IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

FILED
2017 MAR 30 P 3: 41
MAUREEN G. KELLY
LAKE CO. CLERK OF COURT

KELLY ULRICH	)	CASE NO. 16CV000803
Plaintiff(s)	)	JUDGE EUGENE A. LUCCI
vs.	)	**ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT**
BIXEL ORGANIZATION, INC., *et al.*	)	
Defendant(s)	)	

{¶1} The court has considered: (1) Defendant Metropolitan Life Insurance Company's (Metropolitan) motion for summary judgment, filed February 13, 2017; (2) Defendant The Bixel Organization's (Bixel) motion for summary judgment, filed February 13, 2017; (3) the deposition of Kelly Anne Ulrich, filed February 17, 2017; (4) the deposition of Dawn Holly, filed February 17, 2017; (5) the deposition of Regina Solomon-Stowe, filed February 17, 2017; (6) the plaintiff's motion for extension of time to respond to the motions for summary judgment, filed February 24, 2017; (7) the plaintiff's brief in opposition, filed March 7, 2017; (8) Bixel's reply brief in support of its motion for summary judgment, filed March 13, 2017; and (9) Metropolitan's reply brief in support of its motion for summary judgment, filed March 15, 2017.

{¶2} The plaintiff's motion for extension of time is well-taken and is hereby granted. The brief in opposition, filed March 7, 2017, is hereby deemed timely filed.

PROCEDURAL POSTURE

{¶3} The plaintiff filed her complaint on May 10, 2016 against Metropolitan, Bixel, and Arthur J. Gallagher & Co. Bixel filed its answer on June 13, 2016 and Metropolitan filed its answer on July 1, 2016. The plaintiff filed a notice of voluntary dismissal as to Defendant Arthur J. Gallagher & Co. on July 15, 2016. The plaintiff filed an amended complaint on August 25, 2016, adding Michelle Chernikoff as a defendant. Metropolitan filed its answer to the amended complaint on September 29, 2016, and Bixel filed its answer on October 21, 2016. Michelle Chernikoff has not answered. Ms. Chernikoff was served by certified mail on August 30, 2016, but has not answered. Bixel and

Metropolitan filed separate motions for summary judgment on February 13, 2017. The issues have been fully briefed.

ISSUES

{¶4} The issues presented in this case are: (1) whether, under Ohio law, a guardian has the authority to change the beneficiary designation on a ward's life insurance policy; if so (2) whether genuine issues of material fact exist as to whether the plaintiff on his behalf complied or substantially complied with the policy's procedures for changing beneficiaries; and if a guardian does not have the authority to make such a change, (3) whether genuine issues of material fact exist as to whether the owner of the policy complied or substantially complied with the policy's procedures for changing beneficiaries.

LAW

SUMMARY JUDGMENT

{¶5} Rule 56(C) of the Ohio Rules of Civil Procedure states, in pertinent part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Thus, before summary judgment may be granted, it must be determined that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.*, 50 Ohio

St. 2d 317, 364 N.E.2d 267 (1977); *Mootispaw v. Eckstein*, 76 Ohio St. 3d 383, 667 N.E.2d 1197 (1996).

{¶6} Although Rule 56(C) states that "No evidence or stipulation may be considered except as stated in this rule," Ohio courts have recognized that when the opposing party "fails to object to the admissibility of evidence under Civ. R. 56, the court may, but need not, consider such evidence in determining whether summary judgment is appropriate." *Carver v. Deerfield Township*, 139 Ohio App. 3d 64, 742 N.E.2d 1182 (2000), citing *Felker v. Schwenke*, 129 Ohio App. 3d 427, 431, 717 N.E.2d 1165, 1168 (1998), *State ex rel. Spencer v. E. Liverpool Planning Comm.*, 80 Ohio St. 3d 297, 301, 685 N.E.2d 1251, 1255 (1997), and *Bowmer v. Dettelbach*, 109 Ohio App. 3d 680, 684, 672 N.E.2d 1081, 1084 (1996) (holding that "[w]hile the court of appeals may consider evidence other than that listed in Civ. R. 56[C] when there is no objection, it need not do so.")

{¶7} The main purpose of the summary judgment procedure is to enable a party to go behind the allegations in the pleadings and assess the proof in order to see whether there is a genuine need for trial. The remedy should be applied sparingly and only in those cases where the justice of its application is unusually clear. Resolving issues of credibility, or reconciling ambiguities and conflicts in witness testimony is outside the province of a summary judgment. *Napier v. Brown*, 24 Ohio App.3d 12, 492 N.E.2d 847 (1985).

{¶8} In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion. *Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 517 N.E.2d 904 (1988); *Harless v. Willis Day Warehousing*, 54 Ohio St.2d 64, 375 N.E.2d 46 (1978).

{¶9} For purposes of ruling on a motion for summary judgment, a dispute of fact is "material" if it affects the outcome of the litigation. The dispute is "genuine" if it is manifested by substantial evidence going beyond the mere allegations of the complaint. *Mount v. Columbus & Southern Elec. Co.*, 39 Ohio App.3d 1, 528 N.E.2d 1262 (1987).

Declaratory judgment

{¶10} R.C. 2721.03 provides that any person interested under a written contract may have determined any question of construction or validity arising under the contract.

Further, R.C. 2721.04 permits a court to construe a contract via declaratory judgment before or after there has been a breach of contract.

{¶11} Declaratory judgment is appropriate where a real controversy, which is justiciable in character, exists between adverse parties and speedy relief is necessary. *Quality Care Transport v. ODJFS*, 2nd Dist. Nos. 2009 CA 113, 2009 CA 121, 2010-Ohio-4763, 2010 WL 3835611, ¶16. A court may not render an advisory opinion that would not terminate any existing controversy. *Allstate Ins. Co. v. Long*, 11th Dist. Nos. 2001-P-0038, 2001-P-0039, 2003-Ohio-61, 2003 WL 102612, ¶16. Therefore, a declaratory judgment action is not appropriate where resolution of the issues is purely academic and has no practical effect on the legal relations of the parties. *Id.* at ¶18. *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 136, 863 N.E. 2d 142, 2007-Ohio-1248, ¶9. Thus, in order for a justiciable question to exist, "[t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events … and the threat to his position must be actual and genuine and not merely possible or remote." *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 136, 863 N.E. 2d 142, 2007-Ohio-1248, ¶9, quoting *League for Preservation of Civil Rights v. Cincinnati*, 64 Ohio App. 195, 197, 28 N.E.2d 660 (1940). The existence of another adequate remedy does not preclude declaratory judgment. *Quality Care Transport,* ¶16.

The Metropolitan policy

{¶12} The life insurance policy requires that a change of beneficiary be in written form satisfactory to Metropolitan, and that it be dated and signed by the owner of the policy. Bixel's Motion for Summary Judgment, Exhibit 2.

Duties of a guardian

{¶13} The probate court is the superior guardian of wards and all guardians shall obey all orders of the court that concern their wards or guardianships. R.C. 2111.50(A). A guardian's authority is limited to the authority granted by the Ohio Revised Code, case law, and orders or rules of the probate court. R.C. 2111.50(A)(2).

{¶14} R.C. 2111.15 states that "[w]hen a person is appointed to have the custody of the person and to take charge of the estate of a ward, such person shall have all the duties required of a guardian of the estate and of a guardian of the person."

{¶15} The duties of the guardian of a person are: (1) to protect and control the person of the ward, (2) provide suitable maintenance for the ward when necessary, (3) to provide such maintenance and education for the ward as the amount of the ward's estate justifies if the ward has no parents, or his or her parents fail to maintain or educate the ward, and (4) to obey the probate court's orders relating to the guardianship. R.C. 2111.13(A). A guardian of a person may authorize or approve the provision of medical, health, or other treatment or services unless the court provides otherwise. R.C. 2111.13(C). In some circumstances, a guardian of the person may authorize an autopsy, and burial or cremation, but must notify the probate court as soon as possible after giving such authorization. R.C. 2111.13(D)-(F).

{¶16} The duties of the guardian of the estate of a ward are: (1) to file a full inventory, (2) mange the estate for the best interest of the ward, (3) pay all just debts due from the ward, collect all debts due to the ward, and defend all suits against the ward, (4) to obey all judgments touching the guardianship, (5) to bring suit for the ward when doing so is in the ward's best interest, and (6) to settle and adjust, when necessary or desirable, the assets that the guardian may receive in kind from an executor or administrator to the greatest advantage of the ward, subject to approval by the probate court. R.C. 2111.14(A).

{¶17} "The duty of a guardian is to manage and preserve the ward's estate, to provide for the care and protection of the ward's person and to act in the best interest of the ward. A guardian is not the 'alter ego' of the ward and cannot perform all acts for the ward in the same manner the ward would do, except for the adjudication of incompetence." (Citation omitted.) *Witt v. Ward*, 60 Ohio App.3d 21, 23, 573 N.E.2d 201 (10th Dist. 1989). Guardians have no authority to enter into a transaction that does not involve the management of the estate or to interfere with a ward's testamentary disposition. *In re Estate of Boone*, 190 Ohio App.3d 799, 944 N.E2d 307, 2010-Ohio-6269, ¶65 (7th Dist.). The Ohio Supreme Court has held that a guardian is not authorized, without court authority, to change the beneficiary of an insurance policy of the ward. *In re Sellers' Estate: Lindsey v. Johnson*, 154 Ohio St. 483, 96 N.E.2d 595 (1951), syllabus. Further, in *Boone*, 190 Ohio App.3d 799, 944 N.E2d 307, 2010-Ohio-6269 (7th Dist.), the court of appeals upheld the probate court's decision that its prior order permitting the guardian to

change the beneficiary of the ward's life insurance policy was in error and the proceeds should be disbursed to the previously named beneficiary. In that case, prior to becoming incapacitated, the ward had named his fiancée as beneficiary of his life insurance policy. After he became incapacitated, his mother became guardian of both the person and the estate. His mother obtained an order from the probate court changing the beneficiary of the life insurance policy to the ward's estate. The probate court later determined that its order authorizing the beneficiary change was in error because it provided no benefit to the ward and ordered the proceeds to be disbursed to the decedent's fiancée. The mother appealed, arguing that changing the beneficiary conferred a post-mortem benefit by providing funds to the estate for paying necessary bills and expenses. The court of appeals held that changing the beneficiary interfered with the ward's testamentary intention and provided no benefit to the ward for his care and protection because no funds were available prior to his death.

FINDINGS AND CONCLUSIONS

{¶18} This case involves a life insurance policy first issued by Metropolitan's predecessor to the plaintiff's father, Joseph Ulrich, on January 15, 1987. Deposition of Regina Solomon-Stowe, pp. 42-43. At the time the policy was issued, Mr. Ulrich named Daniele T. Ulrich, his wife, as the beneficiary. *Id.* at 46. In November 2000, Mr. Ulrich changed his beneficiary to name Daniele T. Ulrich as a beneficiary with a scheduled reduction of her share of the proceeds, the remainder to be paid to the plaintiff and her sister, Michelle Chernikoff, in equal shares. *Id.* at 49-53. In January 2003, Mr. Ulrich again changed the policy's beneficiary, this time naming the plaintiff and Ms. Chernikoff as the beneficiaries. *Id.* at 56-58. In 2005, Mr. Ulrich was diagnosed with a rare form of dementia. Deposition of Kelly Anne Ulrich, pp. 24-27. The plaintiff alleges, and testified at her deposition, that subsequent to his diagnosis, Mr. Ulrich wished to change his life insurance beneficiary designation to remove Ms. Chernikoff as a beneficiary and name only the plaintiff, and had multiple meetings with Dawn Holly, a Bixel employee, regarding changing the beneficiary. *Id.* at 28-38. The plaintiff further testified that she and Mr. Ulrich were ultimately informed that Mr. Ulrich could not change the beneficiary because of his diagnosis. *Id.* at 35-38. The plaintiff testified that after she became her father's guardian, she and her father met with Bixel so that the plaintiff, as guardian,

could change the beneficiary, and were informed without explanation that Bixel could not assist them with that. *Id.* at 42-44. A beneficiary change form was ultimately filled out, with Bixel's assistance, and sent to Metropolitan, but was denied, indicating that the plaintiff would need a court order to change the beneficiary. Deposition of Dawn J. Holly, pp. 62-71. The plaintiff maintains that she was never informed that a court order would be necessary. Deposition of Kelly Anne Ulrich, pp. 120. Mr. Ulrich passed away without changing the beneficiary of the policy, and the plaintiff received half of the policy proceeds. *Id.* At 124.

{¶19} The court notes that Bixel disputes the plaintiff's version of events, particularly that Mr. Ulrich ever met with a Bixel employee to remove Ms. Chernikoff as a beneficiary, and that the plaintiff was not informed of the need for a court order. However, in reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the party opposing the motion. *Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 517 N.E.2d 904 (1988); *Harless v. Willis Day Warehousing*, 54 Ohio St.2d 64, 375 N.E.2d 46 (1978).

{¶20} The plaintiff's amended complaint seeks a judgment declaring that the plaintiff and/or Mr. Ulrich substantially complied with the policy's change of beneficiary procedures, that the defendants were informed of the decedent's intent to designate her as sole beneficiary, and that the plaintiff is entitled to the full policy amount and the defendants are jointly and severally liable for the policy amount and interest, as well as costs and attorney fees.

{¶21} Both of the defendants argue that they are entitled to judgment as a matter of law because the plaintiff, as guardian of Mr. Ulrich, did not have the authority to change his beneficiary without a court order.

{¶22} The Ohio Supreme Court has held that a guardian is not authorized, without court authority, to change the beneficiary of an insurance policy of the ward. *Sellers*, 154 Ohio St. 483, 96 N.E.2d 595 (1951), syllabus. Indeed the decision in *Boone*, 190 Ohio App.3d 799, 944 N.E2d 307, 2010-Ohio-6269 (7th Dist.) suggests that even the probate court cannot authorize a change to a life insurance beneficiary if the change does not benefit the ward.

{¶23} The plaintiff argues that *Sellers* is distinguishable because changing the beneficiary in that case would not have benefited the ward, while, in this case, changing the beneficiary to the plaintiff would allow her to expend her life savings caring for Mr. Ulrich. The court notes that the guardian made a similar argument in *Boone.* The guardian argued that changing the life insurance policy to the ward's estate (of which she was the sole heir) would benefit the ward by enabling payment of his medical bills after his death, yet the court found that the change did not benefit the ward. However, this case is not distinguishable from *Sellers* even assuming that changing the beneficiary would have in some way benefitted Mr. Ulrich. As indicated in *Boone*, whether changing the beneficiary of the ward's life insurance policy would benefit the ward is a factor for the probate court to consider in determining whether to order such a change. The existence of an alleged benefit to the ward does not give the guardian authority he or she did not already have or absolve him or her of the duty to seek appropriate authorization from the probate court.

{¶24} The plaintiff also argues that *Sellers* has been superseded by R.C. 2111.50, and notes that its holding regarding changing life insurance beneficiaries has never been cited as authority in any subsequent case law. However, *Sellers* has never been overturned, or even distinguished. Indeed, it appears this issue has simply not been addressed since *Sellers* was decided in 1954. This is not an indication that it is not good law. Rather, this is likely because the Ohio Supreme Court established this clear rule in 1954, so it has not been necessary to address this issue again. Further, the Revised Code sections relating to guardianships do not conflict with *Sellers*. In fact, R.C. 2111.50 expressly states that a guardian's authority is limited to the authority granted by the Ohio Revised Code, *case law*, and orders or rules of the probate court. Nothing in the Revised Code gives a guardian the authority to change the ward's life insurance beneficiary.

{¶25} The plaintiff also cites to R.C. 2111.50(B)(5) which permits the probate court to exercise rights to elect options under annuities and insurance policies, and to surrender an annuity or insurance policy for its cash value. Although it is not entirely clear, it appears the plaintiff is arguing that because these powers are explicitly granted to the probate court, and changing the beneficiary on a life insurance policy is not explicitly mentioned, the guardian has the authority to change the beneficiary. The plaintiff misunderstands the

statute. R.C. 2111.50(B) states that the probate court has all the powers that relate to the person and estate of the ward and that the ward could exercise if present and not under disability except the power to make or revoke a will. R.C. 2111.50(B)(1)-(7) list certain powers that are encompassed within the probate court's authority over guardianships. However, it states that [t]hese powers include, but are not limited to…" the specified powers. Thus, this list is not exhaustive, and does not exclude powers not listed. Even if it did, the absence of the authority in the probate court would not vest such authority in the guardian. The probate court is the superior guardian of wards. R.C. 2111.50(A). Therefore, if the power to take some action were denied to the probate court, it would certainly not belong to the guardian. Further, a guardian's authority is limited to the authority granted by the Ohio Revised Code, case law, and orders or rules of the probate court. R.C. 2111.50(A)(2). As discussed above, nothing in the Revised Code grants the guardian authority to change the beneficiary of a ward's life insurance policy, and case law specifically denies the guardian such authority.

{¶26} For these reasons, the court finds that the plaintiff did not have the authority to change the beneficiary of Mr. Ulrich's authority without a court order. As it is undisputed that the plaintiff did not obtain a court order to change the life insurance beneficiary designation, the plaintiff could not have complied or substantially complied with the change of beneficiary procedures. It is, therefore, necessary to determine whether a genuine issue of material fact exists as to whether Mr. Ulrich complied or substantially complied with Metropolitan's change of beneficiary procedures.

{¶27} The life insurance policy requires that a change of beneficiary be in written form satisfactory to Metropolitan, and that it be dated and signed by the owner of the policy. Bixel's Motion for Summary Judgment, Exhibit B. Although the plaintiff argues that the defendants were aware that Mr. Ulrich wanted to change his beneficiary designation, the only evidence that Mr. Ulrich took any action to attempt to change the beneficiary of his life insurance policy is the plaintiff's testimony that she and Mr. Ulrich met with an employee of Bixel on at least two occasions because Mr. Ulrich wished to change the beneficiary, and were informed by the Bixel employee that Mr. Ulrich could not change the beneficiary designation because of his mental state. Deposition of Kelly Anne Ulrich, pp. 31-38. However, the policy requires a writing signed by the owner. No

evidence has been presented that Mr. Ulrich made any written request to remove Ms. Chernikoff as a beneficiary.

{¶28} The plaintiff makes various allegations that the defendants, primarily Bixel, failed to inform her of the need for a court order, and failed to assist her and Mr. Ulrich in changing the beneficiary. Although the plaintiff appears to imply that Bixel engaged in some sort of negligence or misrepresentation in regards to changing the beneficiary, her complaint does not allege such a cause of action and only asks the court to find that she or Mr. Ulrich complied or substantially complied with the policy provisions for changing beneficiaries. For the reasons discussed above, the court finds that neither the plaintiff nor Mr. Ulrich complied or substantially complied with the policy provisions for changing a beneficiary.

{¶29} Accordingly, the court finds that no genuine issues of material fact exist and the defendants are entitled to judgment as a matter of law.

{¶30} The court notes that Michelle Chernikoff has not answered the plaintiff's amended complaint. However, the complaint does not allege a cause of action against Ms. Chernikoff, or seek any relief against her. Rather, it appears she was named for completeness of the presentation of the issues issues, as she may have had an interest in these proceedings. Accordingly, the court finds no just reason for delay.

{¶31} Costs to be paid by the plaintiff.

{¶32} **IT IS SO ORDERED.**

I CERTIFY THIS TO BE A TRUE COPY OF
THE RECORDS ON FILE IN THE LAKE
COUNTY CLERK OF COURTS OFFICE.

DEPUTY
MAUREEN G. KELLY, CLERK OF COURTS

EUGENE A. LUCCI, JUDGE

c: Thomas B. Bralliar, Jr., Esq., Attorney for Plaintiff
Katie Lynn Zorac, Esq., Attorney for Defendant The Bixel Organization, Inc.
Ralph E. Smearman, Esq., Attorney for Defendant Metropolitan Life Ins. Co.

FINAL APPEALABLE ORDER
Clerk to serve pursuant
To Civ.R. 58(B)