11-10158-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REASSURE AMERICAN LIFE INSURANCE CO.,
Plaintiff-Appellee,

v.

MIRIAM ANDREONI, et al.
Defendant-Appellants,

v.

FEDERAL TRADE COMMISSION,
Intervenor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COUR

Reassure American Life Ins. Co. v. Andreoni, No. 11-10158-HH

APPELLEE FEDERAL TRADE COMMISSION'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1 and 28-1(b), the Federal Trade Commission ("FTC" or "Commission") certifies that, in addition to those persons and entities listed in the Certificate of Interested Persons filed by Appellants, the following persons or entities are known to have an interest in the outcome of this case or appeal:

Daly, John F.— FTC Deputy General Counsel for Litigation

Tom, Willard K.— FTC General Counsel

STATEMENT REGARDING ORAL ARGUMENT

Although the facts and procedural history are somewhat complex, the legal issues presented by this case are well-settled. The Federal Trade Commission does not think oral argument is necessary.

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STATEMENT OF JURISDICTION

This is an interpleader action, brought by an insurer seeking a determination of the rightful beneficiary of a life insurance policy. Sitting in diversity, the district court exercised jurisdiction under 28 U.S.C. § 1332.

The court below allowed the Federal Trade Commission ("FTC" or "Commission") to intervene in this action, D.70,[1] and subsequently ordered the Commission substituted for one of the private policy claimants, pursuant to a judgment the Commission received against that claimant in a law enforcement action, D.151. On summary judgment, the court awarded the policy proceeds to the Commission, standing in the shoes of that claimant. D.152. Final judgment for the FTC, disposing of all claims in this action, was entered on December 30, 2010. D.156.

Other claimants to the insurance proceeds noticed appeals on January 12, 2011, and January 28, 2011. D.157; D.159. This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] Docket entries are referred to as "D.xx".

STATEMENT OF THE ISSUES

1. Whether the court below properly granted summary judgment to the Commission, standing in the shoes of one of the policy claimants, when the other claimant was unable to support an essential element of its claim – that the original owner of the Policy made a written request to transfer ownership of the Policy.

2. Whether the district court properly granted the FTC's motion to intervene, when all prerequisites of Rule 24(a) were established.

STATEMENT OF THE CASE

A. Background

Reassure America Life Insurance Company, f/k/a,Valley Forge Life Insurance Company ("Reassure") initiated this interpleader action, asking the court below to identify the rightful beneficiary of a $2,000,000 insurance policy on the life of Anthony Rocco Andreoni ("Anthony"). Anthony died in March 2008. D.1, ¶ 12. Miriam Andreoni ("Miriam"), Anthony's wife, was one of three potential beneficiaries.

Both Anthony and Miriam were also defendants in *FTC v. American Entertainment Distributors, et al.*, No.04-22431-CIV (S.D. Fla.) ("*AED*"), an enforcement action in which the FTC alleged that Miriam, the now-deceased Anthony, and others, had violated [illegible] 17.760 in D0.065.0 Tc-0.060r-0.060r-0. TD(ot)00 0.0000athe n

[2] Appeal of this judgment is pending before this Court in *FTC v. Miriam Sophia Andreoni*,

that Damian Shomers a/k/a David Shomers ("Shomers"),[3] Anthony's business partner and co-owner of the nightclub they ran together, was the owner and primary beneficiary of the Policy when it was issued. *Id.* It was also undisputed that, as owner of the Policy, Shomers had the authority to change the beneficiary or ownership of the Policy by making a "written request" to the insurance company. D.1, Exh. A at 19-20, ¶¶ 3.31-3.36. There was, however, a three-way dispute as to whether and when he had done so.

Shomers was one possible beneficiary. In June 2008, Shomers claimed that he was the rightful beneficiary pursuant to the original terms of the Policy and that any subsequent changes purporting to name new beneficiaries were invalid. D.1, ¶ 14.

Miriam was another possible beneficiary. In October 2007, Reassure received a "Request for Change of Beneficiary Form" naming Miriam as the new, sole beneficiary. None of the parties below disputed that Shomer

[3] After Shomers' death, in December 2009, Bruce E. Warner, the court-appointed representative of the Shomers Estate, was substituted for Shomers. D.68; D.71. In this brief, we use "Shomers" to refer to positions taken by both David Shomers and Bruce E. Warner, on behalf of the Shomers Estate.

[4] *See* D.1, Exh. D. at 2, ¶ 6. The terms of the Trust provide that Miriam would become trustee if her parents cease to serve or are unable to act as trustees for anytn a

beneficiary of the policy. *Id.* at ¶ 10 & Exh. D. Reassure's confirmation of these changes was sent to the Trust, not to Shomers. *Id.* at ¶ 11 & Exh. E.

The purported signatures on the Change of Ownership form were critical to the Trust's claim. Under the term

[5] Shomers presented two additional arguments. First, Shomers asserted that, although not a defendant in *AED*, he was nonetheless subject to the asset freeze entered in that case, and was therefore not authorized to effect a change in beneficiary or to transfer ownership of the Policy. D.11, ¶ 46. Second, Shomers claimed that any transfer of ownership was invalid because it violated the terms of a 2003

Shomers died while the interpleader was pending, and was never questioned about his allegations, but his estate pursued this claim.[6]

2. The Position of Miriam and the Trust.

Miriam and the Trust claimed that the change in beneficiary naming Miriam was valid, but superseded by the December 2007 documents naming the Trust. D.10, ¶ 38. They did not offer, however, any direct evidence that Shomers took any action to transfer ownership to the Trust. *See* D.115. They conceded that Shomers did not sign the December 2007 change of ownership form, and provided no evidence that Shomers had authorized anyone else to sign the form on his behalf. D.115 at 16. Instead, Miriam and the Trust argued, Shomers' conduct in December 2007 and shortly after Anthony's death in March 2008 was consistent with Shomers having implicitly authorized the change, *id.* at 19, and Shomers'

Shareholders' Agreement entered into between DSG and its shareholders, Shomers and Anthony. *Id.*; *see also* D.13, ¶¶ 9-10.

[6] DSG Holding, Inc., ("DSG"), the company Shomers had owned with Anthony, joined Shomers' crossclaim against Miriam and the Trust. D.11. DSG, however, never moved to intervene. And although DSG likewise joined in the Notice of Appeal filed by Warner, *see* D.159, its counsel has withdrawn and no new counsel has filed an entry of appearance on its behalf. As a corporate defendant, it may not pursue its appeal unless represented by a licensed attorney. *See Palazzo v. Gulf Oil*, 764 F. 2d 1381, 1385 (11th Cir. 1985). DSG thus appears to have abandoned its appeal.

"overall pattern of conduct" before and after Anthony's death "confirmed his authorization to the change," *id.* at 16.

Unable to provide direct evidence that Shomers signed, authorized, ratified, or was even aware of the December 2007 forms, Miriam and the Trust argued that those contesting its claim instead should bear the burden of proving that the signatures on the form (of Shomers, and of the notary, Ronda O'Brien), were inserted with intent to defraud. *Id.* at 19.

In July 2009, Miriam, the Trust, and David Shomers reached a contingent settlement to resolve their competing claims to the Policy proceeds. Under the settlement, more than $1.3 million of the proceeds would have been paid to the Trust, and another $650,000 would be paid to DSG, the corporation owned by Anthony and Shomers. Miriam agreed to surrender her claim without receiving any of the Policy proceeds. D.54. The settlement was contingent upon multiple court approvals, which Miriam, the Trust, and Shomers never obtained.[7]

3. The FTC Intervenes and is Substituted for Miriam.

Prior to, and after, the purported settlement, the Commission moved to intervene to preserve its ability to collect on claim against Miriam resulting from

[7] The agreement was contingent upon approval by the district court, approval by the Florida probate court in charge of Anthony's estate, and vacatur of the preliminary injunction in *AED*. *See* D.56 at 7 (discussing D.54).

the *AED* enforcement action, including attachment of any proceeds rightfully payable to Miriam under the Policy. *See* D.37, D.56.

In moving to intervene, the Commission explained that the contested $2 million in Policy proceeds was "the largest asset potentially available" to Miriam to pay a $19 million judgment in *AED*, but that she had impaired the Commission's ability to reach this asset by urging "that the Court disregard her claim in favor of that of the Trust operated by her parents." D.37 at 3-4. But after the private parties announced they had reached a proposed settlement, the district court,"inadvertently" denied the Commission's first motion as moot, in a one page order that directed the Clerk to treat all pending motions as moot. D.53; D.70 at 3-4.

The Commission renewed its motion to intervene, noting that the parties' contingent settlement did not render its motion moot. D.56. Indeed, the proposed settlement, the Commission argued, offered further proof that Miriam's willingness to concede her interest in the proceeds in favor of the Trust would frustrate the Commission's ability to collect on any claim against her. *Id.*[8]

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[8] Contrary to Appellants' assertion, the Commission did not "refuse[] to participate" in the mediation that produced the contingent settlement. Initial Brief of Miriam and the Trust ("Br.") at 17. When the first mediation talks occurred, the Commission's motion to intervene was pending and all private parties opposed intervention. After the district court granted the Commission's renewed motion to

The district court granted the Commission leave to intervene, recognizing that, "[a]s it is clear that Miriam Andreoni will not argue that she is entitled to the insurance proceeds, it is clear that absent intervention by the FTC, those proceeds will not be available to pay any judgment in the *AED* litigation." D.70 at 5. [U]pon consideration," the court concluded, "the parties' purported settlement does not render the FTC's m

intervene and ordered a second round of mediation, the Commission did participate in mediation discussions. *See* D.70; D.99.

[9] Rule 24 provides that the court must grant a timely motion to intervene if the party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately protect that interest." Fed. R. Civ. P. 24(a)(2).

second factor – an interest in the property that was the subject of the suit – established, because the Commission had adequately pled an interest in the proceeds of the Policy (to the extent it was determined they belonged to Miriam), under the Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C. §§ 3301-08. D.70 at 5. The court agreed with the Commission that Miriam's relinquishment of her claim to the Trust controlled by her parents constituted a fraudulent transfer under the FDCPA and would prejudice the ability of the United States to recover any judgment against Miriam in the *AED* enforcement action. *Id.*; D.56 at 2-3.

With respect to the third factor – the prejudice that would be suffered by the Commission if the motion to intervene were denied – the district court recognized that disposition of the insurance proceeds in the interpleader action, might, as a practical matter, impair the FTC's ability to later obtain the monies. D.70 at 6. Finally, the court readily concluded that "none of the other parties adequately represent the FTC's interests [in] finding that Miriam is the rightful beneficiary." *Id.* "Ironically," the court observed, it was in Miriam's interest that the "proceeds go to the Trust controlled by her parents, so that they cannot be turned over as assets in the *FTC v. AED* litigation." *Id.* And, it was "certain

As noted earlier, this intervention ruling was effectively superseded when Miriam subsequently agreed to assign her claim to the Policy proceeds under the consent judgment resolving the Commission's claim against her in the *AED* enforcement action. Upon entry of the consent judgment in *AED*, the district court substituted the FTC for Miriam in this interpleader action, under Fed. R. Civ. P. 25(c). D.151.

4. Summary Judgment.

At the conclusion of discovery, Shomers and the FTC both moved for summary judgment. The district court ruled in the Commission's favor, concluding that Miriam was the rightful beneficiary of the Policy proceeds, denying Shomers' motion for summary judgment, and granting summary judgment to the Commission, which by then had been substituted for Miriam as a party under Fed. R. Civ. P. 25(c). D.152 at 5; 18; D.151.[10]

The court first resolved a threshold evidentiary issue, regarding Shomers' contention that his Verified Answer could serve as proof that the August 2007 change in beneficiary form was invalid. The court recognized that, in ruling on a

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[10] The court recognized that Miriam had assigned her rights as beneficiary under the Stipulated Final Order and Permanent Injunction entered in the *AED* enforcement action, and that the FTC's motion to substitute for Miriam in this case had been granted. D.152 at 5. Thus, the "FTC had the same standing to challenge the position of the Shomers Estate as Miriam Andreoni." *Id.*

motion for summary judgment, it could consider only evidence that would be available in an admissible form at trial. D.152 at 2 (citing *Macuba v. Deboer*, 193 F.3d 1316, 1322-25 (11th Cir. 1999); *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996)). The court determined that Shomers' Verified Answer, D.11 (the sole basis for Shomers' allegation that the designation of Miriam as beneficiary was invalid due to fraud or duress), was inadmissible hearsay, and that the residual exception to the hearsay rule did not apply, D.152 at 3-5.

Following a summary of the factual and procedural background, and recitation of the legal standards, *id.* at 6-13, the district court next addressed Shomers' claim that the January 2005 asset freeze entered in the *AED* litigation precluded recovery by any of the other claimants in the interpleader dispute. *Id.* at 13-15. The Commission, Miriam, and the Trust all argued that this claim was unfounded because the Policy was owned by Shomers and the asset freeze did not apply to his assets. D.108.[11] The court agreed, rejecting Shomers' argument that the *AED* asset freeze deprived him of his authority to change the beneficiary or the owner of the Policy. Shomers' assets were not frozen by the *AED* freeze order, the court noted, because Shomers was neither a defendant in that action, nor owned or

[11] Miriam and the Trust "fully adopt[ed] as their own" the Commission's argument against Shomers' claim based on the preliminary injunction in *AED*. *See* D.114 at 1 (referencing D.108); *see also* Br. at 22.

ownership of the policy, especially in light of the fact that the evidence shows that Shomers had named Miriam Andreoni as a beneficiary." *Id.*

In short, the "only admissible evidence," showed that the "transfer of policy ownership was not valid," and there was "no material evidence to dispute that evidence." *Id.* Under the terms of the Policy, "absent a transfer of ownership to the Trust, the Trust could not change the beneficiary." *Id.* The FTC, standing in Miriam's shoes, was therefore entitled to summary judgment, as "the undisputed admissible evidence before this Court shows that Miriam Andreoni is the rightful beneficiary." *Id.* at 17-18.

STANDARD OF REVIEW

This Court considers de novo a grant or denial of summary judgment, applying the same legal standards as the district court. *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305, 1313 (11th Cir. 2010). Summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). When there is "a complete failure of proof concerning an essential element of the nonmoving party's case," summary judgment is

Dispositions of motions to intervene are reviewed de novo, *Purcell*, 85 F.3d at 1512, but a district court's decision regarding the timeliness of the motion is reviewed for abuse of discretion, *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1477 (11th Cir. 1993), *abrogated on other grounds by Lance v. Coffman*, 549 U.S. 437 (2007). "Once a party establishes all the prerequisites to intervention, the district court has no discretion to deny the motion." *United States v. State of Ga.*, 19 F.3d 1388, 1393 (11th Cir. 1994).

SUMMARY OF ARGUMENT

The district court's determination that Miriam was validly designated as the rightful beneficiary of the Policy in August 2007 stands unchallenged. On appeal, the core issue is thus whether the district court properly concluded that the Trust had no evidence to support its claim that, in December 2007, Shomers made a written request to transfer ownership of the Policy to the Trust.

The FTC, standing in Miriam's shoes, was entitled to summary judgment due to the Trust's complete failure to support its case with evidence. The Trust failed to produce any evidence that Shomers ever signed the December 2007 transfer of ownership form upon which the Trust's claim hinges, that he authorized anyone to sign on his behalf, or that he was even aware of the

document prior to Anthony's death. Without a valid transfer of ownership, the Trust had no right under the Policy to name itse

enforcement action. Nor do they deny that the prerequisites of Rule 24 were established. Indeed, they do not even mention Rule 24.[14] Instead, Appellants cry waiver. They argue that the Commission's position below – that the asset freeze order in *AED* did not prohibit changes in the ownership or beneficiary of the Policy – is inherently inconsistent with the fraudulent transfer theory underpinning the FTC's motion to intervene. Br. at 27, 53-59. But in so doing, Appellants mischaracterize the Commission's position below, and ignore the limits of the *AED* freeze order. The Commission was not inconsistent. Because the Commission established all the prerequisites under Fed. R. Civ. P. 24(a), the district court was obligated to grant its motion to intervene. *(Part II)*

[14] *See* Br. at 53-59 (Part III, which was adopted in its entirety by appellant Bruce E. Warner).

ARGUMENT

(quoting *O'Brien v. McMahon*, 44 So. 3d 1273, 1277 (Fla. 1st DCA 2010)). There was no dispute among the parties that "Shomers needed the intent to change the beneficiary or transfer ownership in order for those documents to be valid." D.152 at 16. But, under Florida law, the contractual provisions of an insurance policy must be strictl

[15] Although the change of ownership form includes a space for notarization (as does the change of beneficiary form), the Policy does not require that a notary validate a written request to change beneficiary or ownership.

terms of contract betw

designated presumptive guardians, because the contractual requirements under the Policy had been satisfied. *Id.* at 1279-81. In this case, however, there is no evidence that Shomers ever exe(is uust prov3licy)Tj35.8800 0s0 rgon42l9.200400 0.urance com

[16] Miriam and the Trust provide no support for the proposition that the mere ministerial act of processing a document by an insurance company provides an automatic imprimatur of validity to the contents of that document. The terms of the Policy mandated that only the owner had authority to transfer ownership, and there is no evidence that Shomers ever exercised his authority to do so. Filing of an

purported failure to react to a passing statement that the Trust might make a claim on the Policy, a statement that we cannot be sure he even heard, is no proof that he transferred ownership of the Policy to the Trust. As the court below recognized, Shomers had no particular reason to react at all; having already given up his beneficial interest in the Policy, he was presumably indifferent to its disposition. In any event, the Policy, by its terms, did not permit transfer of ownership through silent acquiescence. Only a written request, signed by the owner of the Policy, sufficed. See D.1, Exh. A., ¶ 3.36 (changes in assignment, beneficiary, and ownership of the policy are not binding "unless made by Written Request").

Finally, it bears repeating that no party, *not even the Trust*, vouched for Shomers' signature on the December 2007 transfer of ownership form.[17] Unable to verify Shomers' signature, the Trust failed to prove its case. The FTC bore no burden, therefore, to prove forgery of a signature that no one was willing to verify, or to otherwise disprove a claim that the Trust was unable to support with admissible evidence. On summary judgment, a non-moving party cannot

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interpleader action does not waive an insurance company's "binding contract provisions." *Brown*, 448 So. 2d at 562.

[17] Although Miriam and the Trust baldly assert on appeal that "[t]he request was signed by Shomers," Br. at 30, they expressly declined to make such a claim below, and provide no record support for this assertion. They similarly state, also without support, that the insurer found the request to be "satisfactory." *Id.*

compensate for

The FDCPA did not provide the Commission with an "alternative theory" on the merits. *Cf.* Br. at 46. Rather, the FDCPA served as a procedural vehicle to support the Commission's intervention *before* substitution of the Commission for Miriam. D.56 at 2-3, 9-11. It likewise provided a ground on which the court below could retain the funds pending final judgment in *AED*. D.104 at 14-15. Because the *AED* judgment, (and attendant assignment of Miriam's interest) was entered, and the Commission was substituted for Miriam under Rule 25(c) prior to summary judgment, no FDCPA issues remain to be resolved.

II. The district court properly granted the FTC leave to intervene because the Commission had established all the prerequisites to intervention in Rule 24(a).

The Court need not rule on the propriety of the district court's order granting the Commission leave to intervene, because summary judgment was granted to the FTC not as intervenor, but as the direct assignee of Miriam's claim. If this Court nonetheless chooses to review the propriety of the district court's intervention order – even though it was effectively superseded when the Commission was substituted for Miriam under Rule 25(c) – it should affirm.

To intervene as a matter of right under Fed. R. 24(a)(2), a proposed intervenor must show that: (1) the intervention application is timely; (2) an interest exists relating to the property or transaction which is the subject of the action; (3)

disposition of the action, as a practical matter, may impede or impair the ability of the intervenor to protect that interest; and, (4) the intervenor's interests are inad

[18] To the extent that Miriam and the Trust might be deemed to dispute the fraudulent transfer property interest underpinning the Commission's motion to intervene by contesting its factual predicates, *see* Br. at 51-53, such arguments fail. For purposes of deciding a motion to intervene, the district court must accept the allegations of the FTC's proposed pleading as true. *Mendenhall v. M/V Toyota Maru, No. 11*, 551 F.2d 55, 56, n.2 (5th Cir. 1977).

estopped from intervening is based on a series of mistaken premises and mischaracterizations of the proceedings below. Appellants erroneously characterize the FTC's motion to intervene as alleging that Miriam was responsible for the c

CONCLUSION

For the reasons set forth above, the district court's judgment should be affirmed.

Respectfully submitted,

Willard K. Tom
General Counsel

John F. Daly
Deputy General Counsel for Litigation

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CERTIFICATE OF COMPLIANCE

I certify that Appellee's Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 6,825 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Corel WordPerfect word processing program in 14-point Times New Roman font.

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch
Attorney for Appellee,
Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2011, I sent for fili