

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: )  
 )  
 ) In Proceedings  
 ) Under Chapter 7  
PATRICK M. COSTELLO and )  
SHERI COSTELLO, a/k/a ) No. BK 87-30797  
SHERI M. HULLER, )  
 )  
 )  
Debtor(s). )

MEMORANDUM AND ORDER

This matter is before the Court on the motion filed by debtor Sheri Costello, now known as Sheri Huller (hereafter, respondent or Sheri Costello), requesting the Court strike or dismiss the Petition for Imposition of Constructive Trust filed by the Estate of Patrick Costello, deceased (hereafter, petitioner or decedent's estate). A brief summary of the facts is in order. Patrick Costello and Sheri Costello, were married on December 14, 1984. During their marriage, they purchased, as joint tenants, real property at R.R. 1, Lebanon, Illinois. A first mortgage on this property, on which both Patrick and Sheri were liable, was held by Credithrift of America. Also during the marriage, Patrick Costello purchased two policies of life insurance insuring his life. Sheri Costello, his spouse, was named as the beneficiary on these policies.

Patrick and Sheri Costello filed a joint petition for relief under Chapter 7 of the Bankruptcy Code on August 31, 1987. The following day, September 1, 1987, a Judgment of Dissolution of Marriage was entered by the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois in cause No. 87D1064

dissolving their marriage. Two weeks later, on September 15, 1987, Patrick Costello was killed in a motorcycle accident. Subsequently, the proceeds of the two insurance policies were paid to Sheri Costello. These proceeds are now being held in an escrow account pending resolution of this, and related, matters.

The petition at issue is in three counts. In Count I, decedent's estate seeks to impose a constructive trust over the insurance proceeds. Count I alleges that at the time Patrick and Sheri Costello became obligated on the real estate mortgage, they were in a confidential relationship because of their marital status. Further, as a result of the confidential relationship that existed between them, Patrick Costello placed such trust and confidence in his wife that she gained a position of superiority and influence over him. Pursuant to this relationship and trust, Patrick Costello purchased the life insurance policies on his life and named Sheri as beneficiary. However, both Patrick and Sheri intended and agreed that, should Patrick die, the proceeds of the life insurance policies would be used to pay off the first mortgage held by Credithrift of America.

According to count I, Patrick and Sheri later agreed, at the time of their divorce, that Patrick would receive the title to the real property. However, the Judgment of Dissolution of Marriage inadvertently omitted this provision. The Judgment did provide, nonetheless, that Sheri's name would be removed from the mortgage documents. Count I further alleges that Patrick died an accidental death before he was able to remove Sheri's name from the mortgage

documents and from the life insurance beneficiary designations. As a result, Sheri Costello, by now claiming ownership of the life insurance proceeds, is abusing the confidential relationship that existed at the time she and Patrick obtained the mortgage and the life insurance policies. The proceeds do not belong to Sheri Costello since she and Patrick then agreed that any proceeds would be used to retire the mortgage debt. Accordingly, Count I prays for a constructive trust over the proceeds which are to be used to retire the mortgage debt and any balance to accrue to decedent's estate.

In Count II, decedent's estate seeks to impose a resulting trust over the insurance proceeds. Count II incorporates by reference all of the allegations of Count I. It further alleges that Patrick Costello paid for the life insurance policies and remained the owner of the policies even after the divorce. Sheri Costello was named as beneficiary and thus given benefit of title to the proceeds because she was a joint tenant on the real estate. Accordingly, Count II prays for a resulting trust over the proceeds, which are to be used to retire the mortgage debt and any balance to accrue to decedent's estate.

Count III is essentially the same cause of action as Count I. In Count III, decedent's estate seeks to impose a constructive trust over the proceeds of the life insurance policies. Count III incorporates by reference all of the allegations of Count I. It further alleges the existence of an oral contract between Sheri, Patrick and Credithrift of America agreeing that the life insurance proceeds, in the event of Patrick's death, would be used to retire

the mortgage. Sheri Costello is breaching this oral contract by making personal claim to the proceeds. Accordingly, Count III prays for a constructive trust over the proceeds, which are to be used to retire the mortgage debt and any balance to accrue to decedent's estate.

Respondent first moves the Court to strike the petition for failure to comply with Bankruptcy Rule 7001, which requires certain matters to be filed as adversary proceedings. The Court agrees that this is a proceeding "to recover money or property," Bankruptcy Rule 7001, which is not excepted under Rule 7001. Id. The petition on its face does not seek "to compel the debtor to deliver property to the trustee." Id. Additionally, even if the trustee and the bankruptcy estate ultimately stand to benefit by this proceeding, decedent's estate is seeking as well "to obtain ...equitable relief," id., from the Court. Thus, the proceeding is clearly within the scope of Rule 7001.

However, failure to proceed under Rule 7001 does not warrant striking the petition. The proceeding can be assigned an adversary case number upon decedent's estate remitting the appropriate filing fee. Issuance and service of summons are waived pursuant to Bankruptcy Rule 9005 and 11 U.S.C. §105. This will not prejudice any substantial rights of respondent since the parties are already before the Court and have been heavily embroiled in this litigation for several months. Eg., In re Lemons & Associates, Inc., 69 B.R. 360, 362 (Bankr. D. Nev. 1987).

As to the motion to dismiss, the Court initially notes that for

purposes of the motion all allegations in the complaint must be accepted as true. E.g., In re Smurzynski, 72 B.R. 368, 369 (Bankr. N.D. Ill. 1987); In re Haas, 36 B.R. 683, 688 (Bankr. N.D. Ill. 1984); In re Oien, 22 B.R. 720, 721 (Bankr. D. S.D. 1982). "Very little is required in a complaint as long as it sets forth the basis upon which relief is sought." In re Overmeyer, 32 B.R. 597, 602 (Bankr. S.D. N.Y. 1983). A motion to dismiss a complaint must not be granted unless it clearly appears that the plaintiff can prove no set of facts under its pleadings which would entitle it to the relief requested. Cruz v. Beto, 405 U.S. 319, 322 (1972); In re Smurzynski, 72 B.R. at 370; In re Haas, 36 B.R. at 688.

Respondent raises several grounds for dismissal of Count I. Initially, she argues that decedent's estate has failed to allege sufficient facts to establish the existence of fraud or of a fiduciary or confidential relationship between Sheri and Patrick and the subsequent abuse of that relationship by Sheri. She argues that fraud or abuse of confidential relationship are essential elements to a cause of action seeking the remedy of constructive trust. Citing Bankruptcy Rule 7009, she further argues that fraud or an abuse of a confidential relationship must be pleaded with specificity.

However, both parties are incorrect in assuming that a constructive trust may be imposed only where there is fraud, or breach of a confidential or fiduciary relationship. The recent trend in the Illinois law of constructive trusts - bringing Illinois into conformity with the majority of American courts, D. Dobbs, Handbook on the Law of Remedies 245-46 (1973) - has been a broadening of the

circumstances in which this remedy is available. E.g., Chicago Park Dist. v. Kenroy, Inc., 107 Ill.App. 3d 222, 63 Ill. Dec. 134, 437 N.E. 2d 783, 785 (1982). Thus, while constructive trusts have traditionally been divided into the two general categories indicated above, the remedy is not restricted to those grounds. Zack Co. v. Sims, 108 Ill.App. 3d 16, 63 Ill. Dec. 732, 438 N.E. 2d 663, 672-73 (1982); Chicago Park Dist. v. Kenroy, Inc., 437 N.E. 2d at 785; Village of Wheeling v. Stavros, 89 Ill.App. 3d 450, 44 Ill. Dec. 701, 411 N.E. 2d 1067, 1069-70 (1980); Kavanaugh v. Estate of Dobrowolski, 86 Ill.App. 3d 33, 41 Ill. Dec. 358, 407 N.E. 2d 856, 863-64 (1980); County of Lake v. X-Po Security Police Service, Inc., 27 Ill.App. 3d 750, 327 N.E. 2d 96, 99-100 (1975); In re Estate of Ray, 7 Ill.App. 3d 433, 287 N.E. 2d 144, 148-49 (1972). "A plaintiff may be awarded a constructive trust whenever facts are shown in which a person holding property would be unjustly enriched if he were permitted to retain that property.... The remedy is available in circumstances where one has received property which, in equity and good conscience, he ought not be allowed to retain." Chicago Park Dist. v. Kenroy, Inc., 437 N.E. 2d at 785 (citations omitted). See also, Zack Co. v. Sims, 438 N.E. 2d at 673; Village of Wheeling v. Stavros, 411 N.E. 2d at 1069-70; Kavanaugh v. Estate of Dobrowolski, 407 N.E. 2d at 863-64; County of Lake v. X-Po Security Police Service, Inc., 327 N.E. 2d at 100; In re Estate of Ray, 287 N.E. 2d at 148-49.

In the present case, decedent's estate has alleged the existence of a confidential relationship between Sheri and Patrick Costello and

Sheri's abuse of that relationship by withholding the insurance proceeds from their agreed-upon use. Bankruptcy Rule 7008 requires only notice pleading in an adversary complaint. While Bankruptcy Rule 7009, and the cases cited by respondent, do require that fraud be pleaded with specificity, decedent's estate has made no allegations of fraud. There is no requirement under Bankruptcy Rule 7009 that conduct of the nature alleged in Count I be pleaded with the particularity that respondent demands.

Moreover, even if the Court were to find that the petition lacks sufficient allegations of confidential relationship and its abuse, Count I nonetheless states a cause of action for imposition of a constructive trust. Count I clearly sets forth allegations that respondent has received money properly belonging to another under circumstances that in equity she ought not be allowed to retain it. E.g., County of Lake v. X-Po Security Police Service, Inc., 327 N.E. 2d at 100.

Respondent further argues as to Count I that decedent's estate lacks status or standing to claim that the insurance proceeds should be impressed with a constructive trust for the benefit of Credithrift of America, which is not a party to the action. However, respondent has cited no authority to support her position. The Court finds that Count I seeks a constructive trust to realize the parties' agreement to use the insurance proceeds to retire the mortgage. Decedent's estate clearly has standing to attempt to remedy the alleged harm to decedent caused by Sheri Costello's refusal to comply with her purported promise.

As to Count II, which is based on a theory of resulting trust, the Court notes that a resulting trust is a product of judicial construction. It arises by operation of law and is based on carrying out the presumed intention of the parties. E.g., In re Estate of Wilson, 81 Ill. 2d 349, 43 Ill. Dec. 23, 410 N.E. 2d 23, 26 (1980); Suwalski v. Suwalski, 40 Ill. 2d 492, 240 N.E. 2d 677, 679 (1968); West v. Scott, 6 Ill. 2d 167, 128 N.E. 2d 734, 737 (1955); Zack Co. v. Sims, 438 N.E. 2d at 670; Estate of Roth v. Roth, 96 Ill.App. 2d 292, 238 N.E. 2d 607, 611 (1968). The trust comes into existence where one party purchases property with his own funds and legal title is taken in the name of another. E.g., In re Estate of Wilson, 410 N.E. 2d at 26. The trust is premised upon the "natural equity" that the party who pays for the property should enjoy it, unless he intended by the vesting of title to confer a beneficial interest upon the grantee. Zack Co. v. Sims, 438 N.E. 2d at 670, quoting Bowman v. Pettersen, 410 Ill. 519, 102 N.E. 2d 787, 790 (1951).

Most important to the instant case, "the trust arises at the time the title to the property vests, or it does not arise at all. If the trust does not arise then, it will not be created by the payor's change of mind at a later date." Id. at 670-71 (citations omitted). The evidence "must establish beyond a doubt the payment by the claimed beneficiary at the time the title was taken in the alleged trustee." Suwalski v. Suwalski, 240 N.E. 2d at 679 (citations omitted).

Clearly, then, Count II is defective because it fails to allege vesting of title in respondent at the time Patrick Costello took out the life insurance policies. Nor is such an allegation possible. The

designation of Sheri Costello as beneficiary on the unmaturred policies created in her "'no more than a revocable expectancy contingent upon being the beneficiary at the time of the insured's death.'" In re Woodson, 839 F.2d 610, 619 n. 15 (9th Cir. 1988), quoting 4 G. Couch, Cyclopedia of Insurance Law §27:59 at 682-83 (rev. 2d ed. 1984). According to the terms of both policies, attached as exhibits to respondent's motion to dismiss, Patrick Costello was free to change the beneficiary on either policy at any time before his death. Thus, title in Sheri could not vest until Patrick died - long after the alleged trust was created. This is fundamentally distinct from the cases relied on by petitioner, all of which involve situations where a party has paid for property, simultaneously entrusted another with its legal title, and then found the "trustee" asserting ownership rights contrary to the parties' understanding at the time the trust was created. Here, no ownership rights were conferred on Sheri concurrent with Patrick's purchase of the policies. Thus, no trust was created.

Additionally, Count II does not state a cause of action for resulting trust because it fails to indicate the intended beneficiary of the trust. It cannot be determined on the face of Count II whether Sheri was intended to serve as "trustee" for the benefit of Credithrift of America or for Patrick's probate estate. In fact, it is impossible to determine from the petition which name petitioner seeks to substitute for Sheri's as beneficiary of the life insurance proceeds. Without a showing that the parties' intent in this respect was clear from the inception of the trust, the cause of action is insufficient and must be dismissed.

Respondent next argues that Count III fails to state a cause of action either for constructive trust or for breach of contract. Count III is purported to be deficient as an action for the equitable remedy of constructive trust because it is based upon an alleged breach of contract - a legal theory. Respondent has provided an incomplete citation for the sole authority she offers in support of this argument, thus making it impossible for the Court to review her authority. Nevertheless, it is clear that relief in the nature of restitution - forcing the promisor to surrender the benefit he has unjustly received from the promisee - is available to redress breach of contract. E.g., J. Murray, Jr., Murray on Contracts 438-39 (1974).

Moreover, as the Court has already indicated, Count III is essentially the same cause of action as Count I. In both Counts, petitioner alleges that the breach of the parties' agreement as to the insurance proceeds is the wrongful conduct triggering the need for the remedy of constructive trust. Accordingly, for the reasons cited earlier, the Court finds that Count III states a cause of action for constructive trust.

As to respondent's argument that Count III fails to state a cause of action for breach of contract because no consideration is alleged, petitioner has clearly pleaded sufficient facts to show that respondent received something of value in exchange for her promise to use the life insurance proceeds to retire the mortgage. In fact, she received an expectancy of receiving the insurance proceeds upon Patrick's death to be used to retire the home mortgage, thus enabling her to reduce her debt load and to live mortgage-free.

Finally, on May 19, 1988, respondent filed a supplement to her motion to dismiss incorporating the Rule 2004 examinations of Carl Waller and Sheri Costello and moving the Court to treat the motion as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. However, respondent has neglected to provide the Court with transcripts of said examinations. Nor has respondent indicated to the Court those portions of the transcripts upon which she relies. Accordingly, the Court will not treat this matter as a motion for summary judgment.

IT IS ORDERED that respondent's motion to strike the petition is DENIED. Petitioner is ORDERED to pay the filing fee instanter and the Clerk of the Court is ORDERED to assign the proceeding an adversary case number.

IT IS FURTHER ORDERED that respondent's motion to dismiss the petition is GRANTED as to Count II and DENIED as to Counts I and III.

IT IS FURTHER ORDERED that respondent shall file her answer to Counts I and III of the petition on or before June 7, 1988.

/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: May 26, 1988