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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

P. Kellie C. Brimberry,)
)
Plaintiff,)
)
v.)
)
The Northwestern Mutual)
Life Insurance Company, and)
Does 1 through 50,)
inclusive)
)
Defendant.)

CV 13-00127 RSWL (AJWx)

**ORDER RE: COUNTER-
DEFENDANT P. KELLIE C.
BRIMBERRY'S MOTION FOR
SUMMARY JUDGMENT [25]**

The Northwestern Mutual)
Life Insurance Company, a)
Wisconsin corporation,)
)
Counter-Claimants,)
)
v.)
)
P. Kellie C. Brimberry, an)
individual; Fiduciary Trust)
International of)
California, a California)
corporation; and Does 1)
through 10, inclusive,)
)
Counter-Defendants.)

1 Currently before the Court is Counter-Defendant P.
2 Kellie C. Brimberry's Motion for Summary Judgment [25].
3 The Court, having reviewed all papers submitted
4 pertaining to this Motion, **NOW FINDS AND RULES AS**
5 **FOLLOWS:** The Court **DENIES** Counter-Defendant's Motion
6 for Summary Judgment.

7 I. BACKGROUND

8 P. Kellie C. Brimberry ("Mrs. Brimberry")
9 instigated the present Action against The Northwestern
10 Mutual Life Insurance Company ("Northwestern") and Does
11 1 through 50 for failure to pay benefits due to Mrs.
12 Brimberry under two life insurance policies
13 ("Policies") belonging to her late husband, Kurt
14 Brimberry [1]. Prior to Mr. Brimberry's death in 2012,
15 Northwestern issued the Policies to Mr. Brimberry,
16 specifying that in the event of his death, the
17 Policies' benefits would be given to a beneficiary as
18 designated by Mr. Brimberry. Statement of
19 Uncontroverted Facts ## 2, 3. Mr. Brimberry died in
20 August 2012 of unknown causes. Id. at # 15. At the
21 time of his death, the Policies provided a net benefit
22 of \$3,501,691.46, and the sole designated beneficiary
23 under both Policies was Mrs. Brimberry. Id. at ## 4,
24 5. On August 31, 2012, Mrs. Brimberry notified
25 Northwestern of a claim for benefits under the
26 Policies. Id. at # 6.

27 While investigating Mrs. Brimberry's claim,
28 Northwestern was contacted by counsel for Fiduciary

1 Trust International of California ("Fiduciary"), the
2 company for which Mr. Brimberry worked from November
3 2001 until his termination on August 14, 2012. Dkt. #
4 3, ¶ 14; Statement of Uncontroverted Facts # 7.
5 Fiduciary's counsel asserted that Fiduciary had an
6 interest in the benefits payable under Mr. Brimberry's
7 two Northwestern Policies because Mr. Brimberry had
8 embezzled funds from Fiduciary during his employment
9 there and had used the embezzled funds to pay some, if
10 not all, of the Policies' premiums. Id. On November
11 29, 2012, Fiduciary's counsel wrote to Northwestern on
12 behalf of both Fiduciary and Mrs. Brimberry, making a
13 joint demand that Northwestern stay further processing
14 of their adverse claims to benefits while Fiduciary and
15 Mrs. Brimberry attempted to informally resolve their
16 competing claims. Dkt. # 3, ¶ 17.

17 On December 5, 2012, Mrs. Brimberry instigated the
18 present Action against Northwestern for failure to pay
19 benefits due to her under the Policies [1].
20 Northwestern, in turn, filed a Counterclaim in
21 Interpleader against Mrs. Brimberry, Fiduciary, and
22 Does 1 through 10, alleging that Northwestern was
23 unable to determine whether Mrs. Brimberry or Fiduciary
24 was entitled to the policy benefits [3]. Mrs.
25 Brimberry and Northwestern subsequently stipulated to
26 the dismissal of Mrs. Brimberry's Complaint against
27 Northwestern [23, 24], leaving only Northwestern's
28 Counterclaim in Interpleader against Mrs. Brimberry and

1 Fiduciary. Mrs. Brimberry presently moves for summary
2 judgment as to Fiduciary's adverse claim to the policy
3 benefits [25], arguing that Fiduciary's "existing vague
4 and unsubstantiated claim is insufficient to serve as a
5 legitimate interpleader claim." Mot. 1:15-16.

6 **II. LEGAL STANDARD**

7 Summary judgment is appropriate when there is no
8 genuine issue of material fact and the moving party is
9 entitled to judgment as a matter of law. Fed. R. Civ.
10 P. 56(c). A fact is "material" for purposes of summary
11 judgment if it might affect the outcome of the suit,
12 and a "genuine issue" exists if the evidence is such
13 that a reasonable fact-finder could return a verdict
14 for the non-moving party. Anderson v. Liberty Lobby,
15 Inc., 477 U.S. 242, 248 (1986). The evidence, and any
16 inferences based on underlying facts, must be viewed in
17 the light most favorable to the opposing party.

18 Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d
19 1327, 1329 (9th Cir. 1983).

20 Where the moving party does not have the burden of
21 proof at trial on a dispositive issue, the moving party
22 may meet its burden for summary judgment by showing an
23 "absence of evidence" to support the non-moving party's
24 case. Celotex v. Catrett, 477 U.S. 317, 325 (1986).

25 The non-moving party, on the other hand, is
26 required by Fed. R. Civ. P. 56(c) to go beyond the
27 pleadings and designate specific facts showing that
28 there is a genuine issue for trial. Id. at 324.

1 Conclusory allegations unsupported by factual
2 allegations are insufficient to create a triable issue
3 of fact so as to preclude summary judgment. Hansen v.
4 United States, 7 F.3d 137, 138 (9th Cir. 1993). A non-
5 moving party who has the burden of proof at trial must
6 present enough evidence that a "fair-minded jury could
7 return a verdict for the [non-moving party] on the
8 evidence presented." Anderson, 477 U.S. at 255.

9 In ruling on a motion for summary judgment, the
10 Court's function is not to weigh the evidence, but only
11 to determine if a genuine issue of material fact
12 exists. Anderson, 477 U.S. at 255.

13 **III. ANALYSIS**

14 **A. The Parties' Evidentiary Objections**

15 As a preliminary matter, the Court addresses the
16 Parties' evidentiary objections. Fiduciary objects to
17 the Declaration of Mrs. Brimberry on various grounds
18 [31], including lack of foundation, lack of personal
19 knowledge, and legal conclusion. See Fiduciary
20 Objections 2:6-3:2.

21 As succinctly stated by the Eastern District of
22 California,

23 [S]tatements based on speculation, improper
24 legal conclusions, personal knowledge, or
25 argumentative statements are not *facts* and can
26 only be considered as arguments, not as facts,
27 on a motion for summary judgment. Instead of
28 challenging the admissibility of this evidence,

1 lawyers should challenge its sufficiency.

2 Objections on any of these grounds are

3 superfluous, and the court will overrule them.

4 Century 21 Real Estate LLC v. All Prof'l Realty, Inc.,

5 889 F. Supp. 2d 1198, 1215 (E.D. Cal. 2012) (emphasis

6 in original). See also Ditton v. BNSF Ry. Co., No. CV

7 12-6932 JGB (JCGx), 2013 WL 2241766 at *4 (C.D. Cal.

8 May 21, 2013). Specifically, as to Fiduciary's "lack

9 of foundation" objection to Mrs. Brimberry's statement

10 that her husband purchased life insurance policies from

11 Northwestern (see Fiduciary Objections 2:13-14), this

12 objection is not well-taken, given that Fiduciary does

13 not actually contest the fact that Mr. Brimberry did

14 purchase two life insurance policies from Northwestern.

15 Accordingly, based on the foregoing, the Court

16 **OVERRULES** Fiduciary's evidentiary objections.

17 Mrs. Brimberry asserts her own set of objections to

18 Fiduciary's evidence, primarily focused on the

19 Declaration of J. Chisholm Lyons, but also addressing

20 the Declarations of Catherine A. Conway and Debra Wong

21 Yang [35-3, 35-4]. Mrs. Brimberry objects to these

22 declarations on numerous grounds, including that they

23 contain statements lacking hearsay and personal

24 knowledge; statements that are irrelevant,

25 argumentative, and more prejudicial than probative;

26 statements that constitute hearsay and lay opinion; and

27 statements that violate the best evidence rule.

28 As to Mrs. Brimberry's personal knowledge,

1 irrelevance, and argumentative objections, the Court
2 **OVERRULES** these objections pursuant to the legal
3 authority stated above. See Ditton, 2013 WL 2241766 at
4 *4; Century 21, 889 F. Supp. 2d at 1215.

5 With regard to her best evidence, lack of
6 foundation, and hearsay objections, “[a] declaration
7 used to support or oppose a motion [for summary
8 judgment] must . . . set out facts that *would be*
9 *admissible* in evidence.” Fed. R. Civ. P. 56(c)(4)
10 (emphasis added). “On summary judgment, the non-moving
11 party’s evidence need not be in a form that *is*
12 *admissible* at trial. . . . as long as a party submits
13 evidence which, regardless of its form, *may be*
14 *admissible* at trial” Atkinson v. Kofoed, No.
15 NIV S-06-2652 RRB EFB P, 2008 WL 508410 at *2 (E.D.
16 Cal. Feb. 22, 2008) (citing Burch v. Regents of the
17 Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal.
18 2006), report & recommendation adopted, No. 2:06-cv-
19 02652-JKS-EFB, 2008 WL 4186150 (E.D. Cal. Sept. 10,
20 2008). Because Fiduciary does not rely on evidence
21 which, on its face, presents evidentiary obstacles that
22 would prove insurmountable at trial, the Court
23 **OVERRULES** Mrs. Brimberry’s best evidence, lack of
24 foundation, and hearsay objections. See Olenicoff v.
25 UBS AG, No. SACV 08-1029 AG (RNBx), 2012 WL 1192911 at
26 *7 (C.D. Cal. April 10, 2012); Alvarez v. T-Mobile USA,
27 Inc., No. CIV. 2:10-2373 WBS, 2011 WL 6702424 (E.D.
28 Cal. Dec. 21, 2011).

1 Similarly, the Court **OVERRULES** Mrs. Brimberry's
2 objections to statements whose probative value is
3 purportedly "outweighed by . . . unfair prejudice."
4 Fed. R. Evid. 403. In the summary judgment context, a
5 court need not exclude evidence for danger of unfair
6 prejudice, confusion of issues, or any of the other
7 grounds outlined in Federal Rule of Evidence 403.
8 Bafford v. Travelers Cas. Ins. Co. of Am., No. CIV. S-
9 11-2474 LKK/JKM, 2012 WL 5465851 at *8 (E.D. Cal. Nov.
10 8, 2012).

11 Lastly, the court **OVERRULES** Mrs. Brimberry's "lay
12 opinion" objection to Mr. Lyons' statement that
13 Fiduciary would have terminated Mr. Brimberry's
14 employment earlier than August 14, 2012, had Fiduciary
15 known of Mr. Brimberry's "fraudulent" conduct. Lyons
16 Decl. ¶ 12. Mr. Lyons, as the Executive Vice President
17 of Business Development and Marketing at Fiduciary,
18 does not appear to be giving his "opinion" on this
19 issue so much as making a statement on what Fiduciary
20 actually would have done under a different set of
21 facts. Accordingly, Mrs. Brimberry's objection to this
22 statement is **OVERRULED**.

23 **B. Mrs. Brimberry's Motion for Summary Judgment**

24 1. Subject Matter Jurisdiction

25 First addressing Mrs. Brimberry's argument that the
26 Court lacks subject matter jurisdiction in this case,
27 the Court finds that Mrs. Brimberry's argument is
28 without merit. Northwestern asserted its Counterclaim

1 in Interpleader pursuant to Federal Rule of Civil
2 Procedure 22, claiming that the Court had subject
3 matter jurisdiction because (1) there was complete
4 diversity of citizenship between the stakeholder,
5 Northwestern, on the one hand, and the counter-
6 defendants, Mrs. Brimberry and Fiduciary, on the other
7 hand, and (2) the amount in controversy exceeded
8 \$75,000 [33]. These facts are precisely the kind upon
9 which diversity jurisdiction is based for interpleader
10 under Rule 22. See Lee v. W. Coast Life Ins. Co., 688
11 F.3d 1004, 1008 n.1 (9th Cir. 2012); Gelfren v.
12 Republic Nat'l Life Ins. Co., 680 F.2d 79, 81 n.1 (9th
13 Cir. 1982); Liberty Life Assurance Co. v. Ramos, No.
14 CV-11-156-PHX-LOA, 2012 WL 10184 at *2 (D. Ariz. Jan.
15 3, 2012). As such, the Court has proper subject matter
16 jurisdiction in this case.

17 2. Abstention

18 Mrs. Brimberry also urges the Court to defer to
19 "parallel" proceedings currently pending in state Court
20 and to abstain from asserting jurisdiction in this
21 case. Under Colorado River Water Conservation District
22 v. United States, 424 U.S. 800, 813 (1976), and a
23 subsequent line of cases (e.g., Moses H. Cone Mem'l
24 Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19 (1983)),
25 a federal court may stay a federal case in favor of a
26 related state case "in exceptional circumstances."
27 Scotts Co. LLC v. Seeds, Inc., 688 F.3d 1154, 1158 (9th
28 Cir. 2012). "Although courts usually avoid duplicative

1 litigation when similar cases are pending in two
2 different *federal* courts, '[g]enerally, as between
3 state and federal courts, the rule is that the pendency
4 of an action in the *state* court is no bar to
5 proceedings concerning the same matter' in a federal
6 court." R.R. St. & Co. Inc. v. Transport Ins. Co., 565
7 F.3d 966, 974-75 (9th Cir. 2011) (emphasis and
8 alteration in original) (quoting Colorado River, 424
9 U.S. at 817). It is well established that only
10 "exceptional" cases and "the clearest of
11 justifications" support dismissal of a federal case in
12 favor of a related state case. Id. at 978. Given the
13 "virtually unflagging obligation of the federal courts
14 to exercise the jurisdiction given them" (Colorado
15 River, 424 U.S. at 817), the Ninth Circuit has
16 recognized eight different factors that a court must
17 balance prior to staying or dismissing a federal case
18 (R.R. St. & Co., 565 F.3d at 978-79), "with the balance
19 heavily weighted in favor of the exercise of
20 jurisdiction." Mercury Const. Corp., 460 U.S. at 16
21 (1983).

22 Given that Mrs. Brimberry did not argue for the
23 Court's abstention in her moving papers and only raised
24 the abstention argument in her Reply, the Court need
25 not consider this argument. See Cedano-Viera v.
26 Ashcroft, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) ;
27 Thompson v. Comm'r of Internal Revenue, 631 F.2d 642,
28 649 (9th Cir. 1980); United States ex rel. Giles v.

1 Sardie, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000).
2 Furthermore, even if the Court were to consider Mrs.
3 Brimberry's abstention argument, her curt analysis has
4 not demonstrated that this is an "exceptional" case
5 that clearly justifies dismissal pursuant to Colorado
6 River, let alone that the two cases are actually
7 duplicative of one another. As such, the Court finds
8 that abstention is not warranted here.

9 3. Prejudgment Attachment

10 Mrs. Brimberry asserts in her moving papers that
11 Fiduciary is using the procedure of interpleader to
12 constructively effect a prejudgment attachment,
13 essentially "block[ing] the payment of over \$3.5
14 million in insurance proceeds" to Mrs. Brimberry. Mot.
15 6:18. Relying on one case from the California Court of
16 Appeal and two district court cases from outside this
17 Circuit, Mrs. Brimberry suggests that Fiduciary has
18 managed to "hold over \$3.5 million hostage" through the
19 improper use of interpleader. Id. at Part IV.A.
20 However, the cases upon which Mrs. Brimberry relies are
21 not on point here because they address actions in which
22 there was no basis for the claimants to assert
23 interpleader claims to the particular funds at issue.
24 See Downing v. Goldman Phipps PLLC, No. 4:13CV206 CDP,
25 2013 WL 1991531 at *8 (E.D. Mo. May 13, 2013); Ctr.
26 Partners Mgmt., Ltd. v. Cache, Inc., 657 F. Supp. 48,
27 49 (S.D. Fla. 1986); City of Morgan Hill v. Brown, 71
28 Cal. App. 4th 1114, 1125-26 (1999). By way of

1 contrast, Fiduciary does appear to have a basis for its
2 claim to the policy benefits that are the subject of
3 this Action. The case law upon which Fiduciary relies
4 suggests that if payments for the insurance premiums
5 can be traced to funds wrongfully obtained from
6 Fiduciary, then the fruit of such payments is held in
7 constructive trust for the benefit of Fiduciary. See
8 Church v. Bailey, 90 Cal. App. 2d 501, 504 (1949);
9 Brodie v. Barnes, 56 Cal. App. 2d 315, 323 (1942). See
10 also Brown v. N.Y. Life Ins. Co., 152 F.2d 246, 250
11 (9th Cir. 1945). As such, Mrs. Brimberry has not
12 demonstrated that interpleader is being improperly used
13 in this case to effect a prejudgment attachment.

14 The argument in Mrs. Brimberry's Reply regarding
15 prejudgment attachment is similarly unpersuasive
16 because the legal authority upon which she relies there
17 deals exclusively with the use of *lis pendens* in real
18 property cases (see B.J. Assocs. v. Superior Court, 75
19 Cal. App. 4th 952, 969-70 (1999); Westbrook v. Superior
20 Court, 176 Cal. App. 3d 703, 714-15 (1986)) and the use
21 of constructive trusts to secure the payment of debt to
22 a creditor (see CHoPP Computer Corp. v. United States,
23 5 F.3d 1344, 1348-49 (9th Cir. 1993); Universal Marine
24 Ins. Co v. Beacon Ins. Co., 592 F. Supp. 948, 955
25 (W.D.N.C. 1984)), neither of which is the case here.
26 Accordingly, the Court rejects Mrs. Brimberry's
27 argument regarding prejudgment attachment and finds
28 that the procedure of interpleader is not being used

1 improperly in this case.

2 4. Genuine Issues for Trial

3 As to Fiduciary's burden of proof for purposes of
4 this Motion, Mrs. Brimberry asserts that Fiduciary has
5 failed to meets its burden of "produc[ing] competent
6 evidence with 'concrete specifics.'" Reply 2:8-10.
7 Federal Rule of Civil Procedure 56(c) mandates the
8 entry of summary judgment against "a party who fails to
9 make a showing sufficient to establish the existence of
10 an element essential to that party's case, and on which
11 that party will bear the burden of proof at trial."
12 Celotex, 477 U.S. at 322. Fiduciary asserts that it is
13 entitled to the benefits at issue here via a
14 constructive trust that was imposed upon the Policies'
15 proceeds as a result of Mr. Brimberry's alleged
16 embezzlement from Fiduciary. Assuming, *arguendo*, that
17 the legal authority upon which Fiduciary relies
18 supports such a claim (see Brown, 152 F.2d at 249-50;
19 Bailey, 90 Cal. App. 2d at 504; Brodie, 56 Cal. App. 2d
20 at 323), Fiduciary must prove at trial that Mr.
21 Brimberry wrongfully obtained money from Fiduciary and
22 that the money Mr. Brimberry used to pay insurance
23 premiums is traceable to his fraudulent conduct.

24 Although Mrs. Brimberry would have the Court
25 believe that "[t]here are no specifics tracing any
26 misappropriated funds to this policy purchase" (Reply
27 2:22), Fiduciary has presented (1) evidence that Mr.
28 Brimberry submitted and received over \$100,000 from

1 Fiduciary under the guise of business expenses in
2 violation of Fiduciary's policies (see Lyons Decl., Ex.
3 A), (2) a declaration from Mr. Lyons stating that if
4 Fiduciary had discovered Mr. Brimberry's fraudulent
5 activities at an earlier date, Fiduciary "would have
6 terminated Mr. Brimberry's employment at such earlier
7 date and would not have paid Mr. Brimberry a salary or
8 any other compensation or benefits after that date"
9 (see Lyons Decl. ¶ 12), and (3) a bank statement
10 reflecting that a payment was made to Northwestern out
11 of the same account into which Mr. Brimberry's
12 compensation from Fiduciary was deposited (see id. at
13 Ex. B). Additionally, Mr. Lyons attests to two
14 separate, internal investigations conducted within
15 Fiduciary, which revealed that Mr. Brimberry engaged in
16 travel-and-entertainment expense fraud in connection
17 with expense reimbursement claims and misappropriation
18 of funds from the account of a Fiduciary client. See
19 Lyons Decl. ¶¶ 3, 8. Based on the factual evidence and
20 legal authority presented by Fiduciary, the Court finds
21 that a genuine issue remains for trial, thus defeating
22 Mrs. Brimberry's Motion for Summary Judgment. See
23 Celotex, 477 U.S. at 331 n.2 ("[I]f . . . there is any
24 evidence in the record from any source from which a
25 reasonable inference in the [nonmoving party's] favor
26 may be drawn, the moving party simply cannot obtain a
27 summary judgment" (quoting In re Japanese Elec.
28 Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983))).

1 **IV. CONCLUSION**

2 Based on the foregoing, the Court **OVERRULES** the
3 Parties' objections and **DENIES** Mrs. Brimberry's Motion
4 for Summary Judgment.

5
6 **IT IS SO ORDERED.**

7 DATED: August 28, 2013

8
9 RONALD S.W. LEW

10 HONORABLE RONALD S.W. LEW
11 Senior, U.S. District Court Judge
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