

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

DOUGLAS L. HEINSOHN)
a/k/a DOUGLAS LYLEBURN HEINSOHN)
d/b/a TIMBERWINDS RESTAURANT)

Debtor.)

Case No. 90-31655
Chapter 7

WILLIAM T. HENDON, TRUSTEE)

Plaintiff,)

v.)

Adv. Proc. No. 94-3144

CENTRAL UNITED LIFE INS. CO.,)
f/d/b/a CENTRAL INS. CO.; STATE)
MUTUAL LIFE ASSURANCE CO. OF)
AMERICA; LINCOLN NATIONAL LIFE)
INS. CO.; and JOSEPH KIRK,)

Defendants.)

CENTRAL UNITED LIFE INSURANCE)
COMPANY,)

Plaintiff,)

v.)

Adv. Proc. No. 94-3145

DOUGLAS L. HEINSOHN FAMILY)
TRUST and WILLIAM T. HENDON,)
TRUSTEE FOR BANKRUPTCY ESTATE)
OF DOUGLAS L. HEINSOHN,)

Defendants.)

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding* is before the court on a motion to dismiss filed by State Mutual Life Insurance Co. of America ("State Mutual") on December 27, 1994, a motion to dismiss filed by Joseph T. Kirk on December 28, 1994, a motion to dismiss filed by Lincoln National Life Insurance Co. ("Lincoln Life") on January 3, 1995, and the plaintiff's motion for leave to amend complaint filed on January 18, 1995. For the following reasons, the court will grant the plaintiff's motion for leave to amend the complaint, and deny the motions to dismiss.

I.

Plaintiff, William T. Hendon, Trustee (the "Trustee"), initiated this action pursuant to 11 U.S.C. § 542 on November 2, 1994, seeking as relief, *inter alia*, the turnover of funds in the amount of \$99,145.14 from defendant Central United Life Insurance Co. ("Central Life") which funds allegedly constitute property of the estate. Additionally, the Trustee seeks damages from all the defendants resulting from the alleged negligent, intentional, and fraudulent acts of Mr. Kirk, punitive damages from Mr. Kirk, and damages from State Mutual and Lincoln Life resulting from their alleged negligence and breach of contract. After the motions to dismiss were filed by State Mutual, Mr. Kirk and Lincoln Life, the

*The pending motions that this memorandum addresses were filed in adversary proceeding no. 94-3144, prior to this court's February 8, 1995 order consolidating adversary proceeding no. 94-3144 with adversary proceeding no. 94-3145. All references to "plaintiff" and "defendant(s)" in this memorandum are directed at the parties as they are designated in adversary proceeding no. 94-3144.

Trustee moved to amend his complaint for the purpose of curing any deficiencies in pleading various causes of actions against the moving defendants. Because no response in opposition to the motion to amend has been filed by any of the defendants, the court, in accordance with Local Bankr. R. 9(c), will construe the lack of a response to mean that the defendants do not oppose the motion to amend. Furthermore, the court finds that it is in the interest of justice that the Trustee be granted leave to amend his complaint. See Fed. R. Bankr. P. 7015 and Fed. R. Civ. P. 15(a). Accordingly, leave will be granted to the Trustee to allow the complaint to be amended in conformity with the copy of the proposed "First Amended Complaint" attached as an exhibit to the motion to amend.

II.

Because the Trustee is being granted leave to amend the complaint, the court will consider the motions to dismiss in light of the proposed "First Amended Complaint" attached as an exhibit to the motion to amend. The Trustee alleges in the proposed "First Amended Complaint" that in April 1992, he filed a lawsuit against the Douglas L. Heinsohn Family Trust and Unknown Holders of Bearer Share Certificates of Bio Mar Cayman Ltd. ("Bio Mar") to establish the estate's ownership interest of Bio Mar, a Grand Cayman Island, British West Indies corporation which was managed by International Management Services ("IMS"). In addition to providing management and accounting services to corporations such as Bio Mar, IMS also furnished directors and officers. The managing director for IMS is

Clive Harris.

The trustee alleges that during the discovery stage of that prior lawsuit he learned of the possible existence of four insurance policies on the life of the debtor, Douglas Heinsohn, owned by Bio Mar or its wholly-owned subsidiary, Global Golf Ltd. ("Global Golf"). Acting upon that information, in June 1992, the Trustee deposed Mr. Kirk, who was allegedly at that time an authorized insurance agent for Central Life, State Mutual and Lincoln Life. The Trustee alleges that during the deposition, Mr. Kirk was asked to provide a list of the life insurance policies owned by Bio Mar and Global Golf on the life of Douglas Heinsohn and to identify the type of each policy, the present value of each policy and the future value of each policy. The Trustee asserts that the requested information was never provided.

The Trustee further alleges that in January 1993 he learned from Clive Harris with IMS that State Mutual and Lincoln Life were the insurers on the insurance policies, that the policies had been cashed for their surrender values, and that the proceeds from the policies had been transferred to Central Life in October and December 1992. Collective *Exhibit A* to the "First Amended Complaint" contains: (1) a copy of a letter from State Mutual dated December 22, 1992, addressed to Global Golf advising that policy no. 1627786-00 on the life of Douglas Heinsohn had been cancelled and the net surrender value of \$60,480.02 had been forwarded to Central Life; (2) a copy of a check and payment stub of Lincoln Life dated October 2, 1992, evidencing the payment of

\$8,499.98 to Central Life, which constituted the cash surrender value of Lincoln Life policy no. 64-0903920 on the life of Douglas Heinsohn; and (3) copies of three checks from State Mutual to Central Life dated December 22, 1992, representing the cash surrender values of State Mutual policy nos. 1627786-00, 1180441-00, and 573599-00 on the life of Douglas Heinsohn, in the respective amounts of \$60,480.02, \$28,488.64, and \$1,676.50. The Trustee alleges that on August 24, 1992, prior to actually receiving the cash surrender values, Central Life issued policy no. 2059306 on the life of Douglas Heinsohn with the owner being listed as Douglas Heinsohn and that later, Mr. Kirk advised Central Life to change the owner's name to the Douglas Heinsohn Family Trust.

The Trustee avers that IMS, as manager for Bio Mar and Global Golf, the record owners of the Lincoln Life and State Mutual policies, was the only authorized entity which could have effectively cancelled the policies and obtained the cash surrender values. The Trustee contends that the cancellation of the policies and the transfer of the proceeds were accomplished by a series of Central Life assignment and surrender forms ("surrender forms") which were invalid because some were signed with the forged signature of N.D. Nominees Ltd., an officer of Bio Mar and Global Golf, and the remainder were signed by Lowell Poling, a trustee of the Douglas Heinsohn Family Trust, who was not authorized by either Bio Mar or Global Golf to execute the surrender forms. The Trustee avers that the surrender forms were prepared by or at the instruction of Mr. Kirk and were subsequently transmitted to State

Mutual and Lincoln Life by Mr. Kirk.

Attached as *Exhibit B* to the proposed "First Amended Complaint" is a copy of a letter dated April 27, 1993, from N.D. Nominees Ltd., a director of Global Golf, to State Mutual advising that one of the surrender forms, a copy of which was apparently furnished in response to an inquiry from Global Golf and which was apparently used to cancel State Mutual policy no. 1627786-00 owned by Global Golf, was not executed by, at the direction of, or with the consent of Global Golf. That particular surrender form dated November 19, 1992, a copy of which is included in *Exhibit B*, appears to have been executed by Lowell Poling, Trustee, and witnessed by Mr. Kirk.

Attached as *Exhibit F* to the proposed "First Amended Complaint" are copies of four surrender forms dated July 30, 1992, each containing the purported signature of N.D. Nominees Ltd. Three of the surrender forms are directed to the three policies formerly issued by State Mutual and the other is directed to the policy formerly issued by Lincoln Life. None of these surrender forms contain the signature of a witness although the form clearly provides for such.

Attached as *Exhibit I* to the proposed "First Amended Complaint" are copies of three surrender forms dated December 4, 1992, two of which contain the purported signature of Lowell Poling as the secretary and treasurer of Bio Mar, and the other containing the purported signature of Lowell Poling as the secretary and treasurer of Global Golf. These three surrender forms are directed

to State Mutual concerning the three policies which it formerly issued on the life of Douglas Heinsohn.

The Trustee alleges that Central Life and State Mutual contacted each other on several occasions during October through December 1992 concerning the validity of the surrender forms and thereafter transferred the surrender proceeds without resolving the questions surrounding the validity of the surrender forms. The Trustee also alleges that Lincoln Life may have had or should have had questions concerning the validity of the surrender form directed to it but went ahead and transferred the surrender proceeds from its policy to Central Life.

The Trustee asserts six different causes of actions in the proposed "First Amended Complaint." In the first count, the Trustee contends that Central Life received proceeds wrongfully converted from the State Mutual and Lincoln Life policies' surrender values which were subsequently used to purchase the Central Life policy now in existence. The Trustee demands that Central Life be required to turn over the converted proceeds in the amount of \$99,145.13 along with interest.

In the second count, the Trustee contends that he is entitled to recover compensatory damages from all the defendants and punitive damages from Mr. Kirk for his alleged intentional and fraudulent acts. Specifically, the Trustee asserts that Mr. Kirk, after being deposed in the earlier lawsuit by the Trustee concerning the existence of any life insurance policies, perpetrated a fraud upon the estate by facilitating the

cancellation of the four former insurance policies and the transfer of the proceeds and thereafter attempted to conceal the transactions.

The Trustee also alleges that Mr. Kirk misrepresented and failed to disclose the true amount of the proceeds received by Central Life from the surrender values of the four previous policies when he knew that the Trustee would be relying upon the information during an attempted settlement of the prior lawsuit. The Trustee alleges that he relied upon the misrepresented information to his detriment in the settlement proceedings until such time as he became aware of the inaccuracy and walked away from the settlement. The Trustee contends that had the correct information been provided at the time requested, the previous lawsuit could have been settled at that time. The Trustee states that, instead, he had to continue the prosecution of the action, thereby incurring additional attorney fees and litigation expenses and losing interest on the settlement proceeds which would have come into the estate. The Trustee asserts that Central Life, Lincoln Life and State Mutual are liable for the actions of Mr. Kirk since he was acting as their agent as a matter of fact or by law under Tenn. Code Ann. § 56-6-147.

The third and fourth counts allege that State Mutual and Lincoln Life owed a duty of reasonable care to Bio Mar and Global Golf in the cancellation of the four previous policies and the transfer of the proceeds, that the duty was breached by their failure to ascertain that the surrender forms were invalid in that

they were neither authorized by Bio Mar and Global Golf nor executed by an officer or director thereof and that as the direct and proximate result, the estate has suffered damages including the interest the estate would have earned on the proceeds had they been turned over as first demanded, and the attorney fees and litigation expenses incurred in the process of locating the funds and establishing their ownership.

In the fifth count, the Trustee asserts that State Mutual and Lincoln Life breached their contracts with Bio Mar and Global Golf when the proceeds were transferred to Central Life without authority, and as a result, the estate has suffered damages and continues to do so in recovering the funds which were transferred to Central Life. In the sixth and last count, the Trustee alleges that Central Life is liable to the estate for all the damages suffered as a result of the negligent acts of its agent, Mr. Kirk.

III.

Upon considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, as incorporated by Fed. R. Bankr. P. 7012(b), the court must construe the complaint in the light most favorable to the plaintiff, accept as true the factual allegations in the complaint, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993), *reh'g denied* (1993). A complaint need only give fair notice of what the plaintiff's claim

is and the grounds upon which it rests. *Id.* Although this standard is extremely liberal, the plaintiff may not simply assert legal conclusions. Rather, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *Id.* Of course, the burden of demonstrating that a complaint does not state a claim is on the moving party. 2A MOORE'S FEDERAL PRACTICE, p. 12.07 [2-5].

State Mutual takes the position in its motion that no claim is stated against it because the Trustee alleges (a) the cancellation of the four policies and the transfer of the proceeds to Central Life were accomplished as a result of the fraud of Mr. Kirk and the manipulation of Bio Mar and Global Golf by Douglas Heinsohn; and (b) Central Life is willing to pay over the cash value of the new policy. The court disagrees. Although Central Life may be willing to turnover the cash surrender value of the new policy, that amount is alleged to be almost \$25,000 less than the actual amount of proceeds which were generated upon the surrender of the four previous policies. Additionally, the Trustee alleges in the proposed "First Amended Complaint" that Mr. Kirk was the agent of State Mutual, and therefore State Mutual is liable for his alleged negligent, intentional and fraudulent acts.

Moreover, the Trustee contends that State Mutual itself was negligent and otherwise breached its contracts with Bio Mar and Global Golf when it cancelled the three policies it had issued and paid over the proceeds to Central Life upon invalid surrender

forms. The Trustee alleges that State Mutual was on notice that the validity of the surrender forms was in question at the time of the transfer of the funds to Central Life, and in the exercise of reasonable care and diligence, should have required proof of Lowell Poling's authority to sign the surrender forms on behalf of Global Golf and Bio Mar prior to transferring the funds. Accordingly, the court concludes that the Trustee, on behalf of the estate which has been found to be the beneficial owner of the policies, has stated valid causes of action against State Mutual.

With respect to the motion to dismiss by Lincoln Life, a similar argument is asserted that because Central Life is willing to pay the cash surrender value of the new policy, the estate has suffered no damages. Again, the court notes that Central Life has not offered in its answer to pay over the amount of proceeds which it received, but only the cash surrender value of the new policy which is some \$25,000 less. Lincoln Life also asserts that the Trustee failed to allege a valid cause of action sounding in negligence because there are no allegations in the complaint that would imply that any breach of a reasonable duty of care occurred. In the proposed "First Amended Complaint," however, the Trustee does allege that Lincoln Life was aware of or should have been aware of the problems with the surrender form and, additionally, that Lincoln Life, as the principal of Mr. Kirk, is liable for the alleged negligent, intentional and fraudulent acts of Mr. Kirk. Accordingly, valid causes of action are asserted against Lincoln Life.

Finally, Mr. Kirk argues in his motion and brief that the Trustee failed to allege facts in the complaint which could constitute fraud or misrepresentation on his behalf. Regarding the alleged fraud cause of action, Mr. Kirk contends that the Trustee does not allege any facts "showing that Kirk's alleged error in communicating the cash value of the policies was either intentional or reckless." To the contrary, the Trustee alleges that Mr. Kirk facilitated the transfer of the necessary surrender forms to obtain the cash surrender values of the four policies, used those proceeds to fund a new policy, and thereafter provided the cash surrender value of the new policy based only upon the purported receipt of the cash surrender value of the State Mutual policy no. 1627786-00.

Mr. Kirk is also alleged to have instructed Central Life not to release any information concerning the new policy to anyone but Douglas Heinsohn. Accordingly, the court may infer that Mr. Kirk, as agent, was the only one who had sufficient knowledge of the new policy to disclose the pertinent information to the Trustee to enable the settlement to occur. The Trustee alleges that he reasonably relied upon the alleged misrepresentation to his detriment and as a result, suffered damages. Mr. Kirk also takes exception to the allegations that there has been any reliance and that the estate has suffered damages, arguing that the fact that the Trustee learned of the misrepresentation before entering into a settlement negates both elements. In short, Mr. Kirk argues that because the Trustee uncovered the alleged fraud before consummating the settlement, he is without a cause of action. The court cannot

agree. The Trustee alleges that the reliance upon the alleged misrepresentation caused him to incur damages associated with the preparation of settlement documents and notices, the resumption of trial preparations, and the interest that would have accrued upon the insurance proceeds. The fact that the alleged damages resulting from the failed settlement are much less than they would have been had the settlement been consummated based upon the alleged misrepresentation does not alter the court's conclusion in this regard.

The Trustee further asserts both in the complaint and the First Amended Complaint, that in concealing, transferring and misrepresenting the ownership of assets of a bankruptcy estate, Mr. Kirk has committed bankruptcy fraud in violation of Title 18 of the United States Code. Mr. Kirk argues in his brief that by making this statement, the Trustee is apparently basing a civil claim for damages upon the violation of a criminal statute for which there is no private cause of action, citing *Ateser v. Bopp*, 1994 U.S. App. Lexis 18014 (9th Cir., July 19, 1994). Contrary to Mr. Kirk's assertion, however, although the Trustee does make the allegation that Mr. Kirk has violated the bankruptcy fraud criminal statute, such statement appears to be gratuitous because the Trustee does not allege that the alleged violation entitles him to damages. Instead, after making the criminal fraud allegation, the Trustee goes on to allege that Mr. Kirk has been guilty of common law fraud for which he is entitled to damages. Because, as concluded above, the Trustee has sufficiently pled facts establishing common law

fraud and appears to base his entitlement to damages on this allegation rather than the alleged bankruptcy fraud violation, Mr. Kirk's request that this allegation be dismissed will be denied. If, however, in the future, the Trustee seeks damages resulting from any alleged violation of the bankruptcy fraud criminal statute, the court will reconsider its ruling.

IV.

Accepting the facts as true as alleged in the complaint and construing the proposed "First Amended Complaint" in the light most favorable to the plaintiff, the court cannot conclude that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. As a result, the motions to dismiss of State Mutual, Lincoln Life and Mr. Kirk will be denied. An order will be entered in accordance with this memorandum.

ENTER: February 28, 1995

BY THE COURT


MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE