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| KELSEY HERRICK |) | |
| |) | |
| PLAINTIFF, |) | |
| v. |) | ORDER ON DEFENDANT MELISSA |
| MELISSA MONTEJANO, |) | MONTEJANO’S MOTION FOR |
| JESSICA DEMERS, ESQ., and |) | SUMMARY JUDGMENT and MOTION |
| BOURQUE & CLEGG, LLC, |) | TO CONSOLIDATE |
| |) | |
| DEFENDANT. |) | |

Before the Court is Defendant Melissa Montejano’s Motion for Summary Judgment pursuant to M. R. Civ. P. 56 along with a Motion to Consolidate this matter with a pending York County Probate matter. Ms. Montejano contends that federal law precludes the constructive trust and unjust enrichment claims in Counts III and IV of Plaintiff Kelsey Herrick’s Amended Complaint. Likewise, Ms. Montejano asserts there is no basis for the breach of contract claim in Count V. Ms. Herrick opposes the motion and asserts that the facts and evidence in the record provide a prima facie case for each element of her claims against Ms. Montejano and the Estate of Jody Brooks. Counts I and II of Ms. Herrick’s Amended Complaint alleged claims for attorney malpractice against Attorney Demers and Bourque and Clegg but were dismissed in the Combined Order issued by this Court on August 10, 2020. Ms. Montejano is represented by Attorney Greg McCullough. Ms. Herrick is represented by Attorney Christopher A. Wright.

UNDISPUTED FACTS

Kelsey Herrick and Jody Brooks were married from 2006 to 2012, and during their marriage had two children together, Autumn and Cameron, who are still minors. (Def.’s S.M.F. ¶¶ 1-2, 4) At the time of their divorce in 2012, Mr. Brooks was employed at the Portsmouth

Naval Shipyard and had a Federal Employees Group Life Insurance (“FEGLI”) policy worth \$300,000. (Def.’s S.M.F. ¶ 3) Ms. Herrick and Mr. Brooks’ divorce judgment required Mr. Brooks to maintain a life insurance policy in the amount of \$300,000 and name Ms. Herrick as beneficiary thereof, until the child support and spousal support obligations established under the judgment were satisfied. (Def.’s S.M.F. ¶ 5) A copy of the divorce judgment was never provided to Mr. Brooks’ employer, but Ms. Herrick’s former attorney Jessica Demers provided a certified copy of the Divorce Judgment to the United States Office of Personnel Management (“OPM”). (Opp. S.M.F. ¶ 86). The OPM responded that they had received the judgment by letter dated February 22, 2014. (Opp. S.M.F. ¶ 86).

Mr. Brooks eventually married Ms. Montejano in 2013, and they remained married until Mr. Brooks died in an automobile accident in January 2019. (Def.’s S.M.F. ¶¶ 8-9) At the time of his death, Mr. Brooks’ FEGLI policy was in effect, but he had not designated a beneficiary. (Def.’s S.M.F. ¶ 8) While his spousal support had ceased, Mr. Brooks was still paying child support of about \$1,200 per month pursuant to the divorce judgment. (Def.’ S.M.F. ¶ 10-11)

Ms. Herrick first spoke to Ms. Montejano about the FEGLI policy via text message on January 23, 2019. (Def.’s S.M.F. ¶ 20) She informed Ms. Montejano that although she and her children had not been listed as beneficiaries on the policy, she and her children were legally entitled to the proceeds by virtue of the divorce judgment. (Def.’s S.M.F. ¶¶ 20-24) Later, on February 7, 2019, Ms. Herrick told Ms. Montejano that she might need a copy of the police report detailing Mr. Brook’s fatal accident for an application to receive his life insurance proceeds. (Def.’s S.M.F. ¶ 28) Ms. Montejano agreed to help, but the police report and autopsy report were not yet available. (Def.’s S.M.F. ¶¶ 29-30) Ms. Montejano was able to provide the police report number that she obtained from the California Highway Patrol, and Ms. Herrick

submitted her application for the life insurance proceeds with this number as well as a copy of her divorce decree. (Def.'s S.M.F. ¶ 30-31)

Ms. Herrick and Ms. Montejano did not speak again until March 4, 2019, when Ms. Herrick learned that her application for the life insurance proceeds was denied and that they would instead be paid to Ms. Montejano. (Def.'s S.M.F. ¶¶ 32, 35-36) Ms. Herrick supplied Ms. Montejano with a phone number from her FEGLI application that she could call for more information. (Def.'s S.M.F. ¶ 38) Ms. Montejano asked for the name of the person Ms. Herrick spoke to and what they said, adding "we will figure this out, I promise." (Def.'s S.M.F. ¶ 40) Ms. Herrick responded with a photo of the denial letter, to which Ms. Montejano reiterated, "Ok, we will figure this out." (Def.'s S.M.F. ¶ 46)

On March 5, 2019, Ms. Herrick spoke with a FEGLI administrator, hoping to obtain Mr. Brook's life insurance. The administrator informed Ms. Herrick that her claim was denied for two reasons: (1) the policy was not properly listed in the divorce judgment, and (2) the judgment had not been received by Mr. Brook's employer, The Portsmouth Naval Shipyard, before he died. (Def.'s S.M.F. ¶¶ 49-50) Ms. Herrick and Ms. Montejano spoke again on March 7, 2019. Ms. Herrick informed Ms. Montejano that she had "tried one last time yesterday with the life insurance company, but it didn't pan out", and asked Ms. Montejano to clarify her plans moving forward. (Def.'s S.M.F. ¶ 55) Ms. Herrick assumed that Ms. Montejano planned to give her the life insurance proceeds, and was wondering if she would divide the money between them. (Def.'s S.M.F. ¶¶ 56-57) Ms. Montejano responded that her plan was to "get this mistake fixed" and that she "wanted nothing to do with this mess." (Def.'s S.M.F. ¶ 58) Later, on March 18, 2019, Ms. Herrick suggested to Ms. Montejano, "once you receive the check, you can deposit it into your bank account and then you can write me a personal check. . . I checked with my bank,

this seems like the easiest way.” (Def.’s S.M.F. ¶ 59) Ms. Montejano did not respond. (Def.’s S.M.F. ¶ 61)

On March 20, 2019, Ms. Herrick sent a text message to Ms. Montejano to let her know that her lawyer “does know of our arrangement for the life insurance and he may be contacting you regarding that or more information regarding your filing the estate.” (Def.’s S.M.F. ¶ 62) Ms. Herrick’s message was based on her assumption that the conversations on March 4 and 7, 2019 amounted to an agreement for Ms. Montejano to transfer funds from the life insurance policy to her. (Def.’s S.M.F. ¶ 63)

Ms. Montejano was appointed personal representative for the Estate of Jody Brooks on April 18, 2019 and commenced a probate proceeding in the York County Probate court on March 21, 2019. (Def.’s S.M.F. ¶ 68) Ms. Herrick filed a claim against the estate based on Mr. Brook’s failure to designate her as beneficiary of his life insurance policy, but Ms. Montejano denied the claim. (Def.’s S.M.F. ¶¶ 69-70) Ms. Herrick then filed a petition to resolve the disputed claim, to which Ms. Montejano responded with a motion to dismiss. (Def.’s S.M.F. ¶ 71) The parties assert that the Probate Court decided that the disputed claim therein should be consolidated with and decided by this Court, and a Motion to Consolidate the matters is pending before the Court. (Def.’s S.M.F. ¶ 73)

STANDARD OF REVIEW

A party is entitled to summary judgment pursuant to M. R. Civ. P. Rule 56(c) when the summary judgment record reflects there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. M.R. Civ. P. 56(c). A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party’s version appears

more credible or persuasive. *F.R. Carroll, Inc. v. T.D. Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646 (quoting *Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996)). Each party's statements must contain a reference to the record where "facts as would be admissible in evidence" may be found. M. R. Civ. P. 56(e). When the plaintiff is opposing summary judgment, it must establish a prima facie case for every element of each claim. *Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.*, 2007 ME 67, ¶ 7, 924 A.2d 1066. The evidence offered in support of a genuine issue of material fact "need not be persuasive at that stage, but the evidence must be sufficient to allow a fact finder to make a factual determination without speculating." *Estate of Smith v. Cumberland Cty.*, 2013 ME 13, ¶ 19, 60 A.3d 759.

Central to the claims at issue is the divorce judgment between Ms. Herrick and Jody Brooks.

The judgment states that:

Defendant has a life insurance policy in the amount of \$300,000. Defendant shall maintain his life insurance policy in the amount of \$300,000 with a reputable insurance company, naming Plaintiff [Ms. Herrick] as beneficiary thereof, until child support and spousal support obligations hereunder cease, and shall provide periodic proof, upon request by Plaintiff, that said policy is in full force and effect.

Divorce Judgment ¶ 17. Thus, according to the judgment, Mr. Brooks was required to maintain life insurance with a reputable insurer in the amount of \$300,000, naming Ms. Herrick as beneficiary - whether or not that insurance was his FEGLI policy. At the time of Mr. Brooks' death, his spousal support obligation had terminated, but he still had an obligation to pay child support.

DISCUSSION

In Ms. Montejano's motion, she asserts that federal law precludes the equitable and unjust enrichment claims made against her in Counts III and IV of Ms. Herrick's Amended

Complaint. Likewise, Ms. Montejano requests summary judgment on Count V alleging breach of contract, as well as claims brought against the estate of Jody Brooks in the Probate matter.

Counts III and IV- Imposition of a Constructive Trust and Disgorgement of Funds, and Unjust Enrichment

In Count III of Ms. Herrick’s First Amended Complaint, she alleges that pursuant to the divorce judgment, she has legal and equitable interests in the FEGLI policy benefits in Ms. Montejano’s possession. The Federal Employee’s Group Life Insurance Act of 1954 (“FEGLIA”), 5 U.S.C. § 8701 *et seq.*, establishes a life insurance program for federal employees. FEGLIA provides that an employee may designate a beneficiary to receive the proceeds of his life insurance at the time of his death. 5 U.S.C. § 8705(a). Then, upon an employee’s death, life insurance benefits are to be paid in accordance with a specified “order of precedence.” *Id.* The proceeds accrue “First to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death.” *Id.* “If there is no designated beneficiary”, the benefits are paid “to the widow or widower of the employee.” *Id.* Absent a widow or widower, the benefits accrue, in order, to the decedent’s children or their descendants, parents or their survivors, the executor or administrator of the estate, and last, to “other next of kin.” *Id.* To be effective, the beneficiary designation and any accompanying revisions to it must be in writing and duly filed with the Government. *See Id.*

In 1998, Congress amended FEGLIA to create a limited exception to an employee’s right of designation. The statute now provides that, “[a]ny amount which would otherwise be paid to a person determined under the order of precedence. . . shall be paid (in whole or in part) by the Office [of Personnel Management] to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation” or related settlement, but only in the event the “decree, order, or agreement” is received before the date of the

employees death “by the employing agency or, if separated from service, by the Office.” 5 U.S.C. § 8705(e).

Federal courts have consistently construed FEGLIA to provide employees an “unfettered freedom of choice” in selecting the beneficiary of their insurance proceeds. *Hillman v. Maretta*, 569 U.S. 483, 495 (2013). Therefore, even in instances where employees have failed to update their beneficiary designations as apparently intended, Courts have held fast to the procedures established by Congress and codified in FEGLIA.

In *Hillman v. Maretta*, the Supreme Court of the United States evaluated the interaction of FEGLIA and a Virginia law purporting to revoke beneficiary designations in the event of an annulment or divorce. *Id.* at 488. In affirming the Virginia Supreme Court, the Court held that the state law conflicted with FEGLIA and was therefore preempted. *Id.* The Court noted:

One can imagine plausible reasons to favor a different policy. Many employees perhaps neglect to update their beneficiary designations after a change in marital status. As a result, a legislature could have thought that a default rule providing that insurance proceeds accrue to a widow or widower, and not a named beneficiary, would be more likely to align with most people’s intentions. Or, similarly, a legislature might have reasonably believed that an employee’s will is more reliable evidence of his intent than a beneficiary designation form executed years earlier.

Id. at 494-95. The Court went on to explain the judgment made by Congress, evidenced in the plain language of FEGLIA: “Rather than draw an inference about an employee’s probable intent from a range of sources, Congress established a clear and predictable procedure for an employee to indicate who the intended beneficiary of his life insurance shall be.” *Id.* at 495. “[. . .]

FEGLIA evinces Congress’ decision to accord federal employees an unfettered ‘freedom of choice’ in selecting the beneficiary of the insurance proceeds and to ensure the proceeds would actually ‘belong’ to that beneficiary. *Id.*

In its *Hillman* opinion, the Court noted it was not “writing on a clean slate” and considered other cases where federal insurance statutes were in conflict with state laws mandating different distributions of benefits. *Id.* at 492. In a case with very similar facts to those currently before the Court, *Ridgway v. Ridgway*, the Supreme Judicial Court of Maine imposed a constructive trust on insurance proceeds paid to a service member’s widow, who was the named beneficiary, and ordered they be paid to the decedent’s previous wife as required by the terms of a divorce decree. 454 U.S. 46, 50-53 (1981). As in *Hillman*, the Supreme Court explained that the applicable provisions of the Servicemen’s Group Life Insurance Act of 1965 (“SGLIA”) made clear that “the insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office.” *Id.* at 56. Thus, despite the existence of a divorce decree requiring the contrary, the life insurance proceeds accrued to the decedent’s widow according to SGLIA’s order of precedence¹. *Id.* at 52, 60.

Like the facts of *Ridgway*, Ms. Herrick was not named the beneficiary of Mr. Brooks’ life insurance policy, despite the existence of a Divorce Judgment requiring otherwise. According to the order of precedence, in the absence of a named beneficiary, the proceeds of the policy accrue to the decedent’s widow, in this case Ms. Montejano. However, Ms. Herrick contends that she is still the rightful beneficiary of the FEGLI policy proceeds subject to the exception detailed in section 8705(e).

¹ The Supreme Court of the United States traced their decisions in both *Hillman* and *Ridgway* to their decision in *Wissner v. Wissner*, 338 U.S. 655 (1950). In *Wissner*, the Court determined that the National Service Life Insurance Act of 1940 (“NSLIA”) pre-empted a widow’s state-law action to recover life insurance proceeds. In *Hillman*, the Court noted that its reasoning in both *Ridgway* and *Wissner* apply “with equal force” because the statutes considered therein were “strikingly similar” to FEGLIA. *Hillman*, 569 U.S. 483 at 493.

According to section 8705(e), a person with a claim to FEGLI proceeds pursuant to a divorce decree shall be paid to the extent of their interest so long as the judgment is received by the employing office, *or if separated from employment*, by the OPM, prior to the employee's death. 5 U.S.C. § 8705(e). Ms. Herrick asserts that because she provided the OPM with a certified copy of the divorce judgment in 2014, prior to Mr. Brooks' death, she met the requirements of the exception. In Ms. Herrick's view, it does not matter that the judgment was provided to the OPM rather than Portsmouth Naval Shipyard, because the OPM had a duty to process and forward the Divorce Judgment to the appropriate office.

In support of her argument, Ms. Herrick points to *Nixon v. United States*, 916 F.Supp2d 855 (N.D. Ill. 2013). In *Nixon*, a United States Small Business Administration ("SBA") employee signed an updated FEGLI beneficiary form and provided it to the SBA. However, the SBA failed to send the form to the appropriate office, resulting in the wrong beneficiaries receiving payment after the employee's death. The Court in *Nixon* held that:

It makes no sense to interpret FEGLIA to require submission of beneficiary designation forms to the Government while simultaneously absolving the Government of any responsibility for processing and maintaining those forms in the manner required by statute to make them effective. The Court concludes then, that the Government has a duty under FEGLI and the common law to preserve beneficiary forms submitted by employees in a manner that permits an assessment of the employee's current beneficiaries at the time of death.

Nixon, 916 F.Supp2d at 863. After deciding *Nixon*, a similar case arrived before the United States District Court for the Northern District of Illinois three years later: *USAA Life Ins. Co. v. Benvenuto*, 2016 U.S. Dist. LEXIS 133057 (N.D. Ill. 2016). In *Benvenuto*, an employee of the FBI was required by divorce decree to designate his minor children as beneficiaries of his FEGLI policy. Although the FBI could not locate a certified copy of the divorce decree in its records, the

decedent's former wife averred that she had provided the decree to another FBI employee who failed to deliver it to the proper parties internally. The District Court agreed with the plaintiff that, in light of the holding in *Nixon*, had the defendant provided the divorce decree to an FBI employee, that employee had a duty to forward it to the proper parties. Both *Nixon* and *Benvenuto* share a common fact-pattern; documents relevant to the accrual of life insurance benefits were sent to the decedents' employing offices prior to their death but failed to end up in the correct hands.

Ms. Herrick does not allege that she sent the Divorce Judgment to the Portsmouth Naval Shipyard, only to be lost in the shuffle due to employee error. Rather, Ms. Herrick alleges that she sent the Judgment to the incorrect office (the OPM), but that that office was responsible for forwarding the Judgment to the correct one. In contrast with *Nixon* and *Benvenuto*, federal courts have been less consistent when asked whether the Government has a duty to take affirmative steps to remedy a party's mistakes. For instance, the Fifth Circuit has addressed similar facts to those in *Nixon*. See *Metropolitan Life Ins. Co. v. Atkins*, 225 F.3d 510 (5th Cir. 2000). In *Atkins*, the Court expressly held that while the Government had no duty to ensure that employees properly complete their insurance forms, FEGLIA required the Government to properly *maintain* completed forms turned over to its care. *Id.* at 514. However, in *Freirichs v. United States*, a decedent incorrectly filled out his life insurance forms, contacted the human resources department of his former employer, and was told the issue had been corrected. 2006 U.S. Dis. LEXIS 2464. When the issue was never actually corrected, the Court held that Congress did not indicate that it intended FEGLIA to create any actionable duties against the Government. *Id.* at *2 n. 3.

The plain language of Section 8705(e) requires a divorce judgment to be sent to the decedent's employing office prior to their death to alter the order of precedence. Only if the employee has been separated from employment does the statute indicate that the judgment should be provided to OPM. Although federal case law has previously imposed a duty on the Government to maintain the documents and forms in their possession, courts have been far less friendly to requiring the Government to affirmative steps to remedy mistakes made by other parties. Thus, the Court finds that, according to FEGLIA's order of precedence, the benefits of Mr. Brooks' FEGLI policy correctly accrued to Ms. Montejano. Therefore Ms. Montejano is entitled to summary judgment with regard to Count III.

Count IV of Ms. Herrick's Amended Complaint alleges a claim for Unjust Enrichment. To prevail on a claim for unjust enrichment, the complaining party must show that "(1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Knope v. Green Tree Servicing, LLC*, 2017 ME 95, ¶ 12, 161 A.3d 696. Because the benefits of Mr. Brooks' FEGLI policy correctly accrued to Ms. Montejano, the Court cannot hold her retention of those benefits inequitable. Accordingly, Ms. Montejano is also entitled to summary judgment regarding Count IV.

Count V- Breach of Contract

In addition to Ms. Herrick's equitable and unjust enrichment claims, Count V of her Amended Complaint alleges breach of contract. Specifically, Ms. Herrick contends that she and Ms. Montejano entered into an enforceable agreement when Ms. Montejano made statements

such as “we will figure this out, I promise”, when she stated that she planned to “get this mistake fixed”, and that she “wanted nothing to do with this mess.” (Def.’s S.M.F. ¶¶ 46, 58).

Any action to enforce a contract necessarily depends on the existence of a contract itself. “A contract exists if the parties mutually assent to be bound by all its material terms, the assent is either expressly or impliedly manifested in the contract, and the contract is sufficiently definite to enable the court to ascertain its exact meaning and fix exactly the legal liabilities of each party.” *Sullivan v. Porter*, 2004 ME 134, ¶ 13, 861 A.2d 625. “Generally, the existence of a contract is a question of fact to be determined by the jury.” *Id.* However, when a plaintiff fails to allege facts that generate a genuine issue of whether a contract exists, summary judgment is proper. *See Stanton v. Univ. of Maine Sys.*, 2001 ME 96, ¶ 14, 773 A.2d 1045.

Ms. Herrick fails to establish the existence of any contract terms, or any facts indicating Ms. Montejano assented to being bound by said terms. Rather, Ms. Montejano merely indicated she was willing to help Ms. Herrick “fix the mess.” When Ms. Herrick reached out and suggested explicitly that Ms. Montejano divide the insurance proceeds and send her a check, Ms. Montejano did not respond. Further, Ms. Herrick fails to establish that any consideration was given to establish an enforceable contract between the parties—Ms. Herrick admittedly had no plans to compensate Ms. Montejano in any way for providing her with the insurance proceeds. Thus, the Court finds that Ms. Herrick has failed to allege facts sufficient to generate a genuine issue of whether a contract existed, entitling Ms. Montejano to summary judgment on Count V.

Motion to Consolidate and Ms. Herrick’s Claims Against the Estate of Jody Brooks

In addition to the claims brought against Ms. Montejano, Ms. Herrick has also brought a claim against the Estate of Jody Brooks in the York County Probate Court. The Court understands that the parties have agreed to consolidate the claim against Jody Brooks’ estate with the claims against

Ms. Montejano. However, it is not clear to the Court if the parties are asking this Court to actually adjudicate the Probate matter petition pending against Mr. Brooks' estate, or simply to make legal findings here in the nature of declaratory relief. The Court therefore directs counsel for both Ms. Herrick and Ms. Montejano to supplement their arguments on the Motion to Consolidate, clarifying what findings and legal determinations they are asking the Court to make regarding the decedent, and as to what authority the Court may have to do so. In addition, they should clarify what authority they believe the Court has to adjudicate the Petition pending before the Probate Court. Counsel have 14 days from the date of this Order to file simultaneous supplemental arguments on the motion to consolidate.

CONCLUSION

The Divorce Judgment between Mr. Brooks and Ms. Herrick found that Mr. Brooks had a FEGLI policy in the amount of \$300,000, and required Mr. Brooks to maintain a life insurance policy of that value with a reputable insurer, naming Ms. Herrick beneficiary to secure his child and spousal support obligation. FEGLIA has been interpreted by federal courts to provide federal employees with the "unfettered freedom" to name the beneficiary of their choice. Given the federal decisions, and the Summary Judgment record before it, the Court concludes that Ms. Herrick cannot bring the claims she has brought against Ms. Montejano.

However, the Divorce Judgment did not simply require Mr. Brooks to name Ms. Herrick beneficiary of the FEGLI policy. He was required to name her beneficiary of a life insurance policy in the amount of \$300,000 with a reputable insurer to secure certain obligations under that Judgment. The parties seem to agree he failed to do that.

The Court will await supplemental arguments from the parties as set out above before acting on the Motion to Consolidate, and before ordering entry of Judgment in this matter. The Clerk is directed to enter this Order on the docket by reference pursuant to M.R. Civ. P. 79(a).

December 2, 2020

DATE

/s/M. Michaela Murphy

SUPERIOR COURT JUSTICE