1] For a complete discussion of the Legal Standards applicable to Defendant's Motion to Dismiss (Doc. No. 7), please see the "Legal Standards" section of Defendant's Memorandum of Law in Support of Motion to Dismiss (Doc. No. 8). For the purposes of this reply, Defendant will focus on the legal standards now applicable based on Defendant's Response.

USA, Inc., 904 F. Supp. 2d 1260, 1272 n.13 (M.D. Fla. 2012). When a plaintiff's response in opposition to a motion to dismiss introduces new facts not previously alleged in its complaint, "the additional facts alleged in Plaintiff's response to [Defendant]'s Motion to Dismiss must be disregarded." Jeffries v. Wal-Mart Stores E., LP, No. GJH-15-473, 2016 U.S. Dist. LEXIS 13418, at *5 (D. Md. Feb. 3, 2016).

"A plaintiff may not supplement or amend his complaint by presenting new facts or theories in his briefing in opposition to a motion to dismiss." Duffy v. Ticketreserve, Inc., 722 F. Supp. 2d 977, 990 (N.D. Ill. 2010). A "response to a motion to dismiss is not the proper avenue to supplement the Complaint's allegations." Pankey v. Aetna Life Ins. Co., No. 6:16-cv-1011-Orl-37GJK, 2017 U.S. Dist. LEXIS 43201, at *5 (M.D. Fla. Feb. 24, 2017). "Should new facts arise during the course of the litigation, Plaintiff may seek leave of court to file an amended complaint that includes new allegations and evidence." Id. "Facts contained in a motion or brief cannot substitute for missing allegations in the complaint." EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 n.5 (11th Cir. 2016). In ruling on a Motion to Dismiss, a court "will not consider any new facts presented solely in Plaintiff's Response." Caputo v. Lutheran Soc. Servs. of Ill., No. 23-cv-01214-JES, 2023 U.S. Dist. LEXIS 175366, at *1 n.3 (C.D. Ill. Sep. 29, 2023); accord Creative Photographers, Inc. v. Julie Torres Art, LLC, No. 1:22-CV-00655-JPB, 2023 U.S. Dist. LEXIS 41343, at *6 n.4 (N.D. Ga. Mar. 13, 2023) ("The Court notes that the revised response brief contains numerous new facts that are not within the First Amended Complaint. The Court has disregarded any new facts in its resolution of the instant motion.").

B. Failure to Respond to Specific Legal Arguments

"Failing to respond to an argument in a motion to dismiss is equal to conceding that argument." Genterra Grp., LLC v. Sanitas USA, Inc., Civil Action No. 20-22402-Civ, 2021 U.S.

Dist. LEXIS 8156, at *22 (S.D. Fla. Jan. 15, 2021); see also United States ex rel. Osheroff v. Tenet Healthcare Corp., No. 09-22253-CIV, 2012 U.S. Dist. LEXIS 96434, at *37 (S.D. Fla. July 12, 2012) ("The failure to defend a claim in responding to a motion to dismiss results in the abandonment of that claim."); see also Hooper v. City of Montgomery, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007) (dismissing claims as abandoned where the plaintiff failed to respond to the defendants' arguments in support of dismissing those claims); see also Figueroa v. United States Postal Serv., 422 F. Supp. 2d 866, 879 (N.D. Ohio 2006) (the plaintiff's failure to respond to arguments in the defendant's motion to dismiss was a concession that the claim fails as a matter of law and warranted dismissal with prejudice).

"[E]ven a complaint that passes muster under the liberal notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2) can be subject to dismissal if a plaintiff does not provide argument in support of the legal adequacy of the complaint. This rule applies when a party fails to develop arguments related to a discrete issue or when a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss." Lee v. Ne. Ill. Reg'l Commuter R.R. Corp., 912 F.3d 1049, 1053-54 (7th Cir. 2019) (citations omitted); see also Lekas v. Briley, 405 F.3d 602, 614 (7th Cir. 2005) ("[E]ven though a complaint may comply with the simple notice pleading requirements of Rule 8(a)(2), it may nonetheless be dismissed under Rule 12(b)(6) if the plaintiff does not present legal arguments supporting the "substantive adequacy" or "legal merit" of that complaint."). In Lee, the 7th Circuit Court of Appeals affirmed the lower court's decision to grant the defendant's motion to dismiss when the plaintiff failed to respond to the defendant's arguments concerning dismissal. Lee, 912 F.3d 1049. The court noted that

> "Plaintiffs' response to Defendants' Motion to Dismiss fails to cite a single legal case and only argues through unsupported conclusions of fact. It also does not analyze or distinguish the cases relied on in Defendants' Motion.…Plaintiffs' failure to grapple with these issues…clearly results in waiver."

Id. at 1054.

"Our system of justice is adversarial, and our judges are busy people. If they are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning. *An unresponsive response is no response*." Zow v. Regions Fin. Corp., No. CV413-190, 2014 U.S. Dist. LEXIS 19387, at *9 (S.D. Ga. Feb. 14, 2014) (quoting Judge Posner in Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041 (7th Cir. 1999)) (emphasis added). "A party who aspires to oppose a motion must spell out his arguments squarely and distinctly, or else forever hold his peace." Genterra Grp., LLC, 2021 U.S. Dist. LEXIS 8156, at *22. Further, "merely contradicting an opposing party's developed argument with a single, unsupported sentence is not an argument." Martinez v. Colvin, No. 12 CV 50016, 2014 U.S. Dist. LEXIS 41754, at *27 (N.D. Ill. Mar. 28, 2014). Where a plaintiff has not bothered to respond to a defendant's argument, "the Court will treat it as unopposed." Johnson v. Vilsack, No. 4:12-CV-00371 JLH-JTK, 2014 U.S. Dist. LEXIS 76842, at *14 (E.D. Ark. Mar. 10, 2014).

III. ARGUMENT

A. This Court should disregard all factual allegations in Plaintiff's Response in Opposition to Defendant's Motion to Dismiss that were not included in Plaintiff's Complaint.

In her Response, Plaintiff asserts facts not previously alleged in her Complaint. Doc. No. 1. The following factual assertions and legal theories from Plaintiff's Response are notably absent from Plaintiff's Complaint:

1. "Despite the limitations caused by his disease, Mr. Hirsch communicated to Mrs. Hirsch the assets and liabilities of the Debtor to be included in Debtor's bankruptcy Petition, which Mrs. Hirsch, in turn, communicated to Debtor's bankruptcy counsel. This included, but

was not limited to, the entirety of the proceeds of a $5,000,000.00 life insurance policy (the "Policy") issued by the Pruco Life Insurance Company ("Pruco") three years prior in July 2020." [2] Response at 2.

2. "Mrs. Hirsch wrote and sent an email to Debtor's counsel on June 26, 2023, stating, '[Greg] has told me, repeatedly, that the $5M policy was directed to MLG...' and that Mr. Hirsch, in response to the following question from Mrs. Hirsch, 'Is that $2M policy also intended for MLG use?', he stated, 'No. Only the $5M policy [is] for MLG…the other is for you.'" Response at 2.

As discussed above, in considering a motion to dismiss, Courts "will not consider any new facts presented solely in Plaintiff's Response." Caputo, 2023 U.S. Dist. LEXIS 175366, at *1 n.3. Further, a "plaintiff may not supplement or amend his complaint by presenting new facts or theories in his briefing in opposition to a motion to dismiss." Duffy, 722 F. Supp. 2d at 990. Mrs. Hirsch requests that this Court disregard the assertions identified above as they fall outside of the scope of the facts alleged in Plaintiff's Complaint.

B. The Debtor's Schedules and the Amendments thereto are wholly irrelevant to this Court's resolution of Defendant's Motion to Dismiss.

Plaintiff discusses certain Amendments to Debtor's Schedules in the Bankruptcy Case (Case No. 23-40569) at length in her Response. Plaintiff's Response at 3, 7-8. Mrs. Hirsch is aware that issues regarding amendments to the schedules are being litigated in the main Bankruptcy Case. While Mrs. Hirsch could spend time discussing the iterations of the Schedules, she does not do so

[2] Nowhere in Plaintiff's Complaint is it alleged that Mr. Hirsch specifically directed which assets were to be included on the Bankruptcy Schedules or that he specifically directed Mrs. Hirsch or Debtor's Counsel to include the Policy proceeds as an asset of Debtor in the Petition. Not only is such an allegation not in the Complaint, it is also false. As a result of his illness, Mr. Hirsch did not participate in the preparation of the Bankruptcy Schedules.

now because the content of the Schedules is irrelevant to this Court's resolution of Mrs. Hirsch's Motion to Dismiss.

"[I]t is clear that what are 'properties of the estate' is not a matter to be determined with reference to the schedules filed by the Debtor and whether or not an item of property was scheduled by the Debtor." In re Johnson, 16 B.R. 193, 195 (Bankr. M.D. Fla. 1981). "[T]he fact that an item was scheduled by the Debtor as part of his assets obviously does not necessarily mean that the particular item is property of the estate." Id.

Listing property as an asset on Bankruptcy Schedules does not create an otherwise non-existent property right. "[P]roperty scheduled by the debtor as part of its assets is not conclusive evidence that the property is includable in the debtors' estate." In re C.C.L. Constr., Inc., 32 B.R. 693, 697 (Bankr. N.D. Ill. 1983). "Bankruptcy courts must still look to state law when determining the existence and nature of a debtor's interest in property; that is, whether a debtor has any legal or equitable interest in an item." In re Vt. Real Estate Inv. Tr., 25 B.R. 813, 816 (Bankr. D. Vt. 1982).

Therefore, the determination of which iteration of the Bankruptcy Schedules is "valid" has no impact on the resolution of Defendant's Motion to Dismiss. Whether the Policy was or is listed on the Schedules is irrelevant to determining the actual property interests in the Policy proceeds. Plaintiff has failed to assert any facts supporting her claim that the Policy proceeds are property of the Bankruptcy Estate, and her claims should be dismissed.

C. Count I of Plaintiff's Complaint Fails to State a Claim for Determination of Validity, Priority and Extent of Liens and Interest.

Plaintiff's Response fails to address Defendant's assertion that Bankruptcy Rule 7001 "is a procedural rule and does not provide a substantive basis for relief." Day v. Agricenter Int'l, Inc. (In re Butcher Shop of Cordova, LLC), Nos. 21-22100-L, 22- 00080, 2022 Bankr. LEXIS 3086, at *7 n.1 (Bankr. W.D. Tenn. Oct. 26, 2022). Nor does Plaintiff respond to Defendant's showing

that a request for the court to determine ownership of certain property pursuant to Bankruptcy Rule 7001 is a request pursuant to "a procedural rule which itself does not provide grounds for a cause of action." Bailey v. Amaro (In re Amaro), No. 20-96021, 2020 Bankr. LEXIS 2399 (Bankr. N.D. Ill. Sep. 11, 2020 (citing United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 272, 130 S. Ct. 1367, 1378, 176 L.Ed.2d 158, 170 (2010)). Plaintiff does not acknowledge or attempt to distinguish the holding In re Amaro. The Court in Amaro held that the plaintiff's claim pursuant to Bankruptcy Rule 7001 "manifestly fail[ed] to describe an actionable claim" and "therefore, must be dismissed." Id. For the reasons set forth in Defendant's Motion to Dismiss, Plaintiff failed to state a claim in Count I of her Complaint.

In support of Count I, Plaintiff simply cites law on the meaning of the term "property" under Bankruptcy Code § 541. Response at 11. This is a response to an argument Defendant did not make and that is of no import. Mrs. Hisch's Motion to Dismiss did not concern the definition of the term "property" under Section 541. Plaintiff then continues to once again argue the validity of certain amendments to the Bankruptcy Schedules. As explained above, the Schedules and amendments are entirely irrelevant to the resolution of the Motion to Dismiss. Nowhere in Plaintiff's Response does she refute, or even reference, the fact that Rule 7001 is a procedural rule that does not create a cause of action. In Scognamillo v. Credit Suisse First Bos. LLC, the plaintiff failed to address defendant's argument that the claim asserted by plaintiff "was not an independent cause of action." Scognamillo v. Credit Suisse First Bos. LLC, No. C03-2061 TEH, 2005 U.S. Dist. LEXIS 20221, at *33 (N.D. Cal. Aug. 25, 2005). The Court "construe[d] Plaintiffs' failure to respond as a concession" and "therefore grant[ed] the motion to dismiss with prejudice." Id.

Because Plaintiff fails to address the controlling authority in Defendant's Motion to Dismiss, Plaintiff has conceded that her claim in Count I fails as a matter of law. See Figueroa, 422 F. Supp. 2d at 879. As a result, this court should dismiss Count I with prejudice. Id.

D. Count II of Plaintiff's Complaint Fails to State a Claim for Turnover.

Plaintiff's Response to Mrs. Hirsch's Motion to dismiss Count II of the Complaint begins by making a broad statement. Plaintiff states: "[h]aving established above that the Policy is property belonging to the Debtor's Bankruptcy Estate, Plaintiff has clearly stated a claim for turnover." Response at 12. This is not an argument, but merely a conclusory statement. See Martinez, 2014 U.S. Dist. LEXIS 41754, at *27 ("merely contradicting an opposing party's developed argument with a single, unsupported sentence is not an argument"). Moreover, it is a factually inaccurate.

Plaintiff has entirely failed to establish that the Policy is property of the Bankruptcy Estate. The Bankruptcy Schedules do not create a property interest or determine whether an asset is the property of the Bankruptcy Estate. See In re Johnson, 16 B.R. at 195. "Bankruptcy courts must still look to state law when determining the existence and nature of a debtor's interest in property." In re Vt. Real Estate Inv. Tr., 25 B.R. at 816. As established above, Count I of Plaintiff's Complaint failed to state a claim and did not set forth any basis upon which the Court can find that the Policy proceeds are property of the Bankruptcy Estate under applicable Georgia law.

"[A] turnover action is not the appropriate tool for acquiring the right to use or possess property if the debtor's right to use or possess the property is subject to dispute." Scarver v. Ellis (In re McKeever), 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017). Plaintiff has failed to make an opposing argument. Nor did Plaintiff respond to the fact that "[u]nless there is no question remaining as to the liability of the defendant to the estate, e.g., a final judgment from a court of

competent jurisdiction or a stipulation by the defendant, it cannot be said that no dispute exists." In re Satelco, Inc., 58 B.R. 781, 786 (Bankr. N.D. Tex. 1986). Plaintiff fails to recognize that "[t]urnover pursuant to Section 542 is not an available cause of action to resolve disputed property rights." Las Vegas Casino Lines, LLC v. Abbott (In re Las Vegas Casino Lines, LLC), 454 B.R. 223, 226 (Bankr. M.D. Fla. 2011). For the reasons set forth in Defendant's Motion to Dismiss, Count II of Plaintiff's Complaint should be dismissed with prejudice.

Plaintiff states that "there can be no other argument than that the proceeds of the Policy must be turned over to Plaintiff as required by law" and that "[t]here is simply no basis for Mrs. Hirsch's motion to dismiss Plaintiff's turnover claim." Response at 12. Plaintiff's Response here is perfunctory. Plaintiff does not cite a single case to contradict Defendant's arguments or support the Trustee's claim. "Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived." NLRB v. McClain of Ga., Inc., 138 F.3d 1418, 1422 (11th Cir. 1998). As a result, Plaintiff has abandoned her claim for turnover, and it should be dismissed with prejudice. See Johnson, 2014 U.S. Dist. LEXIS 76842, at *14 ("Plaintiff has not bothered to respond to Defendant's argument, so the Court will treat it as unopposed.").

E. Count III of Plaintiff's Complaint Fails to State a Claim for Breach of Confidential Relationship and the Duty of Good Faith.

In Plaintiff's Response to Defendant's Motion to dismiss Count III of the Complaint, Plaintiff once again fails to address the issues. As a result, Plaintiff has waived this claim.

As noted in Defendant's Motion to Dismiss, Plaintiff lacks standing to bring a claim for breach of a confidential relationship between Mr. and Mrs. Hirsch. Plaintiff did not address the issue of standing at all in her Response. Nor did the Trustee mention the ruling of the Georgia Court of Appeals in Ford v. Reynolds. Under such Georgia law, a third party to a fiduciary

relationship does not have standing to bring a claim for breach of a fiduciary duty. Ford v. Reynolds, 315 Ga. App. 200, 726 S.E.2d 687 (2012).

Plaintiff once again failed to cite any case law in her Response to support her claim under Count III. As a result of Plaintiff's failure to address Defendant's standing argument or provide any case law to support her allegations, Plaintiff has abandoned this claim, and it should be dismissed with prejudice. See Flanigan's Enters. v. Fulton Cty., 242 F.3d 976, 987 n.16, 14 Fla. L. Weekly Fed. C 417 (11th Cir. 2001) (finding that the plaintiffs waived their argument when they failed to "elaborate or provide any citation of authority" in support of their allegations); see also Alioto v. Town of Lisbon, 651 F.3d 715, 721 (7th Cir. 2011) ("a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss.").

F. Count IV of Plaintiff's Complaint Fails to State a Claim for Constructive Fraud.

In her Response, the Trustee fails to specifically address any of Defendant's arguments that establish that Count IV fails to state a claim for constructive fraud.[3] As a result, Plaintiff has abandoned this claim, and this Court should dismiss Count IV with prejudice.

As noted in Defendant's Motion to Dismiss, "[t]o establish a constructive fraud claim in Georgia, a plaintiff must establish the following elements: (1) a false representation by defendant; (2) an intent by defendant to induce plaintiff to act or to refrain from acting; (3) justifiable reliance by plaintiff; and (4) damage to plaintiff." United States Vinyl Mfg. Corp. v. Colour & Design, Inc.,

[3] Plaintiff seems to base her argument for constructive fraud on whether or not Mrs. Hirsch made the representations in question. Plaintiff states in footnote 2 that "Mrs. Hirsch has not disputed Debtor's counsel's assertions that her and/or Greg Hirsch's personal attorney directed him to file the amendments." As plaintiff is undoubtably aware, Mrs. Hirsch has not filed an answer in this action. Thus, Mrs. Hirsch has not admitted or denied any of Plaintiffs claims at this point in the litigation. For the purposes of her Motion to Dismiss, Mrs. Hirsch must accept Plaintiff's factual allegations as true, including the allegation that Mrs. Hirsch made the representations in question. As a result, Mrs. Hirsch's admission or denial of the representations in question is irrelevant to this Court's resolution of Defendant's Motion to Dismiss.

No. 4:12-CV-00217-HLM, 2013 U.S. Dist. LEXIS 204136, *35 (N.D. Ga. Mar. 25, 2013). Defendant's Motion to Dismiss sets out how Plaintiff has failed to allege facts that support a claim of constructive fraud under each of these elements. Plaintiff's Response does not address a single one of the elements. Thus, this Court should grant Defendant's Motion to dismiss Count IV. See Scognamillo, 2005 U.S. Dist. LEXIS 20221 (construing the plaintiff's failure to respond to specific arguments in the defendant's motion to dismiss as a concession and dismissing the claims with prejudice).

Defendant's Motion to Dismiss points out that the "false representations" alleged by Plaintiff are legal conclusions and not factual representations. Plaintiff does not attempt to explain how the allegations constitute factual representations. Plaintiff also does not address the Georgia Supreme Court's holding that "[m]isrepresentations as to a question of law cannot constitute remediable fraud, because everyone is presumed to know the law and therefore cannot…be deceived by erroneous statements of law, and such representations are ordinarily regarded as mere expressions of opinion." Sorrells v. Atlanta Transit System, Inc., 218 Ga. 623, 628, 129 S.E.2d 846, 850 (1963). As a result of Plaintiff's failure to respond to Mrs. Hirsch's showing that the "representations" identified by Plaintiff are legal conclusions and therefore cannot constitute a basis for a claim of fraud, Plaintiff has conceded this point for purposes of this Motion to Dismiss.

Plaintiff also failed to address the failure of her constructive fraud claim under all of the remaining elements. As set forth in Mrs. Hirsch's Motion, Plaintiff does not allege any facts that support a claim that Ms. Hirsch intended "to induce [P]laintiff to act or refrain from acting" on the alleged representations. United States Vinyl, 2013 U.S. Dist. LEXIS 204136 at *35. Further, Plaintiff did allege that she justifiably relied on any representations made by Mrs. Hirsch. The fact is that Plaintiff did not rely on any representations of Mrs. Hirsch. Therefore, Plaintiff could not

have sustained any damages as a result of any reliance. Id. Plaintiff's failure to address Defendant's arguments on each of these elements once again serves as an abandonment of her claim for constructive fraud. See Hooper v. City of Montgomery, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007). As a result, this Court should dismiss Plaintiff's claim for constructive fraud with prejudice.

G. Count V of Plaintiff's Complaint Fails to State a Claim for Unjust Enrichment.

Plaintiff's Response fails to address the failure to state a claim for unjust enrichment based upon the fact that the Bankruptcy Estate did not confer a benefit upon Mrs. Hirsch. Plaintiff merely argues that Mrs. Hirsch received a benefit. However, receiving a benefit alone is insufficient to support a claim for unjust enrichment. See Estate of Crook v. Foster, 333 Ga. App. 36, 39, 775 S.E.2d 286, 289 (2015). The issue is not whether Mrs. Hirsch received a benefit but rather that the Bankruptcy Estate did not confer a benefit upon Mrs. Hirsch. Thus the Plaintiff cannot state a claim for unjust enrichment. Plaintiff utterly failed to respond on this issue. As a result, Plaintiff has abandoned her claim for unjust enrichment.

In her Response, Plaintiff admits that a claim for unjust enrichment requires that the Defendant "has been conferred a benefit *by the party contending an unjust enrichment* which the benefited party equitably ought to return or compensate for." Response at 15 (quoting Smith v. McClung, 215 Ga. App. 786, 789 (3) (452 SE2d 229) (1994)) (emphasis added). Plaintiff does not allege that the Bankruptcy Estate conferred a benefit on Mrs. Hirsch. It is indisputable that the Bankruptcy Estate did not confer any benefit on Mrs. Hirsch.

Defendant's Motion to Dismiss cited Tiller v. State Farm. In Tiller the U.S. District Court for the Northern District of Georgia granted the defendant's motion to dismiss the plaintiffs' claim for unjust enrichment because the plaintiffs did not provide a benefit to the defendants. Tiller v. State Farm Mut. Auto. Ins. Co., No. 1:12-CV-3432-TWT, 2013 U.S. Dist. LEXIS 15726 (N.D.

Ga. Feb. 5, 2013). The court in Tiller noted that "[t]he Plaintiffs do not allege…that they conferred a benefit on the Defendants — they only state that the Defendants withheld something from the Plaintiffs and the withholding was a benefit to the Defendants." Id. at *19. The *Tiller* court held that "the Plaintiffs cannot state a claim for unjust enrichment because they did not themselves confer a benefit upon [the defendants]." Id. at *20.

This is the exact problem with Plaintiff's claim in the present case. Plaintiff alleges that Mrs. Hirsch may withhold the Policy proceeds from Plaintiff and that any such withholding is a benefit to Defendant. As in Tiller, these allegations are insufficient to support a claim for unjust enrichment. This Court should grant Defendant's Motion to dismiss Count V. Id.

Further, this Court should grant Defendant's Motion to Dismiss Plaintiff's Count V on the grounds that Plaintiff abandoned the claim. Plaintiff failed to respond to Defendant's specific argument. Plaintiff did not address whether the Bankruptcy Estate itself conferred a benefit on Defendant. Plaintiff did not acknowledge Tiller or attempt to cite authorities contrary to the holding. As a result, defendant has abandoned her claim for unjust enrichment. Borges v. Bank of Am., NA, No. 1:11-CV-3363-JEC-AJB, 2012 U.S. Dist. LEXIS 133931, at *40 (N.D. Ga. May 1, 2012) ("plaintiff's failure to respond to the legal arguments relating to a claim constitutes abandonment of the claim"). Therefore, this Court should dismiss Plaintiff's Claim for Unjust Enrichment.

H. Count VI of Plaintiff's Complaint Fails to State a Claim for Conversion.

Plaintiff's Count VI fails to state a claim for conversion. Plaintiff bases her claim for conversion on her assertion that "Debtor is the rightful beneficiary of the proceeds of the Policy." Response at 16. However, this is not a factual allegation. It is a legal conclusion. Plaintiff bases

her entire case on the theory that the Bankruptcy Estate is the rightful owner of the Policy proceeds. However, the Trustee fails to allege facts or legal theory to support that conclusion.

As discussed above, listing property as an asset on Bankruptcy Schedules does not create an otherwise non-existent property right. See In re Johnson, 16 B.R. at 195 ("the fact that an item was scheduled by the Debtor as part of his assets obviously does not necessarily mean that the particular item is property of the estate."). Plaintiff has failed to state a basis under Georgia law under which the Bankruptcy Estate has an interest in the Policy proceeds. See In re Vt. Real Estate Inv. Tr., 25 B.R. at 816 ("Bankruptcy courts must still look to state law when determining the existence and nature of a debtor's interest in property; that is, whether a debtor has any legal or equitable interest in an item.").

Under Georgia law, insurance proceeds "shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy[.]" O.C.G.A. § 33-25-11. There is no dispute as to the fact that Mrs. Hirsch was the beneficiary designated on the Policy. Compl. ¶ 20. As such, Mrs. Hirsch is the rightful owner of the Policy proceeds. The Bankruptcy Estate does not maintain an interest, legal or equitable, in the Policy proceeds. Therefore, Plaintiff's claim for Conversion must be dismissed.

I. Count VII of Plaintiff's Complaint Fails to State a Claim for Constructive Trust.

As set forth in Mrs. Hirsch's Motion to Dismiss, constructive trust is not an independent cause of action. It is merely a remedy. See Arcturus Int'l LLC v. Geller-Stoff, No. 1:21-CV-5155-TWT, 2022 U.S. Dist. LEXIS 159538, *30 (N.D. Ga. Sep. 2, 2022) ("As correctly pled…the imposition of a constructive trust is not a separate cause of action but a remedy to prevent unjust enrichment."); see also Lee v. Lee, 260 Ga. 356, 357, 392 S.E.2d 870, 871 (1990) ("constructive trust is a remedial device created by a court of equity in order to prevent unjust enrichment.").

Plaintiff fails to address the Motion's argument that constructive trust is not a cause of action under Georgia law. As a result, the Court should dismiss Count VII of Plaintiff's Complaint.

Plaintiff does assert that a constructive trust should be imposed as the remedy for Plaintiff's unjust enrichment claim. Plaintiff quotes Ansley v. Raczka-Long for the proposition that "[e]quity will not allow one with a legal interest in a piece of property a windfall recovery when the beneficial interest should flow to another." Response at 16 (quoting Ansley v. Raczka-Long, 293 Ga. 138, 141, 744 S.E.2d 55, 58 (2013)). In Ansley, the Plaintiff properly stated a claim for unjust enrichment because the Plaintiff conferred a benefit (real property) on Defendant for which the plaintiff reasonably anticipated to be compensated. Ansley, 293 Ga. 138.

As established above, in the case at hand, the Plaintiff did not confer a benefit on Mrs. Hirsch. Therefore, Plaintiff has failed to state a claim for unjust enrichment. Because Plaintiff failed to state a claim for unjust enrichment, Plaintiff has no grounds for seeking the imposition of a constructive trust[4].

Finally, it is worth noting that Plaintiff is not receiving a "windfall" in this case. A windfall is "a piece of unexpected good fortune." Windfall, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2010). Defendant's right to the Policy proceeds is not the result of some "unexpected good fortune." Mrs. Hirsch lost her husband a few weeks before Plaintiff filed this action and sued her. The Policy insured the life of Defendant's husband. Mrs. Hirsch is the named beneficiary on the policy and the proceeds vested in Mrs. Hirsch upon the death of her husband. See Loyd v. Loyd, 203 Ga. 775, 779 (1948). Plaintiff has provided no law to support the

[4] Once again, Plaintiff has abandoned her claim for unjust enrichment by failing to address the discrete legal arguments presented in Defendant's Motion to Dismiss. As a result, there are no grounds to support the imposition of a constructive trust in this case.

proposition that the Policy proceeds are anything other than the rightful property of Mrs. Hirsch. As a result, all of Plaintiff's claims should be dismissed.

IV. CONCLUSION

Plaintiff's response is void of any meaningful law to dispute Defendant's motion to dismiss. Plaintiff's Complaint and the Response in opposition to Defendant's Motion to Dismiss make nothing more than "unadorned, the defendant-unlawfully-harmed-me accusations." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868, 883 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 1964, 167 L.Ed.2d 929, 940 (2007)). As a result, this Court should dismiss Plaintiff's Complaint for failure to state a claim. Id. Further, because of Plaintiff's failure to address the arguments in Mrs. Hirsch's Motion, Plaintiff has abandoned all the claims asserted in her complaint. For this reason as well, Plaintiff's claims must be dismissed.

WHEREFORE, Defendant prays for the following relief:

(a) That this Court grant Defendant's Motion to Dismiss; and

(b) For such other and further relief as this Court deems just and proper.

Respectfully submitted this 17th day of November, 2023.

JONES & WALDEN LLC

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE: **MASTER LENDING GROUP, LLC,** **Debtor.**	**CHAPTER 7** **CASE NO. 23-40569-EJC**
TIFFANY E. CARON, Chapter 7 Trustee for the Bankruptcy Estate of Master Lending Group, LLC **Plaintiff,** **v.** **JUDITH HIRSCH,** **Defendant.**	**Adv. Pro. No. 23-04013-EJC**

CERTIFICATE OF SERVICE

I certify that the foregoing, *Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss,* was electronically filed using the Bankruptcy Court's Electronic Case Filing program which sends a notice of and an accompanying link to the filing to the following parties who have appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

- **Natalie Rowland** nrowland@taylorenglish.com

This 17th day of November, 2023.

JONES & WALDEN LLC

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