Exhibit A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, as Receiver for VALHALLA INVESTMENT PARTNERS, L.P.; VIKING FUND, LLC; VIKING IRA FUND, LLC; VICTORY FUND, LTD.; VICTORY IRA FUND, LTD., AND SCOOP REAL ESTATE, L.P.,

Plaintiffs,

v. Case No. 8:10-CV-245-T-17MAP

DONALD ROWE, individually and as Trustee of THE WALL STREET DIGEST DEFINED BENEFIT PENSION PLAN; JOYCE ROWE; and CARNEGIE ASSET MANAGEMENT, INC.,

Defendants.

v.

METLIFE INVESTORS USA INSURANCE COMPANY,

Garnishee.
_____/

ORDER

Donald and Joyce Rowe, husband and wife, are the subjects of a negotiated multi-million dollar judgment in a clawback action that favored the receivership entities. At issue now is whether the Receiver, in an attempt to collect on the judgment, can garnish a MetLife annuity that Joyce owns. Both sides have moved for summary judgment (docs. 367, 369) on the question, and both sides agree that the appropriate answer depends on the interpretation of their settlement agreement, which all agree is unambiguous. *See* doc. 367, pp. 10-11; doc. 369, p.2. Joyce contends she used

the annuity to secure a loan applied to the judgment, thereby insulating the annuity from collection under the agreement. The Receiver, however, reads the same terms differently; the annuity is exempt only if it served as the loan's *only* collateral. Because Joyce used other assets to support the loan, the Receiver says the annuity is fair game for garnishment. I find the settlement terms regarding the annuity are not as limiting as the Receiver urges. Accordingly, because Joyce applied the annuity as contemplated by the agreement, the annuity is exempt from the Receiver's collection efforts and the writ of garnishment is hereby dissolved.[1]

A. Background

The underlying action is one of many cases in this division emanating from a Securities Exchange Commission enforcement action aimed at dealing with the aftermath of a massive ponzi scheme perpetrated by Arthur Nadel, a hedge fund manager. *See SEC v. Arthur Nadel, et al.,* Case No. 8:09-cv-87-T-26TBM. After the SEC's action and the appointment of Burton Wiand as the Receiver, Nadel pled guilty in the Southern District of New York to a fifteen count indictment charging him with securities fraud, mail fraud, and wire fraud surrounding the events precipitating the enforcement action. The Receiver sued numerous hedge fund investors, including Donald Rowe, individually and as Trustee of the Wall Street Digest Defined Benefit Pension Plan, Joyce Rowe, and Carnegie Asset Management, Inc. ("CAM"), seeking to claw back "false profits" under two theories grounded on the same illegal scheme the indictment tracks: avoidance of fraudulent transfers under Florida's Uniform Fraudulent Transfer Act, Fla. Stat. §§ 726.101, *et seq.* ("FUFTA"), and unjust

[1] The Receiver and Joyce consented to my jurisdictional to resolve the motions for summary judgment (docs. 367, 369) and the writ of garnishment (doc. 311). *See* Reference Order, doc. 382; 28 U.S.C. § 636(c).

enrichment.[2] The Receiver also sought return of principal investments, as well as management and performance fees paid to Donald and CAM. Eventually, the parties reached an agreement (doc. 119), whose relevant aspects required the Rowes pay $250,000 against a joint and several judgment totaling $4,028,385.00 for the Receiver (doc. 124). Payment was to be made according to specific terms; namely, the Rowes could convert the annuity or obtain a loan using the annuity. The choice was theirs to make:

> The Receiver and Defendants agree that the Payment will be made from one of the following: (1) conversion of an annuity issued by MetLife bearing number **** 0039 into cash (the Annuity), in which case the Receiver will treat the balance of the cash resulting from the conversion of the Annuity up to $150,000 minus reasonable fees associated with the conversion process as exempt from his collection efforts on the Judgment; or (2) proceeds of a loan collateralized or otherwise secured by the Annuity, in which case the Receiver will treat the Annuity, up to a value of $400,000, as exempt from his collection efforts on the Judgment. The parties to this agreement acknowledge and agree the Receiver's commitment to treat any item as exempt from his collection efforts on the Judgment is limited only to the extent set forth in this paragraph, and that in all other respects the Receiver is free to pursue all collection efforts authorized by applicable laws.

Agreement, doc. 368-3, p.3. The Rowes picked the second option. Joyce used her 33.33% ownership interest in SRB Associates, LLC and the annuity as security, to secure a loan for $150,000 from a friend, Marianne Siegal. A promissory note, a security and pledge agreement, and an assignment of LLC membership (doc. 367, ex. 7) documented the loan and the pledge of stock. The use of the annuity as collateral relied on their oral agreement, which Joyce's attorney, David Band, memorialized in a State of Florida Uniform Commercial Code Financing Statement Form filed on March 26, 2013. That document clearly describing the "collateral" as:

> ALL DEBTOR'S RIGHT, TITLE AND INTEREST TO DEBTORS MEMBERSHIP INTEREST IN SRB ASSOCIATES, A FLORIDA LIMITED LIABILITY

---

[2] These types of cases are often called "clawback" actions.

> COMPANY, AND ALL DEBTORS RIGHT, TITLE AND INTEREST IN DEBTOR'S INTEREST AS OWNER AND ANNUITANT OF THE METLIFE Annuity BEARING ACCOUNT NUMBER ENDING IN 0039.

doc. 366-1. Joyce then applied the loan proceeds to the judgment.

Armed with the judgment, the Receiver began his post-judgment collection efforts, including this one against the garnishee MetLife Investors USA Insurance Company ("MetLife"), issuer of Joyce's annuity referenced in the agreement. At the time of MetLife's answer (October 29, 2013), its surrender value was $342,484.86. *See* doc. 341, ¶1. Following all this, the Rowes moved to dissolve the writ on grounds that the annuity is exempt from garnishment under the settlement agreement, under Florida's statutory exemption for proceeds of annuity contracts, and under the exemption provisions for head of household (a claim she has since waived) (docs. 332, 333, 341). All these issues are coalesced in the parties' motions for summary judgment. And for their resolution, both sides agree no additional discovery is required (the parties conducted limited discovery) and no material issues of fact exist. The matter can be decided on the summary judgment record.

B. Standard of Review

Motions for summary judgment should only be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1279-80 (11th Cir. 2004). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* Essentially, an issue of fact is "material" if, under the applicable substantive law, it might affect the outcome of the case, and an issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004).

C. Discussion

The agreement's choice of law provision dictates that Florida law governs. As such, the rules for the interpretation of contracts applies. *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985) ("Settlements, of course, are governed by the rules for interpretation of contracts"); *see also Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000) ("Principles governing general contract law apply to interpret settlement agreements"). This also means that a court is without the power to "rewrite a contract or interfere with the freedom of contract or substitute [its] judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain." *Marriott Corp. v. Dasta Construction Co.*, 26 F.3d 1057, 1068 (11th Cir. 1994) (*citing Steiner v. Physicians Protective Trust Fund*, 388 So. 2d 1064, 1066 (Fla. 3rd DCA 1980)). In short, the plain meaning of the contract's terms governs. *Emergency Associates of Tampa, P.A. v. Sassano*, 664 So.2d 1000, 1003 (Fla. 2d DCA 1995) ("faced with an unambiguous contractual provision such as this one, a trial court cannot give it any other meaning beyond that expressed and must construe the provision in accord with its ordinary meaning"). And for that reason, parole evidence is not needed to interpret the terms. *See Equity Lifestyle Properties, Inc. v. Florida Mowing and Landscape Service, Inc.*, 556 F.3d 1232, 1242 (11th Cir. 2009). *See also*

Bryan v. Dethlefs, 959 So. 2d 314, 317 (Fla. 3rd DCA 2007) (affirming trial court's summary judgment where parties agreed that written trust agreement was unambiguous); *Angell v. Don Jones Ins. Agency, Inc.*, 620 So. 2d 1012, 1014 (Fla. 2nd DCA 1993) ("Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment).

Both sides agree that the agreement's terms applying to the annuity are unambiguous. Nonetheless, the Receiver argues that Joyce failed to abide by the terms pertaining to obtaining a loan using the annuity as security. He lists five reasons:

> 1) because $100,000 of the $250,000 came from the trust account of Joyce's lawyer and not the annuity;
>
> 2) that Rowe's loan documents do not reference the verbal agreement between Joyce Siegal pledging the annuity and that the e oral agreement is contrary to the express terms of the written Pledge Agreement whereby Joyce Rowe agreed to pledge all of her interest in SRB to Siegal to secure the $150,000 loan;
>
> 3) because the pledge agreement is a formal, integrated document, the oral agreement is inadmissible to vary its terms;
>
> 4) the oral agreement does not comply with Fla. Stat. § 679.2031 governing the enforceability of security interests; and
>
> 5) even if the oral agreement were enforceable, the annuity was not actually used as collateral for the note.

But the plain terms of the agreement dealing with the annuity are not so detailed: "proceeds of a loan collateralized or otherwise secured by the Annuity, in which case the Receiver will treat the Annuity, up to a value of $400,000, as exempt from his collection efforts on the Judgment." *See* doc. 368-3, p.3. Siegal and Joyce entered into a written agreement concerning the use of the SRB

stock as security and a separate oral agreement (evidenced by the UCC-1 filing described above) adding the annuity as collateral for the loan.[3] The settlement agreement does not require that the pledge of the annuity be in writing; hence, the Receiver's arguments that the oral agreement fails to satisfy the requirements of Fla. Stat. §679.2031 and is inadmissible to vary the terms of the written SRB agreement fail.[4]

Similarly, the Receiver argues that paying $100,000 of the $250,000 payment from Band Weintraub's trust account amounts to a breach of the Agreement. Joyce disagrees. Again, the agreement dictates only that the parties agree that "Payment will be made from ... proceeds of a loan collateralized or otherwise secured by the Annuity." The fact that Joyce obtained only $150,000 of the total $250,000 paid to the Receiver by securing a loan with the annuity does not run afoul to the plain language of the agreement. As Joyce asserts, the pertinent provision in the agreement merely requires that payment of the $250,000 will be made from the proceeds of a loan collateralized or secured by the annuity. The agreement did not specify that the annuity must be the sole source of collateral and did not require that there be written proof that the annuity was pledged as collateral

---

[3] Siegal testified that she required the annuity be added as collateral due to her concern about the value of the SRB stock. The Receiver argues that "any purported collateralization of the MetLife Annuity was thus hypothetical at best." (doc. 367, p.14). Irrespective, both sides agree that the unambiguous terms of the parties' agreement control.

[4] I note that Receiver's position is at odds with other parts of the agreement providing that "[i]n the event Payment is not made in accordance with the procedures set forth [in the Agreement] ... the Receiver and Defendants acknowledge and agree that this [A]greement will be null and void and that they will be left in the same position in which they were, with all attendant rights, at the time the [A]greement was executed." *See* 368-3, p.4. Notably, the Receiver does not seek to vacate the judgment; nor does he seek an order reverting the parties to their pre-agreement status. Instead, based on its premise that Joyce failed to abide by the agreement's specific requirements concerning using the annuity to collateralize or otherwise secure loan proceeds, the Receiver only seeks a finding that the annuity is not exempt from its collection efforts.

or security.

If the Receiver presumed more from the agreement, the language he bargained for does not support his presumptions. For example, the terms of the settlement agreement do not say that *all* of the $250,000 payment be made from proceeds of a loan collateralized or otherwise secured *only* with the annuity. Instead, its plain terms allowed the Rowes to pick one of two options. Joyce did this. If the Receiver intended more, the agreement's ordinary meaning does not support his expansive reading. Courts do not impose contract rights and duties the parties carelessly omit. *See generally Hashwani v. Barbar*, 822 F.2d 1038, 1040 (11th Cir. 1987) (affirming trial court's summary judgment for plaintiff and denial of defendant's request to introduce parol evidence in aid of interpreting settlement agreement where settlement agreement clearly stated parties rights and obligations and was unambiguous). "Where a contract is simply silent as to a particular matter, courts should not, under the guise of construction, impose on the parties contractual rights and duties which they themselves omitted. ... To do so would be to make a new contract for the parties, which the court cannot do." *Southern Crane Rentals, Inc. v. City of Gainesville*, 429 So. 2d 771, 774 (Fla. 1st DCA 1983). *See also Jacobs v. Petrino,* 351 So. 2d 1036 (Fla.. 4th DCA 1976) (finding trial court erred by altering and adding to terms of contract which the contracting parties had omitted from their contract). And the fact that Joyce and the Receiver attribute such different interpretations to the same terms does not alter the Court's view. *Philadelphia Am. Life Ins. Co. v. Buckles*, 350 Fed. App. 376, 379 (11th Cir. 2009) (quoting *Kipp v. Kipp,* 844 So. 2d 691, 694 (Fla. 4th DCA 2003)) (the fact that two parties "may ascribe different meanings to the language [of the settlement] does not mean that language is ambiguous so as to allow the admission of extrinsic evidence").

As the Eleventh Circuit explained in *Hashwani, supra,* where the parties' rights and

obligations are clearly stated in the settlement agreement, yet the parties could have included further terms in the agreement but did not, they are now bound by the terms and conditions which they signed. *Hashwani,* 822 F.2d at 1040 ("... this Court will not rewrite the agreement to make it more favorable to [a party] than the agreement he signed."). If the bargain struck proves improvident in hindsight for one reason or another, that consequence, as noted previously, does not vest this Court with the power to "rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain." *Marriott Corp.,* 26 F.3d at 1068 (11th Cir. 1994) (*citing* Florida law).

Because I find that the annuity is exempt from the Receiver's collection efforts pursuant to the agreement, I need not address whether the annuity is exempt under Fla. Stat. § 222.14 and whether the purchase of the annuity was a fraudulent conversion subject to a challenge under Fla. Stat. § 222.30.[5]

D. Conclusion

Accordingly, it is hereby

---

[5] Fla. Stat. § 222.14 provides that "[t]he cash surrender value of life insurance policies issued upon the lives of citizens or residents of the state and the proceeds of annuity contracts issued to citizens or residents of the state, upon whatever form, shall not in any case be liable to attachment, garnishment, or legal process in favor of any creditor of the person whose life is so insured or of any creditor of the person who is the beneficiary of such annuity contract, unless the insurance policy or annuity contract was effected for the benefit of such creditor." Fla. Stat. §222.30 provides that "[a]ny conversion by a debtor of an asset that results in the proceeds of the asset becoming exempt by law from the claims of a creditor of the debtor is a fraudulent asset conversion as to the creditor, whether the creditor's claim to the asset arose before or after the conversion of the asset, if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor." A debtor's claim of exemption for an exemption acquired through a fraudulent asset conversion will be disallowed.

ORDERED:

1. Joyce Rowe's motion for summary judgment as to the MetLife Annuity (doc. 369) is GRANTED.

2. The Receiver's motion for summary judgment regarding entitlement to the annuity held by Garnishee MetLife Investors USA Insurance Company (doc. 367) is DENIED.

3. The Clerk is directed to dissolve the writ of garnishment against MetLife Investors USA Insurance Company. MetLife Investors USA Insurance Company is discharged from further liability under the writ.

DONE AND ORDERED in Tampa, Florida, on July 11, 2014.

Mark A. Pizzo

MARK A. PIZZO
UNITED STATES MAGISTRATE JUDGE

cc: Counsel of Record