

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 08-22664-CIV-MARTINEZ/BROWN

REASSURE AMERICA LIFE INSURANCE
COMPANY
f/k/a Valley Forge Life Insurance Company,

Plaintiff,

v.

DAMIAN SHOMERS a/k/a David Shomers;
MIRIAM SOFIA ANDREONI;
NADIA SMOLYANSKI,
Co-Trustee of the Anthony Andreoni Irrevocable
Trust; and
PETER SMOLYANSKI,
Co-Trustee of the Anthony Andreoni Irrevocable
Trust,

Defendants;

FEDERAL TRADE COMMISSION,

Intervenor.

First, summary judgment should be entered against the claim presented by the Anthony Andreoni Irrevocable Trust (“Andreoni Trust”) because its claim is based on a forged document. The Trust’s claim rests on a December 2007 change of ownership form purportedly signed by David Shomers. The Trust, however, cannot authenticate the signature of David Shomers or overcome the evidence that the notary’s signature on the document was forged. Because establishing the authenticity of this form is essential to the Andreoni Trust’s claim, the claim cannot survive summary judgment.

Second, summary judgment should also be entered against the claim presented by the estate of David Shomers (the “Shomers Estate”) because the Shomers Estate has no admissible evidence to support its contention that a change in beneficiary form that was signed by Mr. Shomers in August 2007 is the product of fraud or duress. In the disputed form, Mr. Shomers exercises his right under the policy to designate Miriam Andreoni—the wife of the insured, Anthony Andreoni—as the beneficiary. There is no genuine dispute that the change in beneficiary form was signed by Mr. Shomers. However, after Mr. Andreoni died, David Shomers asserted that he was improperly induced to sign the document. Mr. Shomers died in December 2009, and the Shomers Estate has failed to identify any admissible evidence that could prove at trial that the form in which he named Miriam Andreoni as beneficiary is void because of fraud or coercion.

Finally, the material facts relating to the FTC’s claim that the \$2 million should not be released to Miriam Andreoni because of the debt that she owes to the FTC are also not in genuine dispute. In a separate action pending in this Court, *Federal Trade Commission v. American Entertainment Distributors, Inc.*, C.A. No. 04-22431-CIV-Martinez, (*FTC v. AED*”), the Commission has a claim against Miriam Andreoni for \$19.2 million in consumer losses arising from her participation in the deceptive sale of business opportunities. In March 2010,

this Court granted the FTC's motion to intervene in this action for the purpose of preventing Miriam Sophia Andreoni from placing the \$2 million of insurance proceeds beyond the FTC's reach by fraudulently conceding her own claim in favor of the claim by the Andreoni Trust. Miriam Andreoni has defaulted in response to the FTC's complaint and, moreover, the evidence showing that the Trust's claim is unsupported confirms that Miriam Andreoni's effort to thwart the FTC's interest in these funds by conceding her claim was unlawful. To protect the FTC's interest in reaching the \$2 million in insurance proceeds payable to Miriam Andreoni as beneficiary of the life insurance policy, the Court should not release the funds—which have been

Interpleader ¶¶ 3-10. Defendant Miriam Andreoni would become trustee if her parents cease to serve or are unable to act as trustees of the Andreoni Trust for any reason. ¹See DE 1, Complaint for Interpleader, Exhibit D, Irrevocable Trust Agreement, ¶ 11(a). David Shomers died in December 2009, and his interest is now represented by the personal representative of his estate, Bruce Warner (the "Shomers Estate").² Thus, potential beneficiaries are the Shomers Estate, Defendant Miriam Andreoni, and the Andreoni Trust.

The Policy provides that its owner, David Shomers, was authorized to change the beneficiary of the Policy or assign ownership of the Policy by written request to the insurance company. *See* DE 1, Complaint for Interpleader, Exhibit A, ¶¶ 3.31-3.36. The identification of the rightful beneficiary turns on the validity of two written requests for such changes.

Change in Ownership Form. The Andreoni Trust's claim to the Policy proceeds arises from the most recent change request received by the insurance company, a change of ownership form dated December 2007. *See* Complaint for Interpleader ¶ 10, Exhibit D. The change in ownership form requests that David Shomer's ownership be assigned to the Andreoni Trust, which was created by Anthony Andreoni for the benefit of his minor child on December 12, 2007. The request for change in ownership has a signature that purports to be the signature of David Shomers, and purports to be notarized by a notary, Ronda O'Brien. ³ *See* Exhibit D. The

¹ *See* DE 71, Paperless Order Granting Motion to Substitute Bruce E. Warner, in his capacity as the court-appointed representative of the estate of David R. Shomers, for David Shomers.

² The complaint also identifies a third written request for change that is critical to the claim of the Andreoni Trust, namely a request for change in beneficiary in December 2007 in which the Andreoni Trust, as the purported owner of the Policy, requested that it be named the beneficiary. The FTC maintains that the Andreoni Trust is not the beneficiary because this request is also infirm, but it is not necessary to reach this issue to enter summary judgment against the Trust's claim because the document that purports to transfer ownership to the Andreoni Trust is invalid. Because the Andreoni Trust was not the owner, it did not have any authority to request the change in beneficiary reflected in this third written request.

³ There is evidence that the insured, Anthony Andreoni, had motive (he wished to give a trust he created ownership of the Policy) and opportunity (he worked for the same employer as the notary and could have obtained her notary stamp) to forge the signatures of David Shomers and the notary on the change of ownership form. FTC Exhibit 1, O'Brien Testimony at

took over \$19 million from consumers through a deceptive marketing scheme that sold business opportunities involving the purchase of DVD rental machines under the names “Box Office Express” and “American Entertainment Distributors.” The Commission’s complaint charges that AED and its officers—including Miriam Andreoni, who served as AED’s vice president—are liable for restitution and damages because the AED scheme was marketed in violation of the prohibition on deceptive acts and practices in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the FTC’s Franchise Rule, 16 C.F.R. Part 436 (2003). The Commission has obtained judgments of over \$19 million against several of the Defendants in that action (*see FTC v. AED*, DE 124) and seeks a similar judgment against Defendant Miriam Andreoni. If Miriam Andreoni is the rightful beneficiary, the \$2 million in insurance proceeds would be available to recover from Miriam Andreoni for the consumer losses described in *FTC v. AED*.

Although Miriam Andreoni has no evidence to support the Andreoni Trust’s claim to the insurance proceeds, she has twice taken concrete steps to concede her claim in favor of the Andreoni Trust. First, in December 2008, Miriam Andreoni filed a joint answer and cross-claim with the Andreoni Trust in which she and the trust request that the Court declare that the Andreoni Trust is the lawful and rightful beneficiary under the Policy, and that the trust is entitled to all Policy proceeds. DE 10, Defendants’ Answer and Cross-Claim ¶¶ 38, 45. Second, in July 2009, the Miriam Andreoni and the Andreoni Trust endorsed a settlement agreement with David Shomers. Under the conditional settlement, Miriam Andreoni would not receive the proceeds from the life insurance policy, while the Andreoni Trust would receive nearly two thirds of the more than \$2 million payable under the policy.⁴

⁴The settlement was conditioned on obtaining three court approvals, this Court’s approval of the settlement, the approval of an amendment to the preliminary injunction in *FTC v. AED*,

Miriam Andreoni unquestionably has an interest in diverting the insurance proceeds to the Andreoni Trust. The co-trustees, Miriam Andreoni's parents, are charged with using the assets of the insurance policy for the benefit of Miriam Andreoni's child, the co-trustee's granddaughter. Moreover, if Miriam Andreoni's parents cease to be trustees, Miriam Andreoni will become the sole trustee. See DE 1, Complaint for Interpleader, Exhibit D, at 49-53. As this Court observed in granting the FTC's motion to intervene, "[i]ronically, it does not appear to be in Miriam Andreoni's interest for her to be found a beneficiary. Instead, it is in her interest if those proceeds go to the Andreoni Trust controlled by her parents, so that they cannot be turned over as assets in the *FTC v. AED* litigation." DE 70, Order Granting Motion to Intervene and Resetting Case for Trial, at 6.

The Commission maintains that Defendant Miriam Andreoni's concessions represent a fraudulent effort to transfer her rights to the Andreoni Trust to thwart payment of the debt being litigated in *FTC v. AED*. On March 23, 2010, this Court granted the Commission's motion to intervene to challenge such a transfer under provisions of the Federal Debt Collection Practices Act, 28 U.S.C. §§ 3301-08 ("FDCPA"). Under the remedial provisions of the FDCPA, the Commission may obtain avoidance of that transfer or any other relief that the circumstances may require, *id.* § 3306(a), upon a showing that Miriam Andreoni made the transfer under conditions that make it a "fraudulent transfer" under 28 U.S.C. § 3304. Those conditions include the debtor's transfer of an asset without receiving "reasonably equivalent value" at a time when the debtor is generally not paying her debts or is otherwise insolvent. 28 U.S.C. §§ 3303, 3304(a).

and the approval of the probate court overseeing the administration of the estate of Anthony Andreoni, as the estate was also a party to the settlement. DE 70, Order Granting Motion to Intervene at 3. The participants in the settlement have not moved for these approvals.

(1) the validity of the Andreoni Trust's claim that it is the rightful owner and beneficiary of the Policy because David Shomers signed a Request for Change in Ownership Form in December 2007; (2) whether David Shomers's designation of Miriam Andreoni as beneficiary is invalid because it was induced by fraud or duress; and (3) whether the Commission is entitled to relief

⁵ Miriam Andreoni and the Andreoni Trust have never contested the validity of the signature on the request for change in beneficiary. *See* DE 10, Defendants' Answer and Cross-Claim ¶ 31 (agent forwarded Change of Beneficiary Form "signed by cross-defendant Shomers requesting Miriam Sophia Andredoni [sic] be designated the primary beneficiary of the policy"). David Shomers, whose interests are now represented by his estate, also did not dispute that he had signed the request for change in beneficiary, although he denied having "voluntarily" signed the request. *See* DE 23, Cross-Defendant Shomers' Answer and Affirmative Defenses to Cross Claim, ¶ 31.

that his actions were motivated by fraud or fear that was significant enough to render the document invalid.

Summary judgment should be entered against the Shomers Estate's position because it has no admissible evidence of David Shomers' state of mind to prove such a claim at trial. Both David Shomers and the person allegedly responsible for inducing David Shomers to sign, Anthony Andreoni, are dead. Mr. Shomers' allegations before his death that he was influenced by fraud or threats cannot defeat summary judgment because they are conclusory and are inadmissible hearsay. The Estate has not identified any witness who could testify at trial to prove its claim. *See* FTC Exhibit 12, Personal Representative Bruce E. Warner's Answers and Objections to First Set of Interrogatories of Intervenor FTC, Nos. 1, 2.

The Shomers Estate has also claimed that the request to change the beneficiary is invalid because it is contrary to a preliminary injunction entered in *FTC v. AED* that restricted the transfer of assets owned or controlled by Anthony Andreoni or Miriam Andreoni as of the date that the injunction was entered. *See* DE 11, ¶ 47. This claim, however, also fails as a matter of law because the Policy was owned by David Shomers, and the preliminary injunction does not enjoin David Shomers with regard to assets that he owns, or enjoin him from exercising his contractual right to change the beneficiary of a life insurance policy. *See* *FTC v. AED*, DE 101, at 5. In addition, to sustain this claim, the Estate would need to show that it has standing to enforce the preliminary injunction and demonstrate that David Shomers' conduct satisfies the standards for civil contempt. These standards require "clear and convincing evidence" that David Shomers acted in violation of clear and unambiguous requirements of the preliminary injunction when he signed the request to change the beneficiary of the policy. *See, e.g., Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002); *also In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (reversing contempt where alleged contemnor's conduct did not violate a

clear and unequivocal order and the order was not specifically addressed to the alleged contemnor). The Estate has not pled or disclosed any evidence, much less “clear and convincing evidence” that David Shomers, by changing the beneficiary for a Policy that he owned, acted in contempt of an injunction freezing assets owned or controlled by the Andreonis when the injunction was entered in 2005.

III. Miriam Andreoni’s Transfer of Her Interest is a Fraudulent Transfer Under the Federal Debt Collection Practices Act, and the Court Should Hold the Policy Proceeds Pending Adjudication of the FTC’s Claims in *FTC v. AED*

The final issue is whether Miriam Andreoni’s rights as beneficiary to the proceeds of the Policy can be restricted under the FDCPA to protect the FTC’s interest in collecting in *AED*. The FDCPA protects the United States and its agencies against certain transfers of assets by debtors by authorizing broad relief to avoid transfers and restrict assets. In particular, the

Andreoni is a debtor under the FDCPA, in that she is “a person who is liable for a debt or against whom there is a claim for a debt.” 28 U.S.C. § 3002(4). Debts under the FDCPA include restitution amounts owed to the United States, such as those that the FTC seeks in the FTC v. AED litigation. 28 U.S.C. § 3002(3)(B). Second, Miriam Andreoni’s release of her interest in the insurance proceeds is a “transfer” under the FDCPA, which defines transfer broadly to embrace “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes . . . release” 28 U.S.C. § 3301(8).

The FDCPA provides that where, as here, the debt arises before the transfer, the transfer is a fraudulent transfer if:

(1)(A) the debtor makes the transfer or incurs the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(B) the debtor is insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation

28 U.S.C. § 3304(a)(1).

There is no genuine dispute of fact that these two elements are satisfied. First, Miriam Andreoni has not received “reasonably equivalent value” for her rights as beneficiary to the \$2 million policy. In July 2009, Miriam Andreoni agreed to a proposed settlement that would abandon her claim to the \$2 million and provide that the majority of the \$2 million—over \$1.3 million—would go to the Andreoni Trust headed by her parents. DE 54 at 8. Second, Miriam Andreoni is and has been insolvent. The FDCPA establishes a presumption that a debtor “who is generally not paying debts as they become due is presumed to be insolvent.” 28 U.S.C. § 3302(b). Miriam Andreoni’s failure to pay her debts is evidenced by foreclosure proceedings

against her since 2008, arising from her failure to make payments on mortgage and home equity loans that exceed \$570,000. See FTC Exhibit 11.

Thus, under the FDCPA, Miriam Andreoni's agreement to surrender her rights as beneficiary in exchange for no payment was a fraudulent transfer, and the FDCPA authorizes relief under 28 U.S.C. § 3306(a). Because the FTC's claim in *FTC v. AED* is still pending, this Court can appropriately afford relief to protect the FTC by retaining the insurance proceeds pending the outcome of *FTC v. AED*.

CONCLUSION

For the reasons stated above, the Court should enter a judgment declaring that: (1) the Andreoni Trust has no rights as owner or beneficiary of the Policy; (2) Miriam Andreoni is the rightful beneficiary of the Policy as a result of the change of beneficiary requested in 2007; and (3) pursuant to the FDCPA, the proceeds of insurance policy shall be held in the Court Registry pending disposition of the FTC's claim against Miriam Andreoni. *FTC v. AED*.

Respectfully Submitted,

/s Daniel O. Hanks

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2010, I electronically filed the foregoing Federal Trade Commission's Motion for Summary Judgment and Memorandum in Support with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s Daniel O. Hanks