UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

MITZI SYSTEMS, INC., ORDER DENYING MOTION OF DEFENDANT ANNA SMUSKEWICZ FOR JUDGMENT ON THE PLEADINGS AND/OR DISMISSAL

Debtor.

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SHERIDAN J. BUCKLEY, Trustee of the bankruptcy estate of Mitzi Systems, Inc., BKY 3-91-0667

Plaintiff, ADV 3-95-76

v.

ROGER W. SAMES, in his capacity as Court Administrator, Dakota County, First Judicial District; ANNA SMUSKEWICZ, Personal Representative of the Estate of Thomas Smuskewicz, deceased; GEORGE D. LARSON; STATE OF MINNESOTA, Minnesota Department of Revenue; UNITED STATES OF AMERICA, Internal Revenue Service; and A & H CARTAGE,

Defendants.

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At St. Paul, Minnesota, this _____ day of September, 1995.

This adversary proceeding came on before the Court on June 21, 1995, for hearing on the motion of Defendant Anna Smuskewicz, styled as one for judgment on the pleadings, alternatively for dismissal for want of jurisdiction, and for various other relief. Defendant Smuskewicz appeared by her attorneys, Steven M. Gale and Stuart E. Gale. The Plaintiff appeared on behalf of the bankruptcy estate. Defendant Roger W. Sames appeared by Andrea G. White, Assistant Dakota County Attorney. Defendant State of Minnesota appeared by Francis C. Ling, Assistant Attorney General. Defendant George D. Larson appeared by his attorney, Richard H. Speeter. Upon the moving and responsive documents and the arguments of counsel, the Court makes the following order.

NATURE OF PROCEEDING

Mitzi Systems, Inc., is the debtor in a case under Chapter 7 of the Bankruptcy Code, which is presently pending before this Court. The Plaintiff is the trustee of the Debtor's bankruptcy estate. Via his complaint in this adversary proceeding, he seeks a judgment determining that the

estate has the right to the sum of approximately $67,000.00, presently held by Defendant Roger W. Sames in his capacity as Court Administrator for the Minnesota State District Court for the First Judicial District, Dakota County. These funds are the proceeds of a policy of insurance on the life of Thomas A. Smuskewicz, who was the President of the Debtor when it filed for bankruptcy relief, and who is now deceased. The Plaintiff seeks an explicit determination that none of the other Defendants--in particular Defendants Smuskewicz and Larson--have any right, title, or interest in the funds. Finally, he seeks an order requiring Defendant Sames to turn the funds over to him, for administration as an asset of the estate.

Defendant A & H Cartage has not answered or otherwise appeared herein, and is in default. Defendants Larson, State of Minnesota, and United States of America all concur in the Plaintiff's position, and essentially join him in his demands. Defendant Sames acknowledges that he is merely a stakeholder in the funds, and requests only that the dispute before this Court be resolved in a clear fashion so that he may turn the funds over to the party entitled to them. Defendant Smuskewicz energetically opposes all of the Plaintiff's requests for relief.

MOTION AT BAR

Via the motion at bar, Defendant Smuskewicz seeks a judgment that she has the right in the funds at issue, as the surviving spouse of Thomas A. Smuskewicz and as the "equitable beneficiary" of the policy of life insurance in question. Her counsel advances several different theories, seemingly in the alternative. The theories may be summarized as follows:

1. Because the funds were subject to the jurisdiction of the Dakota County District Court in connection with the administration of the probate estate of Thomas A. Smuskewicz, this Court lacked and lacks jurisdiction to determine the entitlement to them, then and now.

2. The doctrine of res judicata now bars the Plaintiff from making any claim to the funds, because the Probate Division of the Minnesota State District Court for the First Judicial District, Dakota County has already determined that Defendant Smuskewicz is entitled to them.

3. In the alternative, this Court should defer to the Dakota County District Court's decision by "abstaining" from entertaining the Plaintiff's claim to the funds.

4. The equitable doctrines of waiver and laches bar the Plaintiff from making any claim to the funds on behalf of the bankruptcy estate.

5. The original policy of insurance on the life of Thomas A. Smuskewicz lapsed before the commencement of the Debtor's bankruptcy case; because the policy was later reinstated by persons other than the Debtor, by paying premiums with funds that were not property of the Debtor, it could not become property of the bankruptcy estate and its proceeds are not subject to the Plaintiff's administration.

Defendant Smuskewicz's counsel denominates his client's motion as being one for judgment on the pleadings

and/or for dismissal. He also request that the Court make various "findings." By their nature, these "findings" would actually be more like rulings of law. It is not quite clear whether Defendant Smuskewicz seeks them as predicates for a dismissal or a judgment on the pleadings, or as independent adjudications.

In so styling the motion, counsel does not cite any particular rule. The first two denominations, of course, seem to sound under Fed. R. Civ. P. 12(b) and (c), as incorporated by Fed. R. Bankr. P. 7012(b). In the presentations, however, the moving and responding parties all make reference to materials outside the four corners of the complaint and the answers. Thus, the correct denomination is as a motion for summary judgment pursuant to Fed. R. Bankr. P. 7056. Fed. R. Civ. P. 12(c), as incorporated by Fed. R. Bankr. P. 7012(b). Defendant Smuskewicz's requests for certain additional "findings" sound under Rule 56 regardless of counsel's lack of citation; as to them, she maintains that she is entitled to judgment "as a matter of law," asserting that certain underlying facts are uncontroverted.

The Plaintiff pointedly disputes Defendant Smuskewicz's right to any of this relief. Defendants Larson, State of Minnesota, and United States of America join him in opposing her motion.

UNDISPUTED FACTS

Numerous facts are established as undisputed from their status as events within the Debtor's bankruptcy case and within the proceedings for the probate of Thomas A. Smuskewicz's estate in the Dakota County District Court.

The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on February 5, 1991. Thomas A. Smuskewicz was one of its principals. At some point before its Chapter 11 filing, the Debtor had purchased a policy of insurance on his life from the Massachusetts Indemnity and Life Insurance Company. The policy had a face value of approximately $65,000.00. Under its terms, the Debtor was the primary named beneficiary.

The Debtor did not include an entry for its interest in the Massachusetts Indemnity policy in the original asset schedules it filed for its Chapter 11 case. It never amended the schedules to disclose one, either.

On motion of the United States Trustee, this Court converted the Debtor's case to one under Chapter 7 on December 3, 1991. The Plaintiff was appointed as trustee of the Chapter 7 estate. On January 16, 1992, he filed a Report in No-Asset Case. In it, he indicated that his inquiry had revealed no assets for administration for the benefit of creditors. On October 15, 1992 , the Court entered an order closing the case and discharging the Plaintiff as trustee.

On August 8, 1993, Thomas A. Smuskewicz died. The insurer deposited the proceeds from the Massachusetts Indemnity policy with the Dakota County District Court. In early 1995, Defendant Smuskewicz moved that court for an order requiring the funds to be turned over to her. Defendant Larson then made a "countermotion" for certain relief as to the policy proceeds. The hearing on the motions convened on February 15, 1995. Appearances were noted on behalf of all of the Defendants named in this adversary proceeding, but not on behalf of the Plaintiff. After hearing argument, that Court (Lacy, J.) took the motions under advisement.

On March 16, 1995, the Plaintiff filed an application to reopen the Debtor's bankruptcy case. This Court entered an order granting that application on March 21, 1995. On March 23, 1995, the United States Trustee appointed the Plaintiff as successor trustee. On March 31, 1995, the Plaintiff presented the United States Trustee with an application for approval of his employment of himself as counsel to represent the estate in pursuing the recovery of the proceeds of the Massachusetts Indemnity policy. After the U.S. Trustee's office processed the application and recommended the employment, the Court entered an order approving it on April 10, 1995.

On April 12, 1995, Judge Lacy entered an order granting Defendant Smuskewicz's motion, and ordering Defendant Sames to pay over the proceeds of the policy to her. He based this disposition on his conclusion that Defendant Smuskewicz was "the equitable beneficiary" of the policy and "should receive its proceeds," noting that he had been "compelled by the equities at hand in ruling" notwithstanding the fact that Thomas A. Smuskewicz had never changed the identity of the principal beneficiary on the policy. No party to the probate proceeding took an appeal from this order.

On May 5, 1995, the Plaintiff filed the complaint that commenced this adversary proceeding.

## DISCUSSION

### I. Standards for Summary Judgment

Under Rule 56, a movant must demonstrate, as a threshold matter, that there is "no genuine issue of material fact." It then must demonstrate that it is "entitled to a judgment" on the facts thus posited, "as a matter of law." If the parties have been involved in other litigation that touched on the subject matter of the controversy at bar and went to a final order or judgment, the movant may rely on the doctrine of res judicata, or "claim preclusion," to meet both of these requirements. In such an instance a movant essentially maintains that all aspects of the subject controversy, factual and legal, were settled by the prior decision, or should have been, and are not subject to relitigation.

Alternatively, a movant for summary judgment may "point out" that all of the extant admissible evidence supports its own factual theory of the case, that the opposing party cannot prove up its own factual theory on the extant evidence, and that the law requires that the movant be given judgment on the basis of the facts that it posits in this way. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); City of Mt. Pleasant v. Assoc. Electric Coop., Inc., 838 F.2d 268, 273-274 (8th Cir. 1988). This shifts the burden of production to the respondent; to avoid having the Court reach the legal phase of the analysis, the respondent must bring forward evidence that would support a specific finding in its favor on the fact(s) that the movant has called it into question. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-252 (1986); Heideman v. PFL, Inc.., 904 F.2d 1262, 1265 (8th Cir. 1990).

### II. Merits of Defendant's Smuskewicz's Motion

Defendant Smuskewicz's counsel argued the substantive issue of the right to the Massachusetts Indemnity policy first, and most strenuously. However, counsel failed to make an evidentiary record for this theory; it must be deferred for fuller development by both parties. The

remaining issues touch on jurisdiction or the preclusion doctrines. On all of them, the Plaintiff prevails.

A. Jurisdiction

As her most basic argument, Defendant Smuskewicz maintains that the sole jurisdiction over the proceeds of the Massachusetts Indemnity policy lay in the Dakota County District Court, as the court with exclusive jurisdiction over the probate estate of Thomas A. Smuskewicz. She is technically correct in noting that the federal courts cannot exercise jurisdiction over proceedings for the administration of probate or trust estates. In re Butler's Trust, 201 F. Supp. 316, 317 (D. Minn. 1962). However, she is quite wrong in the unspoken predicate of her argument: that the policy and its proceeds came under the probate jurisdiction of the Minnesota state courts in the first place.

Once a bankruptcy case has been commenced, the federal courts have exclusive jurisdiction over the property of the bankruptcy estate. 28 U.S.C. Section 1334(d). The bankruptcy estate includes, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. Section 541(a)(1). Once property is in the bankruptcy estate in a Chapter 7 case, it is subject to the administration of the trustee. 11 U.S.C. Section704(1). After the Trustee has completed administration of these assets and the Court has discharged him or her of duties, the Court is to close the case. 11 U.S.C. Section350(a). At that point, any assets scheduled by the debtor that the trustee has not actually administered by liquidation or formal abandonment are deemed abandoned to the debtor. 11 U.S.C. Section 554(c). This provision conclusively terminates the estate's claims to such scheduled-but-unadministered assets. However, property not formally scheduled by the debtor pursuant to 11 U.S.C. Section 521(1) and not liquidated or formally abandoned by the trustee is not deemed to be abandoned upon the closing of a case. 11 U.S.C. Section554(d); Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2d 524, 526 (8th Cir. 1991). Such property remains subject to the claims of the trustee if the case is reopened pursuant to 11 U.S.C. Section350(b). In re Medley, 29 B.R. 84, 86-87 (Bankr. M.D. Tenn. 1983).

The Debtor never scheduled an interest in the Massachusetts Indemnity policy for the purposes of its bankruptcy case. To the extent that it had rights in the policy, then, they remained property of the bankruptcy estate. Because the federal courts retained their exclusive jurisdiction over them, they never became subject to the probate jurisdiction of the Dakota County District Court. In re Erickson, 183 B.R. 189, 193 n. 6 (Bankr. D. Minn. 1995). This Court, then, had and has the sole jurisdiction to pass on the issues raised by the Plaintiff's complaint.

B. Preclusion Doctrines

As an alternative theory, Defendant Smuskewicz essentially argues that the doctrine of res judicata makes the Dakota County District Court's decision binding on him, and bars him from making a claim to the proceeds of the Massachusetts Indemnity policy. Under 28 U.S.C. Section1738, the "full faith and credit statute,"

Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the

judgments emerged would do so.

Allen v. McCurry, 449 U.S. 90, 96 (1980). See, in general, In re Brandl, 179 B.R. 620, 623-624 (Bankr. D. Minn. 1995).

> Minnesota follows the general rules of res judicata . . . that are almost universally applicable.

Glass v. IDS Financial Services, Inc., 798 F. Supp. 1411, 1415 (D. Minn. 1992) (citing Nat'l Farmers Union Property and Casualty Co. v. Fisher, 284 F.2d 421, 425 (8th Cir. 1960)). Under Minnesota law, claim preclusion entails three elements:

1. The parties to the two successive proceedings must be identical or in privity;

2. The earlier proceeding must have resulted in a final judgment on the merits; and

3. Both proceedings must have involved the same cause of action.

O'Neil v. Rueb, 10 N.W.2d 363, 364 (Minn. 1943); Melady-Briggs Cattle Corp. v. Drovers State Bank, 6 N.W.2d 454, 456-457 (Minn. 1942). See also, Minneapolis Auto Parts Co. v. City of Minneapolis, 739 F.2d 408, 409 (8th Cir. 1984) (applying Minnesota law); Glass v. IDS Financial Services, Inc., 798 F. Supp. at 1415.

The Plaintiff acknowledges that he has put into suit the same cause of action that was at issue in the Dakota County District Court. He does not really dispute that that court's decision was a final judgment for the purposes of res judicata. As he would have it, the major reason why he is not bound by the state court's decision is that he was neither a party to the probate proceeding, nor in privity with any party that did actively oppose Defendant's Smuskewicz's claim.

> Of course,
>
> [i]t is a fundamental principle of American jurisprudence that a person cannot be bound by a judgment in litigation to which he was not a party.

Meza v. General Battery Corp., 908 F.2d 1262, 1266 (5th Cir. 1990) (citing Martin v. Wilks, 490 U.S. 755, 761 (1989) and Hansberry v. Lee, 311 U.S. 32, 40 (1940)). This statement, though, is not an absolute; the courts have extended res judicata to bar relitigation of claims by parties who are not actually involved in the earlier action, so long as they were in privity with parties so involved. E.g., Federal Dept. Stores, Inc. v. Moite, 452 U.S. 394, 398 (1981); Ellis v. Minneapolis Comm. on Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982). See, in general, discussion in In re Falk, 88 B.R. 957, 965 (Bankr. D. Minn. 1988). Privity between a party and a successor non-party can be demonstrated by proof that the successor non-party participated in and controlled the prior litigation in its self-interest. Pirrotta v. I.S.D. No. 347, 396 N.W.2d 20, 22 (Minn. 1986); Brunsoman v. Seltz, 414 N.W.2d 547, 550 (Minn. Ct. App. 1987), rev. den. (Minn. January 15, 1988). Some courts have found privity on the basis of an

"identity of rights," or an alignment of interests between the party and the nonparty so as to make the one the "virtual representative" of the other. See discussion in In re Falk, 88 B.R. at 965. However, under Minnesota law, the fact that interests may coincide is not enough to establish privity. Pirrotta v. I.S.D. No. 347, 396 N.W.2d at 22. Beyond all, the basic requirement of privity is fairness. First Alabama Bank v. Parsons Steel, Inc., 747 F.2d 1367, 1378 (11th Cir. 1984). A preclusion doctrine should not be applied if it will work an injustice on the party against whom estoppel is urged, or if it would lead to a result where the party has never had a full and fair opportunity to litigate its claim. United States v. Karlen, 645 F.2d 635, 639 (8th Cir. 1981).

The Plaintiff was not in privity with any of the parties who opposed Defendant Smuskewicz in the Dakota County District Court. During the term of his successive appointments, the Plaintiff has been chargeable as a fiduciary to advance the interests of all of the Debtor's creditors, and not the interests of any single one. In re Bell & Beckwith, 60 B.R. 422, 434 (Bankr. N.D. Ohio 1955); In re Russo, 18 B.R. 257, 270-271 (Bankr. E.D.N.Y. 192) (decided under Bankruptcy Act of 1898). See also Citibank, N.A. v. Andros, 666 F.2d 1192, 1194 (8th Cir. 1981). The trustee, and not interested creditors, takes appropriate action to administer assets for the benefit of all creditors. In re Capitol Chip Co., 19 B.R. 262, 264 (Bankr. D. Haw. 1982). Defendant State of Minnesota and A & H Cartage did not have such a status; they were interested in recovering only their own claims from whatever source they could, and had potentially-adverse claims to the same asset, the insurance proceeds. Defendant Larson may not have had a posture as overtly self-interested as the State and A & H Cartage. To the extent that he actually argued that the insurance proceeds should be administered through the bankruptcy estate, he did so only to try to maximize the chance that his personal liability on account of unpaid payroll taxes would be satisfied through the administration of the funds in bankruptcy. While he may have shared a common goal with the bankruptcy estate--the turnover of the funds for ratable distribution pursuant to the Bankruptcy Code--he lacked the legal standing to speak on behalf of the estate, and certainly could not advance the estate's claims with the force and depth that a trustee could have mustered. None of the actual participants in the probate proceeding were in privity with the Plaintiff.

In a crucial way that also bears on Defendant's Smuskewicz's main res judicata argument, the Plaintiff himself lacked that standing and ability at the relevant times. After the Court discharged the Plaintiff as Trustee in October, 1992, he lacked legal standing to advance the interests of the Debtor's creditors. He was not revested with that standing until his reappointment on March 23, 1995--five weeks after the named parties to the probate proceeding had closed the record and fully submitted their dispute, and less than three weeks before the Dakota County District Court rendered its decision. Defendant Smuskewicz's insistence that the Plaintiff had "more than adequate time to intervene" in the probate proceeding is fatally undercut by the fact that the Plaintiff simply did not have standing until just before the state court rendered its decision. This circumstance mandates that application of "the important general limit on rules of

preclusion"; because the Plaintiff "did not have a full and fair opportunity to litigate the claim . . . decided by the [state] court," Allen v. McCurry, 449 U.S. at 101, he simply cannot be bound by it. Both legally and in terms of his de facto participation, the Plaintiff was a stranger to the probate proceeding.

> A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

Martin v. Wilks, 490 U.S. 755, 763 (1989).

Thus, even assuming that the Dakota County District Court had the jurisdiction to render its determination that the insurance proceeds were not property of the estate, the Plaintiff is not precluded from seeking to relitigate that issue.

C. Abstention

As a third theory, Defendant Smuskewicz moves for an order by which, in deference to the Dakota County District Court's prior decision, this Court would abstain from entertaining the Plaintiff's complaint, pursuant to 28 U.S.C. Section1334(c)(1).

It is rather odd to see this statute invoked in the present context; by its very wording and nature, it contemplates abstention in deference to a future process of litigation and decision in another forum, rather than the according of final, binding effect to the past decision of a coordinate form. In this light, abstention under Section1334(c) probably does not even lie here. Regardless, abstention can be invoked only when the alternative forum has subject-matter jurisdiction over the subject dispute. That jurisdiction is lacking here. Defendant Smuskewicz's motion for abstention, then, is without merit.

D. Waiver and Laches

Defendant Smuskewicz's motion implicates two more of her pleaded defenses, though counsel has not argued them using their specific names.

The first is that the Plaintiff somehow waived his claim to the proceeds of the Massachusetts Indemnity policy by not coming forward any earlier than he did in suing out this adversary proceeding. Under Minnesota law, waiver is an intentional, objectively-manifested relinquishment of a known right. Citzens Nat'l Bank of Madelia v. Mankato Implement, Inc., 441 N.W.2d 483, 487 (Minn. 1989); Hauenstein & Bermeister, Inc. v. Met-Fab Indust., Inc., 320 N.W.2d 886, 892 (Minn. 1982); In re Johnson, 139 B.R. 208, 217 (Bankr. D. Minn. 1992). This theory fails for two reasons. First, Defendant Smuskewicz does not point to a single communication from the Plaintiff in which he objectively manifests any intention to give up all claim to the insurance proceeds. Beyond that, the clear import of 11 U.S.C. Section554(d) is that the Plaintiff could not have relinquished the claim with legal effect, at any point before the reopening of the Debtor's case and his formal abandonment of the proceeds under Section 554(a) or 554(b). Stanley v. Sherwin-Williams Co., 156 B.R. 25, 26-27 (W.D. Va. 1993); Krank v. Utica Mut. Ins. Co., 109 B.R. 668, 669 (E.D. Pa. 1990), aff'd, 908 F.2d 962 (3d Cir. 1990); In re Rothwell, 159 B.R. 374, 377 (Bankr. D. Mass. 1993).

Defendant Smuskewicz's other equitable defense--laches--fails as well. Under Minnesota law, the doctrine of laches bars a party from asserting claims in equity where it has deferred that assertion for such a lengthy period of time that, in the interests of repose, it must be deemed to have abandoned or relinquished the claims. Corah v. Corah, 75 N.W.2d 465, 469 (Minn. 1956). Again, Section554(d) operated to preserve the status of the estate's claims to the insurance proceeds, and overrides any more general argument that the Plaintiff is equitably barred from asserting them.

E. Substantive Right to the Funds

As noted earlier, as part of her motion Defendant Smuskewicz also requested a grant of substantive relief from this Court, de novo; she seeks a new judgment determining that the policy that generated the funds on hand was not an asset of the Debtor and, hence, did not pass into the bankruptcy estate. Her premise is that the policy lapsed as a result of the Debtor's nonpayment of premiums, several weeks before the Debtor filed its Chapter 11 petition; then, some 10 months later, Thomas A. Smuskewicz filed an application for reinstatement of the policy, and went on to make premium payments until he died, out of funds that were his or Defendant Smuskewicz's property. She apparently seeks a judgment here that would duplicate the Dakota County District Court's decision, in its predicate findings and conclusions.

This, essentially, is a request for affirmative relief under Rule 56--an adjudication on the merits, "as a matter of law" and premised on undisputed facts. As the movant for such relief, Defendant Smuskewicz bore the initial burden of production--to bring forward probative evidence to establish all the fact elements of her claim, and to "point out" that no extant evidence supported a contrary version of the facts. As to this burden, the wording of Rule 56 itself required her to bring forward the equivalent of admissible evidence--sworn discovery responses and affidavits under oath. In re Brandl, 179 B.R. at 627. See, in general 10A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure at 48-60 (2d ed. 1983).

Defendant Smuskewicz has failed to carry this burden. Her counsel did not produce an affidavit from her or any other witness with capacity to attest to the relevant facts on the basis of personal observation or experience. The sole evidence proffered for the sequence of events around the policy's alleged lapse and reinstatement is three pages of copied documents attached to counsel's memorandum, without verification or affidavit. One of these pages appears to be a photocopy of a photocopy of a facsimile transmission, the legibility of which is somewhat lacking.

Where a movant for summary judgment seeks affirmative relief, Rule 56 requires a record that has certain minimum indicia of probity and credibility. In particular, documentary exhibits must either be the product of discovery responses from the movant's opponent, vested as such with a presumption of completeness and authenticity. As an alternative, they may be farmed into evidence via an affidavit containing the same recitations as foundational testimony at trial would have. 10A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure at 58-60 (2d ed. 1983). Lacking such an evidentiary record, the Court treating a motion for affirmative relief on summary judgment cannot make defensible

findings. Defendant Smuskewicz has failed to make just that sort of record.

CONCLUSION

In short, the Dakota County District Court's determination of the rights to the proceeds of the Massachusetts Indemnity policy has no force and effect, as against the Plaintiff's claim to it for the benefit of the bankruptcy estate; the court that rendered it lacked jurisdiction over the asset and its decision is not entitled to deference under res judicata. He is entitled to maintain that claim through this adversary proceeding, as if the issue had never been litigated among the parties to the probate proceeding. Defendant Smuskewicz has not established her right to summary judgment on the issue, so this matter will proceed to trial or some other disposition.

ORDER

IT IS THEREFORE ORDERED that Defendant Smuskewicz's motions for judgment on the pleadings, for dismissal for want of jurisdiction, and/or for summary judgment are denied in all respects.

BY THE COURT:

_____
GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE

(FN1) He does not explicitly state that his arguments are in the alternative, but there is no other way to interpret them in a logical fashion.

(FN2) FED. R. BANKR. P. 7012(b) provides that "Rule 12(b) - (h) FED. R. CIV. P. applies in adversary proceedings." In turn, FED. R. CIV. P. 12(b) allows the defenses of "lack of jurisdiction over the subject matter" and "failure to state a claim upon which reief may be granted" to be raised either in a responsive pleading or via motion. Finally, FED. R. CIV. P. 12(c) provides that

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(FN3) This rule makes FED. R. CIV. P. 56 applicable to adversary proceedings in bankruptcy. In pertinent part, FED. R. CIV. P. 56(c) provides that, upon a motion for summary judgment,

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits [submited in support of the motion], if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as

matter of law.

(FN4) The relevant text of this rule is:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [FED. R. CIV. P.] 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion . . .

(FN5) In signing the Debtor's petition and schedules, he identified himself as its president.

(FN6) The Plaintiff identifies the insurer as such in his complaint. Other documents in the record identify "Primerica" as the entity that issued the policy. The discrepancy is not material. For brevity, the policy will be termed "the Massachusetts Indemnity policy. "

(FN7) The Plaintiff alleges in his complaint that the insurer did this in the context of an interpleader action. This may not be accurate; it appears that the litigation relevant to this matter actually took place in the proceedings for the probate of Thomas A. Smuskewicz's estate.

(FN8) In pertinent part, this statute provides:

> The district court in which a case under [the Bankruptcy Code] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the [bankruptcy estate].

Once that jurisdiction is created, judicial authority over the estate passes to the bankruptcy judges for the district, 28 U.S.C. Section 157(a) and Loc. R. BANKR. P. (D. MINN.), _____ and to the "bankruptcy court," as a "unit of the district court," 28 U.S.C. Section 151.

(FN9) This statute establishes, as one of the duties of the Chapter 7 trustee, the obligation to "collect and reduce to money the property of the estate for which such trustee serves . . . "

(FN10)The text of this statute is:

> Unless the court orders otherwise, any property scheduled under [11 U.S.C. Section] 521 (1)..... not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for the purposes of [1 1 U.S.C. Section] 350 . . .

(FN11) This statute provides, in pertinent part:

> Unless the court orders otherwise, property of the estate that is not abandoned under [11 U.S.C. Sections 554(a)-(c)] and that is not administered in the case remains property of the estate.

(FN12) This latter statute provides:

> A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

(FN13) For some reason, Defendant Smuskiewicz's counsel has never used the words "res judicata' or "claim preclusion" in connection with his argument. However, it is clear that this concept is what he is driving at--that his client "should not be twice vexed for the same cause," Shimp v. Sederstrom, 233 N.W.2d 292, 294 (Minn. 1975), because the Dakota County District Court settled all competing claims to the insurance proceeds and the Plaintiff is now precluded from claiming them as property of the estate. Because the same cause of action and the same set of facts are at issue, as between the probate proceeding and this one, "merger and bar" or "claim preclusion" is the proper preclusion doctrine to apply. Hauser v. Mealey, 263 N.W.2d 803, 806-807 (Minn. 1978); In re Brandl, 179 B.R. at 627.

(FN14) This law provides in pertinent part as follows:

> . . .[J]udicial proceedings [of any court of any State]...shall have the same full faith in credit in every court within the United States as they have by law or usage in the courts of such State...from which they are taken.

(FN15) In Falk, Judge Kressel noted that the evolution of resjudicata doctrine in the federal courts and the Minnesota state appellate courts has made its principles essentially indistinguishable. 88 B.R. at 961 and at 961, n. 4.

(FN16) There is no evidence of record that he made this argument, such as a transcript or a copy of a submitted motion paper or affidavit, but counsel have suggested as much.

(FN17) In pertinent part, this statute provides:

> Nothing in [the provisions of 28 U.S.C. Section 1334] prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code].

Though the statute makes reference to the District Court, a bankruptcy judge is fully empowered to render a final order on a motion for abstention under this provision. In re Fulda Ind. Co-op, 130 B.R. 967, 972-973 n. 5 (Bankr. D. Minn. 1991).