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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leslie J. Klass, Plaintiff, vs. Fidelity & Guaranty Life Insurance Company, a Maryland Corporation, Defendant.	No. CIV 04-2337-PHX-RCB O R D E R

Currently pending before the court are four motions: (1) a motion for summary judgment by defendant, Fidelity & Guaranty Life Insurance Company ("Fidelity") (doc. 57); (2) a motion for partial summary judgment by plaintiff Leslie J. Klass (doc. 60); a cross-motion for partial summary judgment by Fidelity (doc. 64); and plaintiff's "Motion to Strike Defendants' Controverting Statement of Facts to Plaintiff's Statement of Facts" (doc. 74).

Background

Unless otherwise indicated, the following facts are undisputed. In May 1990, plaintiff's then-husband, Robert C.

Mothershead, applied for life insurance with Fidelity. PSOF II[1] (doc. 66), exh. 1 thereto. Under the section entitled "Beneficiary and Relationship to Proposed Insured[,]" plaintiff's name appears, followed by "wife[.]" Id. In section 1.A of that application, there are two boxes which can be marked – "Spouse[]" or "Other Insured[]" – and then other identifying information can be provided. See id. There is an "X" in the "Spouse[]" box, and the box "Other Insured[]" is left blank. See id.

Consistent with that application, the "policy information" sheet identifies the "insured" and the "owner" solely as "Robert Mothershead[.]" DSOF I (doc. 58), exh. A thereto. After "beneficiary," that same sheet states: "Beneficiary is as named in the application or in the most recent change on record in our home office." Id. (emphasis omitted). And, as just explained, the insurance application designated plaintiff as the primary beneficiary. The policy date was issued on June 8, 1990, and had an "initial specified amount" of "$500,000[.]" Id.

More than a decade later, on July 15, 2002, plaintiff commenced a matrimonial dissolution proceeding against Mr. Mothershead. On that same date, the Superior Court of the State of Arizona, Maricopa County, issued a preliminary injunction against the parties in that action. See PSOF I (doc. 61), exh. 2 thereto. That injunction expressly prohibited plaintiff Klass and Mr. Mothershead from "tak[ing] out a loan on the community property[.]"

[1] The plaintiff and Fidelity filed four separate statements of fact each. Plaintiff's will be designated as "PSOF" and Fidelity's as "DSOF," followed by a Roman numeral corresponding to the date of filing. That is, plaintiff's first filed PSOF will be referred to herein, as "PSOF I," etc. Likewise, Fidelity's first filed DSOF will be referred to herein as "DSOF I," etc.

Id., exh. 2 thereto. In accordance with A.R.S. § 25-315(A), the injunction also required the parties, among other things, to "maintain all insurance coverage in full force and effect." Id., exh. 2 thereto at ¶ 1(d).

Plaintiff and Fidelity vigorously dispute whether Fidelity received notice of that injunction. Plaintiff has submitted an April 1, 2003 letter to Fidelity from her matrimonial lawyer, enclosing a copy of that injunction. Id., exh. 2 thereto at 255. In that letter, plaintiff's lawyer wrote:

> Arizona State law dictates that each party is restricted from canceling any insurance policy and/or changing the beneficiaries until the Decree of Dissolution is entered with the Court or by further Order of the Court. Please note that the Preliminary Injunction becomes effective the date the Petition for Dissolution is filed. The Petition for Dissolution was filed on July 15, 2002, in the [Klass v. Mothershead] matter.

Id., exh. 2 thereto. Fidelity adamantly maintains that it never received the foregoing letter or copy of the injunction until more recently, as fully explained below.

Fidelity does acknowledge receiving, on April 12, 2003, a letter from attorney Jay M. Polk dated the previous day. DSOF I (doc. 1), ¶ 2; and exh. B thereto at 255.[2] Along with a payment for that policy, Mr. Polk enclosed a certified copy of his "Letters" and Order appointing him "Special Conservator"[3] of Mr. Mothershead. Id., exh. B thereto at 255. Plaintiff Klass filed the petition which resulted in that appointment. Id. at 1, ¶ 3,

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[2] For Fidelity's exhibits, the court is using the handwritten numbers on the bottom right corner thereof.

[3] To simplify, hereinafter the court will use "Conservator," which shall be read as meaning "Special Conservator."

citing exh. B thereto at 262. Those Letters granted Mr. Polk the "power and duty to[,]" among other things, "[a]ccess and investigate any and all financial accounts in the name of" Mr. Mothershead. Id., exh. B thereto at 257, ¶ c).

Pursuant to the terms of the conservatorship order, which was filed April 3, 2003, Mr. Mothershead was "temporarily restrained" from, *inter alia*, "'accessing any financial account'" and from "'accessing any existing lines of credit and credit accounts, obtaining new lines of credit or credit accounts, and from incurring additional debt through credit.'" Id. at 1-2, ¶ 3 (quoting exh. B thereto at 264, ¶¶ 5 and 6). That Order expressly stated that it would "continue in full force until the expiration of ninety . . . days unless otherwise ordered by this Court[.]" Id., exh. B thereto at 265, ¶ 9. The letters appointing Mr. Polk as Conservator stated that they "shall expire on" July 3, 2003. Id. at 2, ¶ 4; see also exh. B thereto at 258, ¶ f).

The record includes three additional Letters of Special Conservatorship. PSOF I (doc. 61), at 3, ¶ 18. Each appoints Mr. Polk as Mr. Mothershead's Conservator. The last of those periodic appointments expired on January 1, 2004.[4] Id., exh. 7 thereto at KLASSDST00139. Substantively, those Letters are nearly identical to the Letters and Acceptance filed on April 3, 2003. There is no proof in the record that Fidelity ever received copies of these later filed Letters, however. In fact, during her deposition

[4] Interestingly, the first of these additional Letters was filed May 7, 2003, slightly more than a month after the filing of the original Letters which plaintiff claims were sent to Fidelity. PSOF I (doc. 61), exh. 7 thereto at KLASS DST 00166. Those May letters were to expire on November 4, 2003. Id., exh. 7 thereto at KLASS DST 00167.

plaintiff was specifically asked, "You've testified today that you're not aware that anyone, yourself included, ever notified Fidelity that the court had entered an order extending the conservatorship over your husband beyond July 3 of 2003, correct?" DSOF I (doc. 58), exh. G thereto at 70:11-15. Plaintiff responded, "That's correct." Id., exh. G thereto at 70:16.

On July 21, 2003, Mr. Mothershead, contrary to the preliminary injunction, and 18 days after expiration of the original Letters and Order of Conservatorship, faxed a "Request for Disbursement" form to Fidelity. Id. at 2, ¶ 6; see also exh. C thereto at 238 and 239. On that form Mr. Mothershead requested the "'Maximum Loan" available on the policy. Id. at 2, ¶ 6 (quoting exh. C thereto at 239). On the fax cover sheet and the loan request form, he further requested, "'[i]f possible, . . . please expedite loan[] due to emergency of resource access.'" Id. at 2, ¶ 6 (quoting exh. C thereto at 238 and 239). Immediately preceding the "[o]wner['s]" signature line on the first page of the request form, it states:

> The undersigned hereby warrant[s] that there has been no assignment, tax lien, bankruptcy, receivership, incompetency proceeding, *divorce* or separate maintenance action, attachment, garnishment, execution, or any other legal process under which any other person is claiming the policy or rights thereunder.

Id., exh. C thereto at 239 (emphasis added).

The "Loan Request" section on that form provides, "This loan is to be in accordance and subject to the loan and interest provisions of the policy and said policy is hereby *assigned to* [*Fidelity*] as sole security for this loan." Id., exh. C thereto at 239 (emphasis added). Additionally, that form required Mr. Mothershead to answer several federal tax withholding questions.

He was required to provide "[t]he Owner's Taxpayer Identification (Social Security Number)[,]" as well as "[t]he Owner's date of birth[,]" which he did. See id., exh. C thereto at 240. The form sought the same information as to the "Joint Owner[,]" to which Mr. Mothershead replied, "N/A" – presumably not applicable. Id. On page two of the request form, there is a "**CERTIFICATION**" line which states, "Under the penalty of perjury, I certify that the information provided on this form is true, correct and complete." Id., exh. C thereto at 240 (emphasis in original). Just beneath that certification is a signature purporting to be that of Mr. Mothershead. The next day, on July 24, 2003, Fidelity issued a check to Mr. Mothershead in the loan amount of $14,363.57. Id. at 2, ¶ 9; and exh. D thereto at 201-202.

Nearly a year later, on June 17, 2004, a "Property Settlement Agreement" was filed in the Klass v. Mothershead dissolution. Id., exh. F thereto at 35. Under the terms of that Agreement, plaintiff was "awarded" the Fidelity policy which is the subject of this action. Id., exh. F thereto at 67. She was awarded that policy, along with two others, "including the remaining cash value, subject to the outstanding loans, on each of said policies." DSOF I, exh. F thereto at 67). According to the Settlement Agreement, beginning earlier in the year, on January 1, 2004, plaintiff was to pay all premiums to maintain the policies which she had been awarded. See id., exh. F thereto at 67.

That Settlement Agreement further provided that the "Special conservator *shall execute an assignment* in favor of" plaintiff Klass. Id., exh. F thereto at 67 (emphasis added). Such assignment was to "assign[] to [Ms. Klass] the claim of the . . .

Conservator, as [Mr. Mothershead's] fiduciary, against Fidelity . . . for negligently and wrongfully making a loan to [Mr. Mothershead][] from" the subject policy. Id., exh. F thereto at 67. Under the terms of that Agreement, Mr. Mothershead was required to "continue to designate [Ms. Klass] as beneficiary on all policies in [his] name, until such time as the *transfer of ownership* occurs." Id., exh. F thereto at 67 (emphasis added).

Several weeks later, on July 7, 2004, Fidelity received a "Transfer of Ownership and Beneficiary request executed by Jay Polk, as Mothershead's Conservator, requesting that the ownership of the [subject] policy be changed from [Mr.] Mothershead to [plaintiff]." PSOF I (doc. 61), exh. 10 thereto at 181. By letter dated July 21, 2004, Fidelity advised plaintiff that that change had been made. Id., exh. 10 thereto at 181. After setting forth its view of the circumstances surrounding the loan to Mr. Mothershead, Fidelity concluded by "respectfully refus[ing] [plaintiff's] demand for repayment of the July 2003 policy loan[.]" Id., exh. 10 thereto at 182.

Evidently in response to that refusal, on July 23, 2004, plaintiff faxed to Fidelity a copy of the April 1, 2003, letter from her divorce lawyer and the accompanying copy of the preliminary injunction. DSOF I, exh. E thereto at 87-92. Stressing that the injunction prohibited "'tak[ing] out a loan on the community property[,]'" plaintiff "renew[ed] [her] demand that these funds [$14,363.57], along with the accrued interest, be reimbursed to the policy." Id., exh. E thereto at 87. Fidelity claims that on that date, it "learned for the first time that its insured," Mr. Mothershead, "had been in the middle of a divorce

proceeding [when] he requested the loan, and that the Court had issued an injunction precluding him from 'tak[ing] out a loan on the community property[.]'"[5] Id. at 3, ¶¶ 10 and 11 (quoting exh. E thereto at 90:2-3). At some point, although the record is unclear as to exactly when, "Fidelity also learned that Mr. Mothershead . . . had purportedly assigned to plaintiff his interest in [the subject] Policy via a . . . property settlement agreement[.]" Id. at 3, ¶ 12 (citation omitted).

On October 5, 2004, plaintiff commenced the present action in the Superior Court of the State of Arizona, Maricopa County against Fidelity. Not. of Removal (doc. 1), attachment thereto. Plaintiff alleges that she was "awarded the [subject] Policy[]" on May 17, 2004, pursuant to the "Property Settlement Agreement." Id., Co. at 2, ¶ 10. Plaintiff further alleges that she was "assigned all rights in the claim of the Conservator against [Fidelity] for wrongfully making a loan against the Policy in violation of the Conservatorship and Preliminary Injunction." Id.

In her first cause of action, plaintiff alleges that Fidelity breached the "insurance contract" by "knowingly and wrongfully permitting Mothershead to withdraw loan funds against the Policy." Id., Co. at 3, ¶ 18. Her second cause of action is for "insurance bad faith[,]" wherein plaintiff alleges, among other things, that Fidelity "breached the implied duty of good faith and fair dealing owed to [her]." Id., Co. at 4, ¶ 21. In a similar vein, plaintiff

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[5] There is a suggestion in the record that perhaps Fidelity learned of this information prior to July 23, 2004, but not much before. In a July 21, 2004, letter from Fidelity to Ms. Klass, it references a July 16th and a July 21st fax from plaintiff to Fidelity. PSOF I (doc. 61), exh. 10 thereto at KLASS DST 000182. It also mentions that the loan to Mr. Mothershead was "apparently in violation of a preliminary injunction." Id., exh. 10 thereto at KLASS DST 000182 n. 1.

further alleges that Fidelity "wrongfully disbursed loan proceeds and has intentionally withheld, delayed, and denied the return of these proceeds to [her] without a reasonable basis for doing so." Id., Co. at 4, ¶ 22. In addition to compensatory damages, plaintiff is seeking "punitive and exemplary damages in an amount to be determined at trial to be appropriate to punish, deter and set an example of [Fidelity][.]" Id., Co. at 5, ¶ D.

Following extensive discovery, the parties filed the present summary judgment motions. If Fidelity does not prevail on its motion for summary judgment on the entire complaint, it seeks partial summary judgment on the bad faith and punitive damages claims. Plaintiff seeks partial summary judgment on two narrow issues: (1) "that Fidelity . . . had notice of a preliminary injunction[;]" and (2) "that Mr. Mothershead himself cannot be held responsible for his actions with [Fidelity] during the times he was under a conservatorship." Mot. (doc. 60) at 1 -2. Fidelity cross moved for partial summary judgment on those same two issues. Resp. & Cross-Mot. (doc. 64) at 1:23-24.

The court will first consider Fidelity's motion for summary judgment as to the entire action because if Fidelity prevails, the other motions become moot.

Discussion

I. Governing Legal Standards

The court assumes familiarity with what has sometimes been referred to as the Celotex trilogy wherein the Supreme Court, in 1986, clarified and refined the standards for deciding Rule 56 summary judgment motions. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v.

Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and Matsushita Elec. Industr. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). There is no need to repeat the entire body of summary judgment case law which has developed since then, especially, as will be seen, these motions turn on purely legal issues, making them proper for resolution pursuant to Fed. R. Civ. P. 56.

II. Fidelity's Summary Judgment Motion

A. Breach of Contract

Fidelity premises its summary judgment argument upon plaintiff Klass' status as a "mere purported assignee of Fidelity's insured," Mr. Mothershead. Mot. (doc. 57) at 6:1. Fidelity contends that in that capacity plaintiff is subject to all claims and defenses which Fidelity could assert against Mothershead. Fidelity thus reasons that because supposedly Mothershead fraudulently obtained a $14,363.57 loan from it, plaintiff, as his assignee, is now deemed to have fraudulently obtained the loan. In turn, Fidelity reasons that the doctrine of "unclean hands" "precludes [plaintiff] as a matter of law from seeking judicial relief" due to "her own fraudulent . . . conduct." Id. at 6: 4-5. Therefore, Fidelity believes that it is entitled to summary judgment.

Plaintiff's response to this argument is terse to say the least. First, with no legal or factual support, plaintiff's response memorandum states that she "has *always* been an owner of the Policy[.]" Resp. (doc. 67) at 12:26 (emphasis added). Plaintiff continues, stating that since "June 23, 2004," she has been the "sole owner" of that Policy, "and is an assignee of the

conservator's interest." Id. at 12:26-27 (citation omitted). With no legal support or analysis, plaintiff baldly asserts that Fidelity's "claims that [she] has no greater rights in the Policy than Mr. Mothershead because mere assignees are subject to all the same claims and defenses that could be asserted against their assignors, is incorrect." Id. at 12:27-13:2 (internal quotation marks and citation omitted). Plaintiff reiterates that she "owns the Policy and has *always* had an ownership interest[]" in it. Id. at 13:2-3 (citation omitted). Plaintiff concludes by simply stating that Fidelity "owed a duty to [her] as the Policy owner." Id. at 13:3.

Fidelity counters that "plaintiff failed to present any evidence that she ever executed an actual assignment[.]" Reply (doc. 68) at 5 (emphasis omitted). Next, Fidelity responds that "any actual assignment is void as a matter of law . . . because the policy had already been assigned to Fidelity as sole security for the loan." Id. at 6. Fidelity misstates one important fact on the assignment issue, that Mr. Mothershead was required to execute an assignment of the claim. In the end, though, that misstatement does not change the fact that there is no written proof of an assignment of the Conservator's claim, as the Settlement Agreement required. Absent such proof, plaintiff lacks standing to bring this action.

1. Assignment

At the outset it is necessary to distinguish between two potential assignments here, something the parties did not always do. The first potential assignment pertains to the policy itself; the second pertains to the Conservator's claim against Fidelity.

The court will consider these two assignments in reverse order because, as just indicated, the latter impacts plaintiff's standing to pursue this action.

a. Cause of Action

"[T]he general rule in [Arizona] is well-settled that the *valid assignee* of a chose in action may bring suit thereon in [her] own name." Certified Collectors, Inc. v. Lesnick, 116 Ariz. 601, 602, 570 P.2d 769, 770 (1977) (citation omitted) (emphasis added); see also In re Exxon Valdez, 239 F.3d 985, 988 (9th Cir. 2001) (internal quotation marks and citation omitted) ("[A] valid assignment confers upon the assignee standing to sue in place of the assignor.") "It is, however, hornbook law that in order to effect a legal assignment of any kind there must be evidence of an intent to assign or transfer the whole or part of some specific thing, debt, or chose in action, and the subject matter of the assignment must be described sufficiently to make it capable of being readily identified." Id. at 603, 570 P.2d at 771 (citations omitted). Fidelity argues that there has not been a valid assignment here, thus entitling it to summary judgment.

Initially Fidelity relegated to a footnote the issue of plaintiff's status as what it terms "a mere 'purported' assignee[.]" Mot. (doc. 57) at 6 n. 1. In its reply, though, Fidelity asserts that plaintiff has not met her burden of proof that "she executed an actual assignment with *Mr. Mothershead*[.]" Resp. (doc. 68) at 6:10-11 (emphasis added). Citing to page 67 of the Settlement Agreement, and quoting the phrase thereon, "'shall execute an assignment[,]'" Fidelity repeatedly states that that Agreement required Mr. Mothershead to execute an assignment in

plaintiff's favor. See, e.g., Mot. (doc. 57) at 6 n. 1 (emphasis added) ("[T]he . . . settlement agreement . . . provided that *Mr. Mothershead* 'shall execute an assignment[.]'"); Resp. (doc. 68) at 5:26-38 (emphasis added) ("The Court has before it the relevant pages of the . . . Settlement Agreement . . . ([DSOF I], ¶ 12; Exhibit F, p. 67), which provide that *Mr. Mothershead* 'shall execute an assignment[.]'")

Page 67 of the Settlement Agreement does not state that Mr. Mothershead is required to execute an assignment to plaintiff.[6] Rather, in unequivocal language that Agreement states that the "*Special Conservator shall execute an assignment* in favor of [plaintiff][.]" DSOF I (doc. 58), exh. F thereto at 67 (emphasis added). The effect of such an assignment, as noted earlier, would be to "*assign*[] *to* [*plaintiff*] *the claim of the Special Conservator*, as [Mr. Mothershead's fiduciary], against [Fidelity] for negligently and wrongfully making a loan to [Mr. Mothershead] . . . in violation of the terms of the Special Conservatorship and Preliminary Injunction issued in this matter." Id. (emphasis added).

After clarifying that under the terms of the Settlement Agreement, the Special Conservator, and not Mr. Mothershead, was to execute the assignment, the next issue is whether the Special Conservator's claim is assignable. "In Arizona, the nature of the claim determines whether it can be assigned." Martinez v. Green, 212 Ariz. 320, 322, 131 P.2d 492, 494 (Ariz. Ct. App. 2006)

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[6] The Agreement does state that plaintiff "shall be awarded[,]" among other policies, the policy which is the subject of this lawsuit, but it does not require Mr. Mothershead to execute an assignment of anything. See DSOF I (doc. 58), exh. F thereto at 67.

(citations omitted). "[P]ersonal injury claim[s] cannot be assigned before judgment." Id. (citation omitted). Economic torts "involv[ing] pecuniary loss, not injury to person or property[]" id. at 322 n. 3, 131 P.2d at 494 n.3 (citations omitted), are assignable though. Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 17, 945 P.2d 317, 328 (Ariz. Ct. App. 1997). Because the alleged loss here is strictly monetary, the value of the loan, the Special Conservator's claim is properly assignable.

The next and most critical issue is whether plaintiff has met her burden of showing that a valid assignment of the Special Conservator's claim was made here. As previously stressed, the Settlement Agreement provided that the Special Conservator "shall execute an assignment[.]" DSOF I (doc. 58), exh. F thereto at 67. The court must decide the meaning of the quoted phrase. This is not a difficult task especially given the well-settled principle that "[w]hen the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning[.]" See Employers Mut. Cas. Co. v. DGG & CAR, Inc., 218 Ariz. 262, 267, 183 P.3d 513, 518 (2008) (internal quotation marks and citations omitted). The phrase "shall *execute*" is unambiguous and clearly contemplates a written assignment. The record is completely void, however, of a written assignment from the Special Conservator to plaintiff.

In PSOF II, plaintiff declares that she was "assigned the Conservator's rights to pursue [Fidelity] for giving up the loan funds." PSOF II (doc. 66) at 1, ¶ 3 (citing exh. 3 thereto at 74:4-75:11). To support that statement, plaintiff cites to her

deposition testimony, but it does not establish that the Special Conservator executed an assignment in her favor as the Settlement Agreement mandates. In fact, when directly asked, "Well, you're telling Fidelity, are you not, that the reason why you believe you have the right to assert this claim is because the claim was assigned to you, correct[,]" plaintiff answered, "No." PSOF II (doc. 66), exh. 3 thereto at 74:4-8. Plaintiff did further testify as to her "belie[f] that . . . it would be cleaner if [she] had all of the authority to assert this claim rather than [the Special Conservator] asserting this claim on behalf of Mr. Mothershead and then [her] asserting this claim on [her] own behalf." Id., exh. e thereto at 75:5-9. Again, however, nowhere in the deposition testimony to which plaintiff cites is there any mention of the Special Conservator actually executing an assignment in her favor.[7] Thus, there is absolutely no proof before the court that the Special Conservator assigned to plaintiff his claim that Fidelity "wrongfully and negligently ma[de] a loan to [Mr. Mothershead][.]" See DSOF I (doc. 58), exh. F thereto at 67.

"The burden of proving the validity of an assignment lies with the purported assignee." Universal Trading & Investment Co. v. Kiritchenko, 2007 WL 2669841, at *6 (N.D.Cal. Sept. 7, 2007) (citing Britton v. Co-op Banking Group, 4 F.3d 742, 746 (9th Cir. 1993)). As just discussed, plaintiff did not meet that burden. That lack of proof is fatal to her lawsuit. In Certified Collectors, the court described the "purported assignment" as "at

[7] Assuming *arguendo* that Arizona law permits an oral assignment of a cause of action, there is no mention, for that matter, of such an assignment in this case.

best [a] cryptic form assignment." 117 Ariz. at 603, 570 P.2d at 771 (footnote omitted). There was a document in the record "entitled 'Assignment[,]'" but it was a "form [which] contain[ed] only a recitation of the consideration involved, and the seal of a . . . notary public." Id. The "crucial information necessary" to constitute an assignment, such as the "identity" of one party thereto and the "capacity in which he made th[at] agreement, his relation (if any) to [the supposed assignor] and any identification [as to] what debt th[at] assignment related[]" was all missing. Id. Thus, in Certified Collectors, the court held that the "basic elements of [a] legal assignment [were] so lacking that [it] c[ould] find no basis in the record on which to conclude that [plaintiff] ha[d] any right to bring an action . . . as the real party in interest." Id. (footnote omitted). It thus affirmed the trial court's grant of summary judgment in defendant's favor, but it did so on the basis of this lack of proof of an assignment, which was not the basis for the trial court's decision. Accord Aperm of South Carolina v, Roof, 290 S.C. 442, 448, 351 S.E.2d 171, 174 (S.C. Ct. App. 1986) (alleged assignment ineffective where "agreement set[] out in clear and unambiguous language" that it has to be "in writing and consented to by [plaintiff][,]" and there was no evidence of such a writing).

In the present case, there is not even a "cryptic form assignment." There is no evidence at all of an assignment from the Conservator to plaintiff, as the Settlement Agreement required. Thus, because plaintiff has not met her burden of proving a valid assignment of the Conservator's claim against Fidelity for wrongful and negligent conduct, she has not shown that she has any right to

pursue that claim herein. Cf. Sherman v. First American Title Ins. Co., 201 Ariz. 564, 570, 38 P.3d 1229, 1235 (Az. Ct. App. 2002) (affirming summary judgment against plaintiff where the record "contain[ed] no affidavits, deposition testimony, or other evidence" of intent to assign broker's commissions to her). Therefore, the court finds that Fidelity is entitled to summary judgment as to plaintiff's breach of contract claim.

b. Policy

To the extent plaintiff bases her breach of contract claim on the "assignment" of the policy to her under the terms of the Settlement Agreement, she fares no better. As the Settlement Agreement plainly states, she was "awarded" that policy, along with two others, "*subject to the outstanding loans*, on each of said policies." DSOF I (doc. 58), exh. F thereto at 67 (emphasis added). Given that plain language, plaintiff cannot now claim that based upon an "assignment" of the policy (as distinguished from an assignment of the Conservator's claim), she has a claim against Fidelity for the 2003 loan it made to Mr. Mothershead.[8]

B. Insurance Bad Faith

To this point, the court's focus has been exclusively on count one of the complaint, breach of contract. Plaintiff also asserts an "insurance bad faith" claim though, wherein she alleges the Fidelity "breached the implied good faith and fair dealing owed to [her]." Doc. 1, Co. thereto at 4, ¶ 21:4-5. Allegedly Fidelity

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[8] The record strongly implies, although it does not conclusively establish, that plaintiff waived any claim against Mr. Mothershead or the conservatorship to half of any supposed claim against Fidelity with regard to the loan. See PSOF I (doc. 61), exh. 10 thereto at KLASS DST 000182 at n.1; and PSOF II (doc. 66), exh. 3 thereto at 75:13 - 76:3.

breached that duty in the first place by "wrongfully disburs[ing] loan proceeds" to Mr. Mothershead. Id., Co. thereto at 4, ¶22:6. Thereafter, Fidelity allegedly breached that duty by "intentionally withh[o]lding, delay[ing], and den[ying] the return of th[o]se proceeds to [plaintiff] without a reasonable basis for doing so." Id., Co. thereto at 4, ¶ 22:6-8. The complaint does not allege the basis for this supposed duty, but in her response plaintiff states that Fidelity "owed a duty to [her] as the Policy *owner*." Resp. (doc. 67) at 13:3 (emphasis added).

Fidelity advances several reasons as to why it is entitled to summary judgment on this bad faith claim. First, it argues that "an insurer does not owe a duty of good faith and fair dealing to the spouse of its insured." Mot. (doc. 57) at 7:2-3 (citations omitted). Assuming the existence of a duty, Fidelity goes on to explain why, as a matter of law, it did not breach that duty.

For the moment, the court will confine its analysis to the issue of whether Fidelity owed a duty to plaintiff. The court will proceed in this way because obviously, if Fidelity did not owe plaintiff a duty, this claim cannot stand as a matter of law. Fidelity then would be entitled to summary judgment and there would be no need to address the merits.

Plaintiff asserts that Fidelity is "minimiz[ing] [her] legal status[]" by "misidentifying [her] as just the spouse of the insured [Mr. Mothershead] and limiting its analysis to its early bad faith acts." Resp. (doc. 67) at 3:27; and 16-17. Plaintiff returns to a dominant theme of her response, which is that Fidelity fails to take into account her community property interest in the policy. Plaintiff further contends that regarding her as "just the

spouse" also "ignores" Fidelity's alleged continued bad faith in dealing with her "after [she] became sole owner of the policy." Id. at 3:19-20. Expressly disavowing her status as a spouse, and stressing that she has "*always* been *an owner* of the policy," and "*always had* an *ownership interest*[,]" plaintiff contends that Fidelity owed her a duty "as the *Policy owner*." Id. at 12:25-26; and at 13:2-3 (citations omitted) (emphasis added). Plaintiff adds that she has "an ownership interest in the Policy . . . as Mothershead's assignee [and] the conservator's assignee[.]" Id. at 16:3.

Given the finding herein that plaintiff has not shown a valid assignment from the Conservator, there is no need to consider whether Fidelity owed plaintiff a duty as the Conservator's assignee. There is also no need to consider plaintiff's assertion that she has an ownership interest as her ex-husband's assignee. This assertion is irrelevant because that "assignment" occurred after the alleged initial breach, *i.e.* Fidelity's loan to Mothershead. Plaintiff's continuing duty theory falls by the wayside if there was no duty owed in the first place. Put differently, if plaintiff was not the policy owner, to which Fidelity owed a duty, when the initial breach occurred (the Mothershead loan), Fidelity did not have a "continuing duty" to plaintiff as she urges. Consequently, the court will focus on plaintiff's argument that Fidelity owed her a duty as an "owner" of the policy.

The flaw with this argument is that, as the record reveals, there is no evidence that plaintiff was the policy owner, or, for that matter, the insured, at the time of the loan. In fact, all of

the evidence is to the contrary. When Fidelity made the loan to Mr. Mothershead, he was the sole owner and insured on the policy.

The court does not have the advantage of having the whole policy before it. The only two documents before it pertaining directly to the policy are the "Policy Information" sheet and application discussed earlier. The "Policy Information" sheet clearly identifies Mr. Mothershead as the sole "insured" and the sole "owner[.]" DSOF I (doc. 58), exh. A thereto at 10. His name also appears on the policy application form as the only "Proposed Insured[.]" PSOF II (doc. 66), exh. A thereto at 3. The space for information regarding an "Other Insured[]" is left blank. Id. This is consistent with the subsequent loan which, as mentioned earlier, requested tax information regarding the "Joint Owner." DSOF I (doc. 58), exh. C thereto at 240. No such information was provided. Id. As the foregoing shows, plaintiff was not an insured or an owner of the policy when it was issued or when Mr. Mothershead made the loan request. Instead, she was designated the "primary beneficiary," as Mr. Mothershead's wife. See PSOF II (doc. 66), exh. 1 thereto at 3. The fact that plaintiff was "awarded" this policy as part of the Settlement Agreement, and thereafter sought and obtained from Fidelity a transfer of policy ownership, further undermines her contention that the "has always been an owner of the policy." Resp. (Doc. 67) at 12:25 (emphasis omitted). If she had always been an owner, then clearly there would have been no need for a transfer of ownership.

Plaintiff also asserts that "[a]t all times [she] had an ownership interest in the Policy . . . as community property." Id. at 16:2. Plaintiff is improperly equating community property with

ownership, however. Failing to make the distinction between community property and ownership is especially critical in the insurance context. As Fidelity explained, under the insurance law, owners, assignees and beneficiaries have separate and distinct interests. A particularly important distinction here is the following:

> [U]ntil the benefits [of any life or disability insurance policy] become payable[,] *the insurer shall be entitled to deal with the insured* or person designated in the policy as having control thereof with respect to the policy and all benefits thereof, including loan and cash surrender values, *without first securing the consent of such spouse*.

Ariz. Stat. § 20-1128 (West 2002) (emphasis added). This statute provides some authority for Fidelity dealing with Mr. Mothershead, as the insured, regarding the loan, "without first securing the consent of" plaintiff, his spouse at the time, who was not then an insured.

The ownership of an insurance policy is determined from the contract itself and insurance law, irrespective of whether that policy may also be community property. Thus, it does not necessarily follow, as plaintiff urges, that because the policy may have been community property, as an asset acquired after marriage with community funds, she was the "owner" of that policy from its date of issuance. In short, because plaintiff has not shown that she was the owner of the policy when the initial alleged breach occurred, she has not shown that Fidelity owed her a duty of good faith and fair dealing which can be carried forward. Fidelity is therefore entitled to summary judgment on this bad faith claim as well.

Plaintiff's recourse, if any, seems to be against her ex-

husband. By making the loan request from Fidelity, he appears to have breached the preliminary injunction - an injunction to which he, but not Fidelity, was a party. In any event, the court's holding that Fidelity is entitled to summary judgment on the entire complaint, renders moot the parties' respective motions for partial summary judgment, as well as plaintiff's motion to strike. Accordingly, the court denies those motions.

For the reasons set forth herein, IT IS ORDERED that:

(1) the motion for summary judgment by defendant Fidelity & Guaranty Life Insurance Company (doc. 57) is GRANTED;

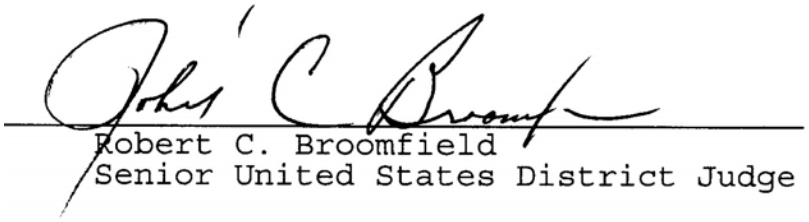
(2) the motion for partial summary judgment by plaintiff Leslie J. Klass (doc. 60) is DENIED as moot;

(3) the cross-motion for partial summary judgment by defendant Fidelity & Guaranty Life Insurance Company (doc. 64) is DENIED as moot; and

(4) the motion to strike the controverting statement of facts by plaintiff Leslie J. Klass (doc. 74) is DENIED as moot.

The Clerk of the Court is directed to enter judgment in favor of defendant and terminate this case.

DATED this 31st day of March, 2009.



Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record