

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN HANCOCK LIFE INSURANCE
COMPANY (U.S.A.),

Plaintiff,

v.

DANIEL C. VIAU,

Defendant.

Case No. 17-cv-04317-CW

ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

(Dkt. No. 11)

Plaintiff John Hancock Life Insurance Company (U.S.A.) moves for a preliminary injunction. Docket No. 11. Defendant Daniel C. Viau filed an opposition and Plaintiff filed a reply. Docket Nos. 22, 24. On October 3, 2017, the parties appeared for a hearing. Having considered the papers, supporting evidence, and the arguments of counsel, the Court DENIES Plaintiff's motion for preliminary injunction.

BACKGROUND

Around 1986, Defendant was badly burned in a fire on private property. Decl. of Walter H. Walker ¶ 2. The case settled and the property owner agreed to pay Defendant a substantial amount of money. Id. ¶ 3. The settlement money would be paid through an annuity contract. Id. ¶ 4. The annuity contract, which is dated October 23, 1987, provides for a series of monthly payments

1 and periodic lump sum payments to be made to Defendant on
2 specific dates starting in 1987 and continuing through August 1,
3 2045. Decl. of Ketty Saez ¶ 4, Ex. A.

4 On August 18, 2015, Plaintiff sent Defendant a letter
5 alleging that Plaintiff had been overpaying the monthly payments
6 due to Defendant since September 2007. Id. ¶ 8, Ex. B. The
7 letter contains a comparison of the amount Defendant "should have
8 received" under the annuity contract and the amount actually
9 received. Id., Ex. B. The letter alleges that the total
10 overpayment was \$127,588.12. Id., Ex. B at 1.

11 On September 1, 2015, Plaintiff sent Defendant another
12 letter. Id. ¶ 9, Ex. C. This letter purports to compare the
13 amount Defendant "should have received" under the annuity
14 contract and the amount Defendant actually received. Id., Ex. C
15 at 1. Plaintiff reiterated that Defendant had been overpaid
16 \$127,588.12. Id., Ex. C at 1. The letter further refers to a
17 "verbal agreement" "discussed via telephone on September 1, 2015"
18 that Plaintiff would withhold \$64,000 from the lump sum due to
19 Defendant on August 19, 2017 and \$63,588.12 from the lump sum due
20 to Defendant August 19, 2022. Id. Plaintiff attached a draft
21 "Agreement for Reduction of Debt" to the letter. Id. at 3. In
22 addition to the payment terms, the draft agreement also included
23 a provision that would require Defendant to release Plaintiff
24 "and its directors, officers, affiliates, agents, owners,
25 employees, successors and attorneys, from all claims, demands,
26 known or unknown, that now exist and that arise out of, or are in
27 any way connected with, or that result from, the matters
28 described herein." Id., section 4. The draft agreement contains

1 no provision requiring Plaintiff to release Defendant in a
2 similar fashion. See id.

3 On January 27, 2016, March 2, 2016, and April 1, 2016,
4 Plaintiff sent Defendant additional letters, which were
5 substantially the same as the September 1, 2015 letter. Id.
6 ¶¶ 10-12, Exs. D-F. Plaintiff reiterated that Defendant had been
7 overpaid \$127,588.12 and again requested that Defendant sign an
8 agreement allowing Plaintiff to withhold \$64,000 from the lump
9 sum due on August 19, 2017 and \$63,588.12 from the lump sum due
10 on August 19, 2022. See id., Exs. D-F.

11 On April 28, 2016, Mr. Walker, counsel for Defendant, sent a
12 letter to Plaintiff on behalf of Defendant. Id., Ex. G. Mr.
13 Walker disputed Plaintiff's claim that Defendant owed Plaintiff
14 money. Id. Mr. Walker pointed out a mistake in Plaintiff's
15 letters: Plaintiff's letter states that Defendant should have
16 received \$2,400.84 for the month of September 2007, but the
17 annuity contract states that Defendant should have received
18 \$3,400.44 for the same month.¹ Id. at 1-2; Id., Ex. A at 1.
19 According to Plaintiff's letter, then, Plaintiff actually
20 underpaid Defendant by \$1000 for the month of September 2007.
21 Id., Ex. G at 2. Mr. Walker also alleged that Defendant
22 experienced "difficulties" with his annuity contract under
23 Plaintiff's administration. Id. at 1. Plaintiff apparently
24 allowed the mother of Defendant's child to withdraw money from
25 his monthly payments for about two years. Id. Another time,

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28 ¹ Mr. Walker's letter contained some typographical errors with respect to these numbers, which he corrected in a follow-up letter on May 5, 2016. Id., Ex. H.

1 Defendant received a check of \$1,100 from Plaintiff which
2 Plaintiff had forgotten to give to him. Id. In addition,
3 Defendant's payments "stopped" in October for a period of time,
4 and were restored after Mr. Walker called Plaintiff on
5 Defendant's behalf. Id. at 2. Mr. Walker stated that he
6 considered the matter closed. Id. Mr. Walker also stated that
7 Defendant is "not competitively employable," has "no savings and
8 no assets," and "needs his structured payments to live." Id.
9 Mr. Walker concluded by stating that Defendant would not sign the
10 agreement. Id.

11 On July 17, 2017, Mr. Downey, counsel for Plaintiff, sent a
12 letter to Mr. Walker. Decl. of Thomas M. Downey, Ex. I. Mr.
13 Downey reiterated that Defendant had been overpaid by \$127,588.12
14 during the period of September 2007 through August 2015. Id. at
15 1. Mr. Downey came forward with a new proposal to settle the
16 alleged overpayment: (1) the August 19, 2017 lump sum payment of
17 \$100,000 would be applied to the debt, and (2) the monthly
18 payments due between September 1, 2017 and September 1, 2019
19 would each be reduced by \$1,500 until the remaining balance was
20 paid off. Id. Mr. Downey invited Defendant to provide an
21 alternative proposal, but hinted that Plaintiff might seek court
22 relief. Id. at 2.

23 On July 24, 2017, Mr. Walker responded that, as previously
24 explained, the proposed deal was "unacceptable." Id., Ex. J.
25 Mr. Walker stated that Defendant could not survive on the terms
26 of the proposed deal. Id.

27 Four days later, on July 28, 2017, Plaintiff filed this
28 lawsuit against Defendant, seeking return of the alleged

1 overpayment of \$127,588. Plaintiff asserted claims for
2 restitution, money had and received, conversion, and declaratory
3 and injunctive relief. On October 10, 2017, Plaintiff filed an
4 amended complaint asserting the same claims but reducing the
5 amount of the alleged overpayment from \$127,588 to \$113,155.

6 On August 10, 2017, Plaintiff filed this motion seeking to
7 enjoin Defendant from "accepting, accessing, spending,
8 transferring, withdrawing, or otherwise dissipating the lump sum
9 payments due on August 19, 2017 and August 19, 2022." Motion at
10 2.

11 LEGAL STANDARD

12 To obtain either a TRO or a preliminary injunction under
13 Federal Rule of Civil Procedure 65, the moving party must
14 demonstrate "(1) a likelihood of success on the merits; (2) a
15 significant threat of irreparable injury; (3) that the balance of
16 hardships favors the applicant; and (4) whether any public
17 interest favors granting an injunction." Raich v. Ashcroft, 352
18 F.3d 1222, 1227 (9th Cir. 2003); see also Winter v. Natural Res.
19 Def. Council, Inc., 129 S. Ct. 365, 374 (2008). The Ninth
20 Circuit has recognized that an injunction could issue if "serious
21 questions going to the merits were raised and the balance of
22 hardships tips sharply in plaintiff's favor," so long as the
23 plaintiff demonstrates irreparable harm and shows that the
24 injunction is in the public interest. Alliance for the Wild
25 Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011)
26 (citation and internal quotation marks omitted). Injunctive
27 relief is "an extraordinary remedy that may only be awarded upon
28 a clear showing that the plaintiff is entitled to such relief."

1 Winter, 555 U.S. at 22.

2 DISCUSSION

3 I. Likelihood of Success on the Merits

4 "To prevail on a common count for money had and received,
5 the plaintiff must prove that the defendant is indebted to the
6 plaintiff for money the defendant received for the use and
7 benefit of the plaintiff." Rutherford Holdings, LLC v. Plaza Del
8 Rey, 223 Cal. App. 4th 221, 230 (2014). To prevail on a claim
9 for conversion, the plaintiff must prove an "ownership or right
10 to possession of the property at the time of the conversion, the
11 defendant's conversion by a wrongful act or disposition of
12 property rights, and resulting damages." Avidor v. Sutter's
13 Place, Inc., 212 Cal. App. 4th 1439, 1452 (2013). "Money can be
14 the subject of an action for conversion if a specific sum capable
15 of identification is involved." Id.

16 Plaintiff has not provided any persuasive evidence showing
17 that Defendant actually received overpayments from September 2007
18 through August 2015. The only direct evidence Plaintiff submits
19 in support of this point is the declaration of Ketty Saez,
20 Assistant Vice President and Senior Counsel for Litigation,
21 Bankruptcy, and Dispute Resolution for Plaintiff, who states in a
22 conclusory fashion that Defendant "accepted monthly payments from
23 Plaintiff in amounts that exceeded the monthly payments due under
24 the terms of the Annuity Contract" in the amount of \$113,155.
25 Saez Decl. ¶ 7. Ms. Saez does not state how she determined that
26 Defendant had been overpaid or how she calculated the amount of
27 the overpayment. Ms. Saez's declaration is insufficient to show
28 that Plaintiff is entitled to relief. Am. Passage Media Corp. v.

1 Cass Commc'ns, Inc., 750 F.2d 1470, 1473 (9th Cir. 1985) (in
2 denying preliminary injunction motion, disregarding affidavits
3 that were "conclusory and without sufficient support in facts").
4 Plaintiff could have provided reliable evidence in the form of
5 copies of the actual checks sent to and cashed by Defendant,
6 which should be in Plaintiff's possession, but Plaintiff failed
7 to do so.

8 The only other evidence Plaintiff provides is the letters it
9 sent to Defendant to try to collect the alleged overpayment.
10 While the Court may consider hearsay evidence in conjunction with
11 a preliminary injunction motion, these letters have already been
12 demonstrated to be unreliable. These letters are inaccurate on
13 their face. Every single letter sent by Plaintiff to Defendant
14 states that, under the annuity contract, the monthly payments for
15 the period of September 2007 through August 2008 should have been
16 \$2,400.84. This is contradicted by the annuity contract itself,
17 which plainly shows that the monthly payments for the period of
18 September 2007 through August 2008 should have been \$3,400.44.
19 This mistake affects Plaintiff's calculation of the alleged
20 overpayment. According to Plaintiff's letters, Defendant
21 actually received \$2,400.84 for September 2007, which means that
22 Defendant was not overpaid for that month and was actually
23 underpaid by about \$1000. In addition, the alleged overpayment
24 for the period of October 2007 through August 2008 should be
25 reduced by a significant amount. As a result, Plaintiff's
26 calculation of the alleged overpayment as \$127,588.12 is wrong.
27 Although Defendant's counsel pointed out this mistake in his
28 April 28, 2016 letter, Plaintiff continued to assert the amount

1 of the alleged overpayment was the same: \$127,588.12. See Downey
2 Decl., Ex. I. Plaintiff even maintained that the alleged
3 overpayment was \$127,588 in its initial complaint. Docket No. 1
4 ¶ 9. Plaintiff did not attempt to correct its mistake until
5 thirteen days later, when it filed an amended complaint asserting
6 the alleged overpayment was \$113,155. Docket No. 10 ¶ 9. This
7 amount is different from the amount that would result from
8 correcting the mistake pointed out by Defendant, and so it is
9 possible that Plaintiff found other mistakes in its calculation,
10 none of which are disclosed in its preliminary injunction motion.
11 What is clear from all this is that the Court cannot rely on the
12 letters -- or Plaintiff's accounting -- to determine whether
13 Defendant received overpayments.

14 Moreover, Defendant has raised at least some serious doubt
15 over whether Defendant was underpaid at various times over the
16 years. Plaintiff's own letters show that Defendant was underpaid
17 for the month of September 2007. Defendant's counsel's letter
18 alleges that Defendant received a check for \$1,100, which
19 Plaintiff had forgotten to give to him. The same letter also
20 alleges that payments to Defendant stopped in October for some
21 period of time, which Defendant confirmed at the hearing. In
22 addition, Defendant's counsel states that he personally sat down
23 with Defendant and reviewed Defendant's records and found
24 evidence that Plaintiff has underpaid Defendant "at various times
25 more than \$1,000 per month." Walker Decl. ¶ 6. If Plaintiff
26 underpaid Defendant at various times, then those underpayments
27 would likely count against the alleged overpayment, if any.

28 Accordingly, because Plaintiff cannot establish the amount

1 of money it claims it is owed, or even that it is owed any money
2 at all, Plaintiff has not made a clear showing that it is likely
3 to succeed on the merits of its claims.²

4 II. Significant threat of irreparable injury

5 Plaintiff alleges in a conclusory fashion that "Defendant
6 will dissipate or otherwise transfer the lump sum payments
7 received from Plaintiff and not preserve the funds for
8 reimbursement to Plaintiff" while this case is pending. Motion
9 at 7. Plaintiff claims that this is evidenced by Defendant's
10 refusal to return the funds or accept a plan to settle the debt.
11 Id. at 6-7.

12 "Purely monetary injuries are not normally considered
13 irreparable." Lydo Enterprises, Inc. v. City of Las Vegas, 745
14 F.2d 1211, 1213 (9th Cir. 1984); see also Idaho v. Coeur d'Alene
15 Tribe, 794 F.3d 1039, 1046 (9th Cir. 2015). "The possibility
16 that adequate compensatory or other corrective relief will be
17 available at a later date, in the ordinary course of litigation,
18 weighs heavily against a claim of irreparable harm." Sampson v.
19 Murray, 415 U.S. 61, 90, 94 (1974). "A party seeking an asset
20 freeze must show a likelihood of dissipation of the claimed
21 assets, or other inability to recover monetary damages, if relief
22 is not granted." Johnson v. Couturier, 572 F.3d 1067, 1085 (9th
23 Cir. 2009); see also In re Estate of Ferdinand Marcos, Human
24 Rights Litig., 25 F.3d 1467, 1480 (9th Cir. 1994) (affirming
25 district court's finding that money damages would be inadequate

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27 ² Because Plaintiff cannot show it is likely to be able to
28 prove the elements of its claims, the Court need not consider at
this time whether Defendant is likely to prevail on its statute
of limitations argument.

1 "due to impending insolvency of the defendant or that defendant
2 has engaged in a pattern of secreting or dissipating assets to
3 avoid judgment").

4 Here, Defendant refused to settle the debt because he
5 disputes that he was overpaid. Opposition at 6. He also
6 disputes that he is legally required to return the amount
7 demanded by Plaintiff. Id. As discussed above, Defendant's
8 concerns have merit. Defendant's refusal to simply give in to
9 Plaintiff's demands and pay the amount requested does not show
10 that Defendant is likely to dissipate or secrete the funds, as
11 Plaintiff suggests.

12 Plaintiff further argues that Defendant may not be able to
13 return the funds at the end of this lawsuit because is "not
14 competitively employable." Reply at 2. This argument is belied
15 by the fact that, under the annuity contract, Plaintiff is
16 obliged to pay Defendant substantial lump sum and monthly
17 payments until at least 2044. See Saez Decl., Ex. A at 1-2. If
18 this lawsuit results in a money judgment against Defendant,
19 Defendant could presumably use those funds to pay the money
20 judgment. Plaintiff responds that Defendant could transfer
21 future lump sum payments on the secondary market. Reply at 3.
22 But this argument appears to be merely speculative. "Speculative
23 injury does not constitute irreparable injury." Goldie's
24 Bookstore, Inc. v. Superior Court of State of Cal., 739 F.2d 466,
25 472 (9th Cir. 1984) (citing Wright and Miller, 11 Federal
26 Practice and Procedure § 2948 at 436 (1973)); see also Aliya
27 Medcare Fin., LLC v. Nickell, 2014 WL 12526382, at *7 (C.D. Cal.
28 Nov. 26, 2014) (finding no likelihood of irreparable injury where

1 allegations of insolvency were "wholly speculative" and there was
2 no evidence of actual dissipation or diversion of funds).

3 III. Balance of hardships

4 "Courts must balance the competing claims of injury and must
5 consider the effect on each party of the granting or withholding
6 of the requested relief." Winter, 555 U.S. at 24.

7 The balancing of the hardships favors Defendant. Defendant
8 will likely suffer great hardship if he is required to freeze
9 \$200,000 in annuity payments, an amount which exceeds greatly
10 even Plaintiff's monetary demand in this case. Defendant appears
11 to rely heavily on his annuity payments in order to pay his
12 bills. See Walker Decl. ¶¶ 2-5. Plaintiff does not dispute this
13 point. Reply at 2.

14 By contrast, Plaintiff will not suffer any irremediable harm
15 if the injunction does not issue. As discussed above, Plaintiff
16 may recover money damages later, if and when a judgment against
17 Defendant issues.

18 IV. Public interest

19 While the public interest does weigh in favor of fair
20 disposition of legal disputes and the preservation of legal
21 remedies, as Plaintiff contends, there has been no clear showing
22 that Plaintiff is likely to succeed on the merits of its claims.
23 There is also a significant public interest in proper
24 administration and regulation of insurance companies, which
25 provide "a vital service" that is "quasi-public" in nature. See
26 Yue v. Conseco Life Ins. Co., 282 F.R.D. 469, 484 (C.D. Cal.
27 2012) (quoting Egan v. Mutual of Omaha Ins. Co., 24 Cal.3d 809,
28 820 (1979)). Because it appears that Plaintiff committed several

1 errors in administering Defendant's annuity contract, and any
2 overpayment occurred because of Plaintiff's own errors rather
3 than Defendant's intentional wrongdoing, the public interest
4 weighs against granting an injunction.

5 In sum, a preliminary injunction is not warranted because
6 all of the factors favor Defendant.

7 CONCLUSION

8 Plaintiff's motion for a preliminary injunction (Docket No.
9 11) is DENIED.

10 As stated at the hearing, Plaintiff has filed copies of the
11 annuity contract as exhibits to at least the complaint and the
12 present motion which contain personally identifiable information,
13 including an individual's birth date and a financial-account
14 number, in derogation of Federal Rule of Civil Procedure 5.2.
15 The parties shall review the record to determine all instances
16 where such information was filed on the docket. The parties
17 shall then file a stipulated motion to remove the incorrectly
18 filed documents, following the steps on the Court's website:
19 <http://www.cand.uscourts.gov/ecf/correctingmistake#SENSITIVE>.
20 The parties should do so without delay.

21 At the parties' Rule 26(f) conference, the parties shall:
22 (1) review the checks that were sent to and cashed by Defendant
23 and determine the amount of Plaintiff's overpayment to Defendant,
24 if any; (2) present their respective positions on the effect of
25 the statute of limitations on the potential recovery in this
26 case, and (3) discuss whether the statute of limitations issue is
27 suitable for disposition as an early motion for summary judgment.
28 The parties shall report on their discussion of the above issues

1 in their case management statement.

2 IT IS SO ORDERED.

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4 Dated: October 5, 2017



CLAUDIA WILKEN
United States District Judge

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