UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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

REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, Tiffany E. Caron, as Chapter 7 Trustee for the bankruptcy estate of Master Lending Group, LLC ("Plaintiff"), hereby files this Reply to Defendant's Response in Opposition to Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint. Plaintiff incorporates by reference Plaintiff's Response to the Motion to Dismiss and the arguments made by Trustee's Counsel during the Court's hearing on November 30, 2023. In addition, Plaintiff, respectfully shows the Court as follows:

COUNT I - BANKRUPTCY RULE 7001(2)

Count I is provided for in both Rule 7001(2) and 28 USC 157(b)(2)(a), (k), and (o) as a core proceeding and is extremely routine. Plaintiff has set out in great detail the facts supporting a finding that the Estate is a third party beneficiary and/or has an equitable interest in the policy proceeds as of the Petition Date ("PD") and Judith Hirsch ("Defendant") herself so scheduled it that way. That is what the Court is being asked to determine.

The Defendant's argument that Plaintiff did not address this in reply to Defendant's Motion to Dismiss is specious. Plaintiff's Counsel argued this matter in Court. Further, Defendant's Counsel appeared in Court on Motions filed by the Trustee in the underlying case without filing any response at all (much less an objection) to the Trustee's Motion for Turnover and Motion to Strike. Nevertheless, he appeared at the hearing with objections which have never been reduced to writing. Plaintiff's Count I is basic and routine and was addressed by Plaintiff's Counsel in person during the Motion to Dismiss hearing in response to Defendant's oral objection. Defendant ignores this and continues to argue that Plaintiff has waived the right to respond. If Plaintiff has waived her right to respond then it would be impermissible for any party to appear at a hearing to make arguments which were not filed in writing in advance of a hearing; this is simply not the procedure of the Court.

FACTS

Defendant continues to attribute some meaning to the fact that when Gregory Hirsch died on August 3, 2023, the Pruco policy proceeds vested in Defendant. Plaintiff's Counsel argued in Court that property of the estate ("POE") and the rights of all parties are determined on the PD, and what happens thereafter is irrelevant. The following facts are set out by Plaintiff:

(a) It is indisputable that Defendant had power of attorney ("POA") for Gregory Hirsch, who happens to be the sole owner of Master Lending Group ("MLG");

(b) upon information and belief, MLG's funds were used to buy the policy and pay the premiums;

(c) It is indisputable that ten days prior to the PD, Judith Hirsch herself sent Jud Hill an email (Exhibit A to Plaintiff's Amended Complaint) explaining that Gregory Hirsch has "repeatedly" told her that MLG gets the proceeds of the $5 million policy.

(d) It is indisputable that on the PD, Judith Hirsch, by her POA for Gregory Hirsch, scheduled such an equitable interest for that $5 million, at which time it was unvested;

(e) It is indisputable that Judith Hirsch, in her capacity as POA for Gregory Hirsch, authorized the Chapter 7 filing by MLG and signed that original petition and schedules for the MLG bankruptcy filing showing her understanding that MLG was to get the funds even though she had failed to change the beneficiary.

BREACH OF FIDUCIARY DUTY

Defendant argues that, under Georgia Law, there can be no breach by a beneficiary (in this case, Judith Hirsch). However, Plaintiff's Complaint is referring to Judith Hirsch in her role as POA and that she was required to make the change of beneficiary, as directed to her by Gregory Hirsch. At that time, although Gregory Hirsch would still have had the right to change the beneficiary himself, he was too incapacitated to do so. What Plaintiff asserts is that, by virtue of the POA, Judith Hirsch was required to implement the change in beneficiary to MLG as she seems to acknowledge in the Exhibit A email to Jud Hill. She had not done so, which tends to support the inference that that is why Gregory Hirsch had to tell or remind her "repeatedly." Plaintiff's position is that Defendant was in a position of confidence and trust, which placed her in a fiduciary relationship which she breached. To be clear, Gregory Hirsch was also the sole owner of MLG, so he had effectively given Judith Hirsch POA for MLG as well. Thus, her failure to follow his instructions was a breach to MLG as well as to Gregory Hirsch, individually. Defendant asserts that Plaintiff has no standing to assert a breach of fiduciary duty because MLG was not a party to the relationship. Plaintiff disagrees. Judith Hirsch was POA for MLG as well as Gregory Hirsch individually in his capacity as sole owner of MLG, on which basis she authorized the Chapter 7 filing by MLG and signed the petition and schedules.[1]

[1] In view of the Comments in the Defendant's Response that it seemed unclear whether Plaintiff is asserting breach of fiduciary duty, Plaintiff intends to supplement that Count to assert this with more specificity.

CONTROLLING LAW

Defendant argues that state law controls citing *Butner v. U.S.*, 440 U.S. 48 (1979). This was a real estate case decided under the Bankruptcy Act of 1898. POE is expanded under the Bankruptcy Code. *Butner* says that, while generally property interests are created by state law, federal law will apply where "some federal interest requires a different result." *Id*. at 55. "Property interests in bankruptcy may not be determined by state law when federal law would require a different result." *Id.* at 55. "When such a conflict occurs, bankruptcy policy prevails." *In re McCafferty*, 96 F.3d 182, 196 (6th Cir. 1996).

In the case of *Lassman v. McQuillan*, the Court held that an equitable interest in life insurance proceeds, as the residue of the Policy, are property of the party holding the equitable interest notwithstanding the holder of the legal interest. *(In re Charles River Press Litho., Inc.)*, 338 B.R. 148, 157 (Bankr. D. Mass. 2006). In *Lassman*, it was the Trustee who was arguing for the legal ownership of a life insurance policy to control ownership as of the petition date. However, the Bankruptcy Court looked past the ownership listed in the documents held by the life insurance company to the existence of an equitable interest in the life insurance policy and its proceeds. The Bankruptcy Court found a resulting trust, reasoning that, "[a] resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein…in circumstances which clearly raise an inference that the [Parties] did not intend that the entity retaining legal control should also retain

the beneficial interest therein." *Id.* at 162 (holding legal title to the property subject to a resulting trust for the benefit of equitable interest holder). The *Lassman* Court concluded that, what matters is the intention of the parties. *Id.* (Court relied on letters between the parties showing their unambiguous intent). In this case, Exhibit A to Plaintiff's Amended Complaint shows the unambiguous intent of Gregory Hirsch to have the policy proceeds paid to MLG, of which Judith Hirsch was well aware and communicated the same to Debtor's Counsel.[2]

At the very least, MLG is a third-party beneficiary.[3] "Pursuant to O.C.G.A. § 9-2-20 (b), 'the beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract.' We have further defined a 'third-party beneficiary contract' as "'one in which the promisor engages to the promisee to render some performance to a third person. (Cit.)'" *LDH Properties v. Morgan Guaranty Trust Co. &c.*, 145 Ga. App. 132, 133 (2) (243 S.E.2d 278) (1978)." *Starrett v. Commercial Bank*, 226 Ga. App. 598, 599 (1997).

"Congress intended a broad range of property to be included in the estate." *U.S. v. Whiting Pools, Inc.,* 462 U.S. 198, 204 (1983). Given the above facts and the federal bankruptcy laws designed to pay creditors as much as possible combined with the fact that the policy was unvested on the PD, in addition to the fact that Gregory Hirsch specifically directed Judith Hirsch that the policy proceeds belonged to MLG, it is proper for the policy proceeds to be POE. Also, the policy was unvested on the PD. As

[2] Plaintiff intends to add a Count and/or a prayer for relief for a resulting trust.
[3] Plaintiff intends to add a Count to the Amended Complaint for a third-party beneficiary claim.

an example of *Butner* being only generally true, Plaintiff cites *In re Chambers*, 451 B.R. 621 (Bankr. N. D. Ga. 2011)(Mullins, J.), where the Court was interpreting OCGA 21-5-33(c) in the individual case of Jill Chambers, a state house representative. The Court held that despite the state statute providing that campaign funds "shall not constitute personal assets," the campaign funds were held to be POE.

PROPERTY OF THE ESTATE

The commencement of a bankruptcy case by the filing of a petition, voluntary or involuntary, creates an estate. 11 U.S.C. § 541(a). The estate so created includes, subject to certain exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

Debtor's equitable property interest under 541(a) defeats any state statute that provides to the contrary. "Section 541(c)(1)(B) of the Bankruptcy Code reinforces the Congressional mandate that all legal and equitable interests in property become property of the estate. It says that a debtor's interest in property becomes property of the estate despite any provision in an agreement or applicable nonbankruptcy laws conditioned on the commencement of a bankruptcy case that effects a forfeiture, modification, or termination of the debtor's interest in property. 11 U.S.C. § 541(c)(1)(B). In other words, parties cannot contract around what becomes estate property, and states cannot legislate estate property away. *In re Envision Healthcare Corp*., 2023 WL 860744 (Bankr. S.D. Tex. 2023). "'All' is a broad term, but not an ambiguous one. We all know what 'all' means." *Id.*

The Petition Date is the controlling date for the determination of property of the estate. It has long been held that the Petition Date is when "the status and rights of the [parties]…are fixed." *White v. Stump*, 266 U.S. 310, 313 (1924). See also, *Owens v. Owens*, 560 U.S. 305, 314 n. 6 (1991). Therefore, on the Petition Date, Property of the Estate consists of "all debtor's property wherever located and by whomever held." 541(a).

CONSTRUCTIVE TRUST

Constructive Trust is an implied trust. Under OCGA 53-12-132 (2010), (a) "A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to the property, whether from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity. (b) the person claiming the beneficial interest in the property may be found to have waived the right to a constructive trust by subsequent ratification of long acquiescence." (Emphasis added.). Plaintiff was prompt in challenging so there can be no waiver or ratification. Further, Plaintiff seems to be the ideal candidate for application of the trust. No constructive trust can exist until a court "Imposes" defendant's property or assets with the constructive trust. It is appropriate where, as here, we have serious allegations of confidential relationship and breach of fiduciary duty as POA for Gregory Hirsch (including in his capacity as sole owner of MLG). See e.g., *N. S. Garrett & Sons v. Union Planter National Bank of Memphis, (In re N.S. Garrett & Sons*), 772 F.2d 462 (8th Cir. 1985).

CONCLUSION

For all the foregoing reasons, Plaintiff submits this Reply to Defendant's Response in Opposition to Plaintiff's Motion for Leave to File Plaintiff's First Amended Complaint.

This 26th day of December, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2023, I electronically filed **PLAINTIFF'S REPLY TO RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE PLAINTIFF'S FIRST AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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