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IN THE MATTER OF THE ESTATE OF HIROKAZU SANO	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-P-442-09 CIVIL ACTION OPINION

Argued: December 9, 2011
Decided: December 13, 2011

Honorable Peter E. Doyne, A.J.S.C.

Victor A. Nezu, Esq. appearing on behalf of the plaintiff, Yoko Sano, individually and as the Administratrix of the Estate of Hirokazu Yoko (The Law Offices of Victor A. Nezu).

Michael S. Kimm, Esq. and Francesco A. Savoia, Esq. appearing on behalf of the defendant, Jin Young Chung (Kimm Law Firm).

Aileen F. Droughton, Esq. appearing on behalf of the defendant, Jin Choi (Traub Lieberman Straus & Shrewsberry LLP).

Introduction

Before the court are two motions for summary judgment filed separately by counsel for defendants Jin Choi and Jin Young Chung ("defendants" when referenced collectively, "Choi" and "Chung" when referenced individually). Opposition to the

motions was filed by counsel for plaintiff, Yoko Sano, individually and as the Administratrix of the Estate of Hirokazu Sano ("plaintiff" or "Yoko"). Counsel for both defendants submitted a reply to plaintiff's opposition.

Oral argument was requested and the same was entertained on December 9, 2011.

Relevant Statement of Facts and Procedural History

This court's decisions of March 15, 2010, May 14, 2010, and April 21, 2011, are incorporated herewith as if set forth at length. Only a summary of the history of this case therefore follows.

Briefly, Hirokazu Sano ("Hirokazu") was the owner of several café/bakeries and one baked goods factory, all located in the New York-New Jersey area. On or about September 27, 2002, Hirokazu obtained a life insurance policy, which named one of his businesses, Parisienne Inc. ("Parisienne"), as the primary beneficiary and his wife, Yoko, as the secondary beneficiary. On or about January 22, 2004, it appears Hirokazu executed a change of beneficiary in favor of Chung, whose sister, Choi, acted as Hirokazu's agent in obtaining both the initial policy and the change of beneficiary.[1] Both sisters had known Hirokazu for an extended period and are the sisters of his former business partner. Hirokazu and Chung, who had worked for Hirokazu in his various

[1] Plaintiff disputes the signature on the change of beneficiary form is her husband's, though she testified during her deposition it appeared to be, and Robert Baier, a forensic document examiner retained by Chung's counsel, has opined it is "highly probable" and "beyond a reasonable doubt" the signature is Hirokazu's.

businesses since about 1992, were engaged in a romantic relationship from about 2005 to 2007.[2]

Hirokazu died intestate on July 23, 2008, and the proceeds of the $2.5 million life insurance policy were transferred to Chung approximately two weeks later. As set forth in the New York Life Insurance Continued Interest Account Statement, an account bearing Chung's name had an opening balance of $2,503,235.61 on August 5, 2008. The same account had a balance of $801,714.03 on August 31, 2008, and $438,146.19 on February 28, 2009.[3] On November 12, 2009, an eight-count verified complaint and order to show cause were filed on behalf of Yoko, alleging Chung procured the change of beneficiary in her favor by defrauding Hirokazu and exerting undue influence upon him. By way of the complaint, Yoko sought to void the change in beneficiary and require Chung to turn over all insurance proceeds received.

On February 16, 2010, counsel for Chung filed a motion to dismiss the action for purported defective service of process and failure to state a claim. On February 22, 2010, Yoko's counsel filed a cross-motion seeking a preliminary injunction requiring Chung to deposit the proceeds from the life insurance policy plus interest with the court pending the outcome of the litigation or in the alternative to post a bond. By way of a written decision dated March 15, 2010, this court granted Yoko's request for injunctive relief finding she had satisfied the requirements set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and denying Chung's request to dismiss the complaint. As such, this court

[2] Yoko argued this relationship probably started before 2005 and, more pertinently, was already ongoing when Hirokazu executed the change of beneficiary in 2004, but was unable to adduce any evidence to support this supposition.

[3] As detailed below, Chung's counsel provided an informal accounting of the proceeds on March 25, 2010, and represented in a letter to the court dated March 12, 2010, Chung had $1 million in a CD.

ordered the $1 million held in a CD by Chung be placed in escrow to be held by her counsel, who was to provide an accounting as to the remaining $1.5 million. The request to post a bond was denied.

In accordance with the court's directive, an accounting was provided by Chung's counsel which set forth of the exhausted $1.5 million: $650,000 was used to purchase equipment and for construction work for Swan U.S.A., Inc. ("Swan"), the parent company for Sik Gaek Restaurant in Flushing, New York, owned by Chung and her current husband; $240,000 was used to purchase a grocery store in Flushing, New York, which was subsequently closed; $160,000 was used to purchase a Karaoke business several store fronts from the grocery store, which was also subsequently closed; $70,000 was used for Chung's daughter's college tuition; $300,000 for a condominium in Los Angeles, California; and $70,000 for living expenses. Of the $1 million held in the CD, Chung was planning to allocate $800,000 towards the purchase of a house. By way of the written decision dated May 14, 2010, this court granted Yoko's request for additional injunctive relief, ordering Chung to escrow the deed to the condominium and the shares of Swan, and prohibited any encumbrance, transfer, assignment or utilization of the same.

Meanwhile, on April 14, 2010, Yoko's counsel filed an amended verified complaint adding Choi as a co-defendant and alleging Chung and Choi conspired to secure a change of the beneficiary in the decedent's life insurance policy. A series of procedural machinations followed Choi's entry into the case, including a removal to federal court, a precise detailing of which is not necessary at this time. Suffice it to say,

on April 4, 2011, the court executed an order accepting, nunc pro tunc, Choi's answer, which was initially filed in the United States District Court for the District of New Jersey.

In the meantime, on March 11, 2011, Chung's counsel filed a motion to dismiss the complaint for failure to provide discovery and to vacate the court's order, as per its written decision dated May 14, 2010, and thereafter memorialized by way of the order dated January 27, 2011, for the sequestration of her assets. Choi opposed the motion in as far as Chung sought to vacate the order sequestering her assets; she took no position as to whether the complaint should be dismissed for failure to provide discovery. Counsel for Yoko opposed both aspects of the motion, which the court denied for the reasons set forth in its written decision of April 21, 2011.

Finally, the instant motions for summary judgment were filed by counsel for Choi and Chung on November 2, 2011, and November 9, 2011, respectively. Yoko's counsel filed opposition on November 30, 2011. Counsel for defendants each filed replies on December 5, 2011. Essentially, Choi argues Yoko has no knowledge of any facts underlying the allegations set forth in her complaint; Yoko's complaints are based solely on speculation; and therefore she cannot competently show a genuine issue of material fact exists, rendering summary judgment appropriate. Chung argues likewise. Additionally, Choi asserts Yoko's failure to serve an expert report and serve and file an affidavit of merit mandates summary judgment be granted on Yoko's claims of negligence and breach of fiduciary duty against her.

Yoko argues she need not have personal knowledge of all the events relevant to this action; Hirokazu was a poor English-speaker who trusted the people with whom he

surrounded himself; Hirokazu had repeatedly told her the life insurance proceeds would be available to provide for her, their family, and his businesses; and, in sum, the record reflects numerous genuine issues of material fact sufficient to render summary judgment improper. Yoko also contested the need for either expert testimony or an affidavit of merit.

Legal Analysis

Motions for summary judgment are controlled by R. 4:46, which states in pertinent part:

> The judgment or order sought shall be rendered forthwith if the pleadings . . . together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require the submission of the issue to the trier of fact.
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> [R. 4:46-2(c).]

The seminal New Jersey case interpreting R. 4:46-2 is Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). In Brill, the Supreme Court of New Jersey held when deciding a motion for summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party and considering the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issues in favor of the non-moving party. Id. at 523.

As such, the court must first interpret the facts in the light most favorable to the non-petitioner. Second, should material facts be legitimately in question, the motion must be denied.

As will be seen, by and large, the thrust of defendants' motions is overbroad. That is, the burden of the non-moving party at the summary judgment stage is merely to show a genuine issue of material fact exists. The non-moving party need not prove her case when opposing a summary judgment motion. In like manner, it is not for the court, at this stage, to determine which version of the facts it deems more likely. Rather, each party must meet its burden of proof, as applicable, only at the time of trial, which is when the fact-finder, here the court, appropriately makes credibility determinations.

Defendants' emphasis on Yoko's theories as being implausible or incredible at this time is inapposite and unavailing. Similarly, defendants' bald assertions their versions of the facts are correct provide no basis to grant summary judgment in their favor. Simply put, the court is not called upon to determine the likelihood of success of plaintiff's claims at the time of trial. That said, from the extensive papers before the court, it appears safe to surmise plaintiff faces significant hurdles when, and if, the time of trial arrives. It is clear, though, genuine issues of material fact exist. Accordingly, defendants' motions for summary judgment are denied as to plaintiff's claims of undue influence, fraud, fraud in the inducement, civil conspiracy, unjust enrichment, and conversion; summary judgment is granted on plaintiff's claims of liability of a life insurance beneficiary, constructive trust, purchase-money resulting trust, breach of fiduciary duty, and negligence.

Counts Common to Both Defendants

Undue Influence

"'Undue influence' has been defined as 'mental, moral or physical' exertion which has destroyed the 'free agency of a testator' by preventing the testator 'from following the dictates of his own mind and will and accepting instead the domination and influence of another.'" Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981) (quoting In re Estate of Neuman, 133 N.J. Eq. 532, 534 (E. & A. 1943)); Pascale v. Pascale, 113 N.J. 20, 30 (1988). The doctrine "afford[s] donors protection against their voluntary actions, the import of which they may not have fully understood." In re Estate of Penna, 322 N.J. Super. 417, 423 (App. Div. 1999) (citing Bronson v. Bronson, 218 N.J. Super. 389, 392 (App. Div. 1987)). To prove undue influence the movant must meet the two-fold burden of showing 1) the donor-decedent and donee shared a confidential relationship; and 2) suspicious circumstances existed. In re Estate of Stockdale, 196 N.J. 275, 303 (2008).[4] If the contestant of the will, or will substitute, can show these elements, the burden shifts to the proponent to overcome the presumption of undue influence; normally, the proponent must do so by a preponderance of the evidence, but in certain circumstances, the more rigorous clear and convincing standard must be met. Ibid.; Haynes, supra, 87 N.J. at 177-81.

A confidential relationship exists where "trust is reposed by reason of the testator's weakness or dependence or where parties occupied relations in which reliance

[4] Generally, this construct is utilized in analyzing a testamentary bequest or inter-vivos gift. Whether the instant construct falls within same is not decided herein as defendants have not asserted the beneficiary designation is not a testamentary bequest.

is naturally inspired or in fact exists." Haynes, supra, 87 N.J. at 176 (quoting In re Estate of Hopper, 9 N.J. 280, 282 (1952)). The suspicious circumstances "need be no more than 'slight'" in order to shift the burden to the proponent of the transfer. Ibid.; Estate of Stockdale, supra, 196 N.J. at 303. Generally, whether the contestant has sufficiently demonstrated these elements is a question best left for the finder of fact. In re Livingston's Will, 5 N.J. 65, 73 (1950) ("Each case of this nature must be governed by the particular facts and circumstances attending the execution of the will and the conduct of the parties who participated in order to determine if the coercion exerted was 'undue.'"); see also In re Will of Liebl, 260 N.J. Super. 519, 527-28 (App. Div. 1992), certif. den. 133 N.J. 432 (1993).

This case does not depart from the general rule, as an examination of the parties' arguments reveals genuine fact issues as to whether the elements of undue influence are met. Evaluating the facts, as the court must, in the light most favorable to Yoko, it has not been established conclusively neither defendant exerted undue influence over Hirokazu. First, there is a question whether confidential relationships existed between Hirokazu and Choi and Hirokazu and Chung. As for Choi, in addition to being his long-time friend, she was Hirokazu's insurance agent; they thus shared a relationship wherein, by definition, Hirokazu relied on Choi and placed his trust in her to act on his behalf. See Triarsi v. BSC Group Servs., 422 N.J. Super. 104, 115 (App. Div. 2011) (quoting Aden v. Fortsh, 169 N.J. 64, 78-79 (2001)) ("The import of the fiduciary relationship between the professional and the client is no more evident than in the area of insurance coverage. Insurance intermediaries in this State must act in a fiduciary capacity to the client because

of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies.") (internal quotations and alterations omitted).[5] There thus exists at least a genuine issue as to whether Choi and Hirokazu shared a confidential relationship.

Chung was Hirokazu's long-time employee and, by all accounts, acted as his "right hand." He relied on her heavily to run his business; she paid company bills, signed checks on Hirokazu's behalf, opened mail, and may have assisted in any language barriers that may have existed for Hirokazu. They seem to have shared a close relationship, which at some point, though apparently after the change of beneficiary occurred, evolved into a romantic one. This is not to say, however, at the time the change of beneficiary form was executed the relationship between Chung and Hirokazu necessarily differed significantly from the usual relationship between a "general manager"-type employee and her employer. Indeed, as the typical cases of undue influence involve family or fiduciary relationships, the type of relationship existing between Chung and Hirokazu – a mixture of friendship and business relationship, plus a subsequent romantic relationship – may not squarely fit into the traditional "confidential relationship." Yet, Chung's sister aided Hirokazu in executing the change of beneficiary; perhaps, through or in concert with Choi, then, using her position of familiarity with Hirokazu, Chung acted to unduly influence him, at least as postulated by plaintiff. As it

[5] But see Weinisch v. Sawyer, 123 N.J. 333, 340 (1991) ("An insurance agent owes a fiduciary duty to the insurance company and acts not for the insured but for the insurer as its employee. An insurance broker, on the other hand, owes a duty directly to his or her principal, the insured.") (internal citations omitted). The distinction between "agent" and "broker," and the category into which Cho fits, have not been raised by any party, however, and so the court need not address those questions. Moreover, in the fact-sensitive inquiry of determining the existence of a confidential relationship, it is unlikely any technical distinction which may exist would be pivotal.

is defendants' burden at the summary judgment stage, the court will allow, in an abundance of caution and for purposes of this motion only, plaintiff to further explore this theory. Given the factual contentions, it cannot be said no rational fact-finder could find Hirokazu shared a confidential relationship with Chung.

An analysis of "suspicious circumstances" is therefore necessary. It appears the record is replete with possible "suspicious circumstances," all of which are matters of genuine factual dispute. Presumably, based on Yoko's theory, defendants took advantage of Hirokazu's alleged lack of understanding of the change of beneficiary transaction and his weak English-speaking ability. This purported limitation is hotly contested by the parties with deposition testimony supporting each side. Yoko also places great emphasis on the words "Key employee," which were written next to Chung's name on the change of beneficiary form. It is clear a fact issue exists as to what Hirokazu took these words to mean. Did he understand them to mean the proceeds were to be used on behalf of the company or, did he intend the proceeds for Chung's personal use as a reward for being a "Key employee"? Moreover, even if the latter, reasonable minds may differ as to whether the idea to "reward" Chung was Hirokazu's own or defendant(s) acted to overbear his will in deciding to leave her such ample recognition. It is also undisputed the phrase "key employee" is a term of art in the insurance industry. Choi testified at her deposition policies exist allowing a company to insure the life a "key employee." Such a policy pays the insurance proceeds to the company upon the employee's death. Whether this possible meaning of the phrase "Key employee" added to any possible confusion Hirokazu may have experienced with regards to the change of beneficiary is not clear.

Even further, there appears to be no compelling reason to include the phrase "Key employee" in the first place if, as defendants claim, Hirokazu intended to gift the proceeds to Chung for her personal use.[6]

Also, while not necessarily improper, it can be argued Choi's role in changing the beneficiary of Hirokazu's life insurance policy to her own sister is "suspicious," especially when Choi concededly completed the entire form. There is also no written correspondence presented regarding the change of beneficiary or Hirokazu's desire to execute same. Furthermore, Chung's rapid dissipation of the funds after receipt may be considered suspicious; and while this "circumstance" obviously arose after the change of beneficiary, it may still give insight into Chung's own thoughts about her right to the proceeds.

In short, while Yoko's claim of undue influence is not, and need not be, proven, it is clear genuine issues of material fact exist. Defendants' motions for summary judgment on Yoko's claim of undue influence are accordingly denied.

Fraud and Fraud in the Inducement

"The five elements of common-law fraud are: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J.

[6] After oral argument, counsel for Choi and thereafter counsel for Chung forwarded to the court a legible copy of the change of beneficiary form, which provided instructions to enter the beneficiary's "relationship" to the insured. While this bolsters defendants' case somewhat, it still does not answer the question of why "Key employee" was written, as opposed to just "employee," or what the words "Key employee" meant to Hirokazu. Thus, again, while the instructions buttress defendants' arguments, they do not conclusively answer the questions of fact which exist.

582, 610 (1997) (citing Jewish Ctr. of Sussex Cnty. v. Whale, 86 N.J. 619, 624-25 (1981)). Unlike undue influence, where the defendant substitutes the donor's intentions with her own, causing the donor to act in a way which is only apparently voluntary, fraud occurs when the defendant simply tricks the donor into making an involuntary transfer, i.e., one the donor would not have made if the true state of the facts were made known to him. Also unlike undue influence, fraud must be proven by clear and convincing evidence. Albright v. Burns, 206 N.J. Super. 625, 636 (App. Div. 1986) ("Fraud of course is never presumed; it must be clearly and convincingly proven."). Fraud in the inducement does not differ materially from common-law fraud, as it provides a cognizable basis for equitable relief in the event a false promise induced reliance. See Lipsit v. Leonard, 64 N.J. 276, 283 (1974) (quoting William Prosser, Torts § 109 at 728-29 (4th ed. 1971)) ("A promise, which carries an implied representation that there is a present intention to carry it out, is recognized everywhere as a proper basis for reliance . . . . [A]nd a promise without the intent to perform it is held to be a sufficient basis for an action of deceit or for restitution or other equitable relief.").

The disposition of a fraud claim is ordinarily not appropriate at the summary judgment stage. See Pressler & Verniero, Current N.J. Court Rules, comment 2.3.4 on R. 4:46-2 (2012) ("The motion [for summary judgment] should ordinarily not be granted where an action or defense requires determination of a state of mind or intent, such as claims of waiver, bad faith, fraud or duress."). Once again, this case is no different. Yoko asserts Choi committed fraud by writing the words "Key employee" next to Chung's name on the change of beneficiary form; in so doing, goes the argument, Choi

knew Hirokazu would understand these words to mean Chung would use the proceeds in her capacity as a "Key employee," i.e., not for her personal use but for the benefit of the company, even though Chung never so intended. Finally, it is argued, Hirokazu's relationship with defendants and his language limitations rendered his reliance on the implied assertion entirely reasonable, and it is this reliance which permitted the insurance proceeds to pass to Chung instead of Parisienne and/or Yoko.

The nature of a fraud claim makes it very difficult for the moving party to demonstrate there are no genuine issues of material fact. While the court recognizes plaintiff's resort to the record in citing specific facts in support of her fraud claim may appear less than compelling, it cannot be said defendants have carried their difficult burden at this time. Cf. Shelcusky v. Garjulio, 172 N.J. 185, 199-200 (2002) (quoting Brill, supra, 142 N.J. at 540) ("If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that 'there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.'") (emphasis added). For purposes of summary judgment, and, again, viewing the facts in the light most favorable to Yoko, as the court must, the reason for writing "Key employee" has not been adequately explained; nor has the significance of those words to Hirokazu. Keeping in mind it is defendants' burden to show an absence of genuine issue of material fact, the infirmities in plaintiff's resort to the record are not

so glaring as to warrant summary disposition on plaintiff's fraud claim.[7] Accordingly, summary judgment on plaintiffs' fraud claims is denied.

Civil Conspiracy

Similarly, the record is not sufficiently clear to warrant summary judgment on plaintiff's claim of civil conspiracy:

> In New Jersey, a civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage."
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> [Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005) (quoting Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div.1993), certif. denied, 135 N.J. 468 (1994)).]

Admittedly, evidence of an outwardly expressed agreement is not conspicuous in the record. As explained by the Court in Banco Popular, however, "[i]t is enough [for liability] if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." Ibid. (quoting Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988)) (emphasis added). "Most importantly," the Court continued, "the 'gist of the claim is not the unlawful agreement, but the underlying wrong which, absent the conspiracy, would give a right of action.'" Id. at 177-78 (quoting Morgan, supra, 268 N.J. Super. at 364). Importantly, relevant to this case, "a creditor in New Jersey may bring a claim against one who assists another in executing a fraudulent transfer." Id. at 178.

[7] It goes without saying the outcome may be different at trial, when plaintiff must prove her claim by clear and convincing evidence.

It is evident, then, while some agreement must be shown, liability for participation in a civil conspiracy rests more on the misdeeds of the actors than the lucidity of the script they were following. Here, whether the wrong be colorable as a claim for undue influence or fraud, there is sufficient evidence, for purposes of resisting summary judgment, to show the two defendants acted in concert and with the purpose of bringing about the change of beneficiary, even if the agreement was only implicit. As recipient of the proceeds, and apparent close confidant of the donor, Chung's role in a possible civil conspiracy may be easily understood. Choi's role may be gathered from the fact she executed a change of beneficiary in favor of her sister, despite only two years prior procuring the initial policy which benefited Hirokazu's business and/or his wife; under this theory, Choi may have entered into an implicit agreement to procure the proceeds for Chung without regard for Hirokazu's true intentions.

Overall, once again, it cannot be said only one possible outcome on this claim can be envisioned at this time. In bringing their motions for summary judgment, defendants had to be prepared to demonstrate there was no genuine issue of material fact on a given claim. As they are unable to do so with regards to civil conspiracy, their motions for summary judgment on this count are denied.

Counts Unique to Chung

Unjust Enrichment and Conversion

A cause of action for unjust enrichment lies where "defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). As plaintiff cites, "[c]ommon-law conversion is

'the exercise of any act of dominion in denial of another's title to the chattels or inconsistent with such title.'" Lembaga Enters. v. Cace Trucking & Warehouse, 320 N.J. Super. 501, 507 (App. Div. 1999) (quoting Mueller v. Technical Devices Corp., 8 N.J. 201, 207 (1951)). Obviously, if Chung obtained the change of beneficiary through either undue influence or fraud, her possession of the funds would be unjust and in denial of, or inconsistent with, plaintiff's lawful rights. Therefore, given the factual disputes present in this case, and for the same reasons stated with regard to the above causes of action, Chung's motion for summary judgment on plaintiff's claims of unjust enrichment and conversion is denied.

Liability of a Life Insurance Beneficiary

Sano asserts Chung is liable under Section 2206 of the Internal Revenue Code, which provides:

> Unless the decedent directs otherwise in his will, if any part of the gross estate on which tax has been paid consists of proceeds of policies of insurance on the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the taxable estate.
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> [26 U.S.C.A. § 2206.]

Sano's claim very well may have merit; or it may not. The claim, however, is not pertinent to her underlying causes of action, and therefore the court will not address it further. That is, this is not an action to administer an estate, wherein the court would determine the appropriate party to pay taxes and the appropriate amount to be paid. This is an action to determine whether the change of beneficiary came about by some unlawful

means. Simply put, the issue of who pays the taxes on the proceeds is not properly before the court. Accordingly, Chung's motion for summary judgment on this claim is granted.

Constructive Trust and Purchase-Money Resulting Trust

"[A] constructive trust is a powerful tool to be used only when the equities of a given case clearly warrant it." Flanigan v. Munson, 175 N.J. 597, 611 (2003) (emphasis added). "Generally, courts are authorized to impose a constructive trust wherever specific restitution in equity is appropriate on the facts. Such a trust is designed to prevent unjust enrichment and force a restitution to the plaintiff of something that in equity and good conscience [does] not belong to the defendant." Id. at 608 (internal citations and quotations omitted). Constructive trust is a remedy, rather than a cause of action in itself. Recognizing the court allowed the "claim" of constructive trust to survive Chung's motion to dismiss, as no further evidence has come before the court verifying the nature of the constructive trust as a cause of action, Chung's motion for summary judgment on plaintiff's "claim" for a constructive trust is granted. The "remedy" remains available.

In like manner, Chung's motion for summary judgment on plaintiff's "claim" for a purchase-money resulting trust is granted. As with the constructive trust, it is unclear a purchase-money resulting trust is a cause of action rather than a remedy. In re Estate of Rauch, 167 N.J. Super. 497, 500-01 (App. Div. 1979) (citing Weisberg v. Koprowski, 17 N.J. 362, 371 (1955)) ("It is well settled that a resulting trust will be declared in favor of

the one paying the purchase price of property transferred to another unless it is shown that the one paying the price did not so intend.").

Counts Unique to Choi: Breach of Fiduciary Duty and Negligence

Choi's motion for summary judgment on Sano's claims of breach of fiduciary duty and negligence must be granted given Sano's failure to produce an expert report or an affidavit of merit.[8] While Sano argues her claims are not in the nature of malpractice, and there is therefore no need for either of these filings, an examination of Sano's amended complaint demonstrates both claims rest on Choi's alleged failure to adequately advise Hirokazu of the effect of changing the beneficiary of the policy to Chung. That is, Sano argues Choi "should have" acted in a certain manner in her capacity as a professional. It cannot be clearer, then, her two causes of action assert the same claim for professional malpractice.

Our Supreme Court has noted:

> It is not the label placed on the action that is pivotal but the nature of the legal inquiry. Accordingly, when presented with a tort or contract claim asserted against a professional specified in the [affidavit of merit] statute, [N.J.S.A. 2A:53A-27,] rather than focusing on whether the claim is denominated as tort or contract, attorneys and courts should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to that specific profession. If such proof is required, an affidavit of merit is required for that claim, unless some exception applies.
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> [Couri v. Gardner, 173 N.J. 328, 340 (2002).]

[8] The court notes Choi did not list Sano's failure to file an affidavit of merit as an affirmative defense in her answer, though she did seek leave to move for dismissal on the issue at the status conference held on August 3, 2011, which the court granted in its case management order of the same date. No report followed, and, accordingly, there need be no exploration of time limitations that may be implicated.

Sano claims Choi should have advised Hirokazu the change of beneficiary as written would result in Chung receiving the proceeds for her own personal use. Success on this claim requires proof there exists "a deviation from the professional standard of care." Ibid. There is no competent evidence a competent insurance agent would or should have so informed Hirokazu or done any of the other acts Sano asserts Choi needed to have done in order to discharge her duty, such as discussing the change of beneficiary in person. It is for this purpose courts require expert testimony in malpractice cases. Rosenberg v. Cahill, 99 N.J. 318, 325 (1985) (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961)) ("It is generally recognized that in the ordinary medical malpractice case 'the standard of practice to which [the defendant-practitioner] failed to adhere must be established by expert testimony,' and that a jury generally lacks the 'requisite special knowledge, technical training and background to be able to determine the applicable standard of care without the assistance of an expert.'"); see also N.J.R.E. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

Plaintiff's resort to the common knowledge doctrine is of no avail. This doctrine allows plaintiffs in a malpractice action to "present triable issues without resort to the testimony of an expert. In such a case the jury itself is allowed 'to supply the applicable standard of care and thus to obviate the necessity for expert testimony relative thereto.'" Rosenberg, supra, 99 N.J. at 325 (quoting Sanzari, supra, 34 N.J. at 141). Significantly,

"it is the unusual professional malpractice case in which the common knowledge doctrine can be invoked," as it was intended to apply in "situations where the carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience." Ibid. The doctrine has applied in such cases of a dentist pulling the wrong tooth, Steinke v. Bell, 32 N.J. Super. 67, 70 (App. Div. 1954), or a physician failing to inform a patient of a needle left in the patient's body after a medical procedure, Tramutola v. Bortone, 118 N.J. Super. 503, 512-13 (App. Div.1972). Clearly this is not such a case.

Nor does the court find persuasive, or apt, plaintiff's reliance on Bates v. Gambino, 72 N.J. 219, 225 (1977), a case in which the common knowledge doctrine applied as the broker's negligence was found in his failure to be aware of temporary coverage immediately available to the plaintiffs, which would have covered the losses they sustained prior to the effective date of their policy. Bates, supra, 72 N.J. at 222-23. This lack of knowledge meant the defendant did not possess the minimum "necessary skill and knowledge required of one who holds himself out to the public as an insurance broker." Id. at 223. As the standard for a broker in this situation had already been set, no expert testimony was needed to state what standard should be applied. Id. at 225-26. Again, as there is no evidence before this court to the effect Choi's alleged conduct was negligent as a matter of law, as in Bates, an expert would be needed; plaintiff has failed to provide an expert report, and so her claims of breach of fiduciary duty and negligence – which amount to malpractice claims – must be dismissed. Choi's motion for summary judgment on these counts is accordingly granted.

Secondarily, as discussed above, plaintiff's claims clearly sound in professional malpractice, and an insurance producer is a "licensed person" for purposes of the Affidavit of Merit Statute. See N.J.S.A. 2A:53A-26(o), -27. As such, plaintiff was required to submit an "affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." N.J.S.A. 2A:53A-27. The affidavit is to be submitted within sixty days of the filing of an answer, and one, and only one, additional sixty-day period may be granted to allow for the filing of an answer. Ibid. Choi's answer was accepted, as filed, on April 4, 2011. Even giving plaintiff the benefit of the doubt she was not then on notice of the need for an affidavit of merit, the court, on August 3, 2011, permitted Choi to file a motion to dismiss for failure to file an affidavit of merit. The requisite 120-day period has thus expired, and plaintiff has not filed an affidavit of merit and indeed, during and subsequent to oral argument, denied the need to do so.[9] On this ground, too, therefore, Choi's motion for summary judgment on plaintiff's claims of breach of fiduciary duty and negligence is granted.

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[9] The court rejects plaintiff's contention the scope of the Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, covering "personal injuries, wrongful death or property damage," is so limited as not to encompass the money damages she seeks. Nagim v. New Jersey Transit, 369 N.J. Super. 103, 118-19 (Law Div. 2003) (quoting Cornblatt v. Barow, 303 N.J. Super. 81, 81(App. Div.1997), aff'd, 153 N.J. 218 (1998)) ("Early jurisprudence under the [Affidavit of Merit Statute] has conclusively recognized that the 'property damage' language of the statute includes a claim for money damages. . . . 'The right or claim to "money damages … is a property right … beyond question."'").

Perhaps more importantly, it is discouraging, after having read thousands of pages of briefs and exhibits, subsequent to oral argument counsel saw fit to submit the following: 1) a letter from plaintiff's counsel arguing it was "entirely possible" Choi was not a licensed insurance producer at the relevant times, questioning the sufficiency of the license Choi purportedly did have, and attaching a Bulletin from the State Department of Banking and Finance detailing the requirements to be fulfilled in order to be deemed "licensed"; 2) a response letter from Chung's counsel, who, although the affidavit of merit issue does not

Conclusion

Under plaintiff's best case, she will be able to show Hirokazu had little or no proficiency with the English language; he was a very trusting individual; Chung was a valued and "key" employee in whom he reposed total trust; and because of his limitations with the English language and his trusting nature, he, in effect, turned over all administrative matters of the various businesses to Chung. Plaintiff will then attempt to show the two sister-defendants conspired to effectuate the change of beneficiary, inserting the words "Key employee" to wrongfully induce Hirokazu to think the money would be used by Chung as an employee for purposes of the businesses. Plaintiff will, in all likelihood, rely on the fact it is the rare employer who gives even a trusted employee $2.5 million for her efforts expended over approximately a decade. In short, as plaintiff urged at oral argument, she will seek to cast Hirokazu as a "simple baker," not a sophisticated businessman, who insulated himself in a world of Japanese speakers, with the apparent exceptions of Chung and a few others, and who was taken advantage of as a result of the trust he placed in others.

The court remains mindful of defendants' arguments concerning the purported deficiencies in plaintiff's "theory" and, more specifically, her inability to point to specific facts in the record in opposing defendants' motions for summary judgment. These,

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pertain to his client, felt "obliged" to correct plaintiff's counsel's supposed misstatement of the law; and 3) a response from Choi's counsel, who, after requesting the court consider the letter, argued plaintiff's counsel's letter was improper, incorrect, and, even if correct, still unavailing due to Yoko's failure to provide an expert report. Suffice it to say, all such submissions are improper. As such, the court makes no finding with regards to plaintiff's contentions Choi has not proven she was properly, if at all, licensed or genuine issues of material fact exist in connection with this issue.

however, are defendants' motions for summary judgment, and the burden on movants is clear.

Based on the foregoing, defendants' motions for summary judgment are granted in part and denied in part. Plaintiff's counsel shall prepare and submit an appropriate order pursuant to the five-day rule.