UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

RACING SERVICES, INC.,	**Chapter 7**
DEBTOR.	**Bankruptcy No. 04-30236**

KIP M. KALER, as Bankruptcy Trustee,
For RACING SERVICES, INC.,
PLAINTIFF,
v.

Adversary No. 11-7002

SUSAN BALA,
DEFENDANT.

SUSAN BALA,
COUNTER-CLAIMANT,
v.

KIP M. KALER, as Bankruptcy Trustee,
For RACING SERVICES, INC.,
COUNTER-DEFENDANT.

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiff/Trustee's Motion for Summary Judgment. Defendant, Susan Bala, filed a Resistance and Cross-Motion for Summary Judgment. The Court held a hearing on the motions on October 21, 2011. Kip Kaler appeared as Trustee and attorney for Trustee. Katrina Turman Lang and Joseph Turman

appeared on behalf of Susan Bala. The Court took the matter under advisement. This is a core proceeding under 11 U.S.C. § 157(b)(2)(A), (E), (K), and (O).

STATEMENT OF THE CASE

The subject of this adversary action is the treatment of proceeds of a life insurance policy taken out in Susan Bala's name (the "Policy"). Shortly after obtaining the Policy, Bala and Racing Services, Inc. ("RSI" or Debtor), her employer, entered into a Majority Shareholder Collateral Assignment (Split Dollar) Agreement. It is the terms of the Collateral Assignment and its effect on the Policy that give rise to the current dispute. Trustee argues that the Policy is an asset of the bankruptcy estate. Bala disagrees arguing that she, and not the estate, is solely entitled to the cash proceeds of the Policy.

The parties argue the Policy language, and accompanying Collateral Assignment, are unambiguous, and thus its interpretation is a question of law to be determined by the Court. Both parties argue that the "unambiguous" language of the Policy and Collateral Assignment supports their own conclusions.

The Court finds that the language of the Policy and Collateral Assignment is unambiguous and reveal the bankruptcy estate has the superior interest in a portion of the cash surrender value of the Policy. The bankruptcy estate's interest in the Policy exceeds the cash surrender value and consequently, the bankruptcy estate is entitled to recover the full cash surrender value.

BACKGROUND

Susan Bala is a former employee and the sole stockholder of RSI Holdings. RSI Holdings is the sole stockholder of Debtor, RSI. RSI is a Delaware Corporation and was the licensed pari-mutuel service provider in North Dakota. It was a developer of the North Dakota equine horse racing and breeding industry.

On March 27, 1995, The Guardian Life Insurance Company of America ("Guardian") issued Whole Life Policy No. 3909537 on the life of Susan Bala. Bala was the listed owner of the Policy at the time it was created and at all times pertinent to this litigation. The face amount of the Policy is $500,000.

On May 16, 1995, approximately two months after the Policy was issued, Bala and RSI executed a "Majority Shareholder Collateral Assignment (Split Dollar)" Agreement in connection with the Policy. Under the Collateral Assignment, Bala was the employee who owned the Policy, the premiums were paid by RSI, and Bala's brother was listed as the beneficiary.

Under the terms of the Collateral Assignment, Bala assigned and transferred the Policy and "any supplementary contracts issued in connection therewith" to RSI:

> to the extent of the total of any and all amounts heretofore or hereafter advanced by the Assignee [RSI] to the Assignor [Bala] for the payment of premiums or a portion of the premiums . . . subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer [Guardian] may have against the Policy.

(Collateral Assignment, ECF Doc. No. 32-2.) The Collateral Assignment provided RSI: "(a) the right to obtain, upon surrender of the policy by the Assignor [Bala], an amount of the cash surrender proceeds [of the Policy] up to the amount of the Assignee's [RSI's] interest in the policy." (Id.) The Collateral Assignment further provided: "If this agreement is terminated, the Assignee [RSI] shall transfer its Interest in the Policy to the Assignor [Bala] in exchange for an amount equal to the Assignee's [RSI's] Interest, obtained by the Assignee [RSI] upon the security of the policy." (Id.)

Between May 1995 and June 2004, RSI paid the monthly premium due under the Policy by automatic withdrawal from an RSI bank account. The premiums paid during

this period totaled at least $70,765.92. From July 2004 through November 2006, the premiums were paid under the Policy's Automatic Premium Loan Provision which provided: "any unpaid premium will be paid at the end of the grace period by an automatic loan if this option was elected in the application," and "the premium does not exceed the available loan value," as was the case here. Payment of the premium under this term decreased the Policy's cash surrender value.

The parties disagree about the specific purpose of the Collateral Assignment. Neither the Policy nor the Collateral Assignment itself provides background about this matter.

At some time after they entered the Collateral Assignment an RSI employee filed a report with a state regulator about irregularities at RSI. A federal investigation into RSI was launched. As a result of this investigation, RSI filed a voluntary Chapter 11 bankruptcy petition on February 3, 2004, in the United States Bankruptcy Court for the District of Delaware. On February 12, 2004, the case was transferred to this Court. Creditors sought to have the company reorganized or sold. On June 15, 2004, however, RSI's bankruptcy case was converted from a Chapter 11 to a Chapter 7. Attorney Kip [1] Kaler was appointed the Chapter 7 Trustee.

In February 2005, as a result of the federal investigation, Bala and RSI were convicted of conducting and conspiring to conduct an illegal gambling business, along with numerous other counts. Forfeiture judgments were entered against Bala and RSI in the amount of $19 million and $99 million, respectively. The Eighth Circuit Court of Appeals, however, reversed on all counts, concluding there was insufficient evidence. See United States v. Bala, et. al., 489 F.3d 334 (8th Cir. 2007).

Between the convictions and the Eighth Circuit's reversal, numerous events

concerning the Policy took place. In September of 2006, the U.S. Attorney for the District of North Dakota filed a Motion for Forfeiture of Property in the criminal action. The motion sought forfeiture of Bala's remaining asset—the cash surrender value of the Policy. Bala was never served with the motion. The court granted the motion on October 25, 2006. It ordered that Bala's interest in the Policy be forfeited to the United States. The bankruptcy estate did not object to the United States' Motion for Forfeiture of Property. Instead, the bankruptcy estate entered into an agreement with the U.S. Attorney's Office to split one-half of the net proceeds recovered from the cash surrender value of the Policy.

On or about January 19, 2007, Guardian received a copy of the October 25, 2006 Forfeiture Order. The Forfeiture Order required Guardian to surrender the Policy and deliver its cash surrender value to the United States in partial satisfaction of judgments against RSI and Bala. By letter dated February 8, 2007, Guardian delivered a check in the amount of $64,032.33—the cash surrender value of the Policy at that time—to the United States Department of Justice.

On February 23, 2007, however, another Order was entered in the criminal case. It was acknowledged that Bala may not have received notice of the Motion for Forfeiture of Property, and ordered that any attempt to liquidate the life insurance asset cease immediately and any proceeds already received be held pending a mandate from the court of appeals. Guardian, however, had already surrendered the Policy proceeds to the United States Government. At this time, Bala was still being held in federal prison as a result of her criminal conviction.

In July of 2007, four months after Bala's conviction was reversed, the Department of Justice returned Guardian's $64,032.33 check. Guardian then notified Bala's counsel,

Attorney Jon Brakke, that the cash surrender value of the Policy had been returned to Guardian. It also informed Bala of the terms and conditions under which the Policy surrender could be reversed and the Policy reinstated. Specifically, Guardian pointed out Bala needed to submit evidence of insurability and pay the overdue premium from November 2006 through August 2007 (plus loan interest), in the total amount of $6,074.01.

Bala did not submit a reinstatement application, remit the overdue premium and loan interest, or otherwise respond to Guardian's July 18, 2007 letter. Bala does not claim she responded. Instead, she argues that she had recently been released from prison, had lost her business, and was unable to make the payments necessary to reinstate the Policy. She argues her inability to make the payments stems, in part, from the fact she was not permitted to take a loan against the cash value of the Policy.

In January 2009, based on Bala's failure to reinstate the Policy, Guardian filed a Motion for Interpleader Relief in the underlying bankruptcy. After full briefing and argument the court granted the Motion for Interpleader Relief. Guardian was directed to deliver to Trustee the cash surrender value of the Policy ($64,032.33) to be held by Trustee in an independent interest-bearing bank account. The court noted the funds would be subject to disbursement only upon further order of the Court. The order further provided: "Upon the delivery of its check for $64,032.33 to Mr. Kaler . . . Guardian Policy No. 3909537 is and shall forever be CANCELED and SURRENDERED, and no further death or cash surrender proceeds thereunder shall be payable . . . ." (04-30236, ECF Doc. No. 606, at 2.)

On July 29, 2010, in the underlying bankruptcy, Trustee filed a Motion for 506 Determination of Interest of Susan Bala in the Guardian Life Insurance Policy. The

Motion was briefed and orally argued. On January 18, 2011, the court denied the motion and directed Trustee to file the action as an adversary proceeding.

Trustee filed this adversary—alleging the same arguments—on January 24, 2011. Trustee filed a Motion for Summary Judgment on April 20, 2011. On May 20, 2011, Bala filed a resistance and Cross-Motion for Summary Judgment. Judge Hill denied the Motion for Summary Judgment and Cross-Motion for Summary Judgment on July 21, 2011. The order denying the motions provided a brief factual history of the action and the arguments of the parties.

On September 8, 2011, Trustee filed a Renewed Motion for Summary Judgment. On October 6, 2011, Bala filed a Response to the Motion for Summary Judgment and a Renewed Cross-Motion for Summary Judgment. The undersigned held a hearing on the Motion and Cross-Motion on October 21, 2011. The Court took the matter under advisement and granted fourteen (14) days for the parties to submit additional briefs. No additional briefs were timely filed. On February 14, 2011, Bala filed a Supplement to her Response and Cross-Motion.

CONCLUSIONS OF LAW

A. Summary Judgment

Summary judgment is governed by Federal Rule of Bankruptcy Procedure 7056. Rule 7056 applies Federal Rule of Civil Procedure 56 in adversary proceedings. Rule 56 states, in relevant part, that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The granting of "[s]ummary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issues of material fact exist and the

movant is entitled to judgment as a matter of law." Hayek v. City of St. Paul, 488 F.3d 1049, 1054 (8th Cir. 2007). Summary judgment is appropriate when only questions of law are involved. Anderson v. Hess Co., 649 F.3d 891, 894 (8th Cir. 2011); see Bakke v. Murex Petroleum Corp., 342 Fed. App'x 230, 233 (8th Cir. 2009) ("The interpretation of a written contract is a question of law if the parties' intent can be determined from the language of the writing alone.").

The burden of showing there are no genuine issues of material fact belongs to the moving party. Winthrop Res. Corp. v. Eaton Hydraulics, Inc., 361 F.3d 465, 468 (8th Cir. 2004). "Once the movant has supported the motion, the non-moving party 'must affirmatively show that a material issue of fact remains in dispute and may not simply rest on the hope of discrediting the movant's evidence at trial.'" In re Houston, 385 B.R. 268, 271 (Bankr. N.D. Iowa 2008) (quoting Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 260 (8th Cir. 1996)).

"A 'material' fact is one 'that might affect the outcome of the suit under the governing law . . . .'" Johnson v. Crooks, 326 F.3d 995, 1005 (8th Cir. 2003) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An issue of material fact is genuine if a reasonable fact-finder could return a verdict for the nonmoving party on the question. Anderson v. Libberty Lobby, 477 U.S. at 252. Evidence that raised only "some metaphysical doubt as to the material facts" does not create a genuine issue of fact. Matsushita Elec. Indus. Co. v. Zenith Radio, Corp., 475 U.S. 573, 586 (1986). "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" In re Patch, 526 F.3d 1176, 1180 (8th Cir. 2008) (quoting Matsushita Elec. Indus. Co., 475 U.S. at 587).

Local Rule 7056-1, also imposes additional requirements for motions for summary

judgment:

> Upon any motion for summary judgment pursuant to Fed. R. Civ. P. 56, there shall be attached to the motion and also included in the supporting brief, a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.
>
> In response to the motion, the adverse party shall file, separate from the brief, a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be tried. The adverse party has 30 days after service of a brief in support of a motion for summary judgment within which to serve and file an answer brief.
>
> All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. Failure to file briefs within the prescribed time will subject such motions to summary ruling and the failure to file a brief by the moving party shall be deemed an admission that, in the opinion of counsel, the motion is without merit, and such failure to file a brief by the adverse party be deemed an admission that, in the opinion of counsel, the motion is well taken.

[2]

(N.D. Bankr. Ct. Local Rule 7056-1.)

B. North Dakota Contract Interpretation

Both parties agree this is a case of contract interpretation. The North Dakota Code provides standards for courts to employ in contract interpretation actions. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D. Cent. Code § 9-07-02. Section 9-07-03 provides:

> A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied.

N.D. Cent. Code § 9-07-03. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the

other provisions of this chapter." N.D. Cent. Code § 9-07-04. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D. Cent. Code § 9-07-06.

> The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

N.D. Cent. Code § 9-07-09.

Courts have strictly interpreted these Code provisions. "If the intent of the parties to a contract can be ascertained from the agreement alone, interpretation of the contract is a question of law. Thus, an unambiguous contract is particularly amenable to summary judgment." Rogstad v. Dakota Gasification Co., 623 N.W.2d 382, 387 (N.D. 2001) (citations omitted); see VND, LLC v. Leevers Foods, Inc., 672 N.W.2d 445, 453 (N.D. 2003).

> Whether or not a contract or its terms are clear and unambiguous is a question of law. Atlas Ready-Mix of Minot v. White Properties, 306 N.W.2d 212, 220 (N.D. 1981). When parol evidence is admitted to explain ambiguous matters in an agreement it is up to the trier of fact to determine the effect of the evidence upon the ambiguity. Thomas C. Roel Associates, Inc. v. Henrikson, 295 N.W.2d 136, 137 (N.D. 1980).

Schulz v. Hauck, 312 N.W.2d 360, 363 (N.D. 1981).

"An insurance contract, like any other contract, is to be construed according to the sense or meaning of the words that are used in the contract." Andersen v. Standard Life & Acc. Ins. Co., 149 N.W.2d 378, 380 (N.D. 1967) (citing Schmitt v. Paramount Fire Ins. Co., 92 N.W.2d 177 (N.D. 1958)). "A split-dollar arrangement is a contractual agreement under which an employer contracts with its employee to pay some or all of the annual premiums on a life insurance policy for the employee" and the parties contract

about how policy benefits will be paid out. Stephenson v. Hartford Life & Annuity Ins. Co., No. 02c3917, 2006 WL 2349931, at *2 n.2 (N.D. Ill. Aug. 9, 2006).

The Eighth Circuit has described split-dollar agreements as follows:

> Two common methods exist for splitting the payments in split dollar agreements. Under the endorsement system . . . the employer owns the policy and pays the annual premiums to the insurance company. The employee then pays his share of the premiums to the employer. In the collateral assignment system, the employee owns the policy and pays the annual premiums. The employer makes annual interest-free loans to the employee in the amount of the increase in the policy's cash surrender value. In exchange, the employee assigns the policy to the employer as security for the loans. Despite the difference in form, the net effect of each method is the same.

Sercl v. United States, 684 F.2d 597, 598 n.1 (8th Cir. 1982).

C. 11 U.S.C. § 506

Trustee's Motion for Summary Judgment argues that the Bankruptcy Estate has a secured interest in the Policy proceeds under 11 U.S.C. § 506. Section 506 is entitled, "Determination of secured status." The Court, however, questions the applicability of § 506. Neither party has raised this issue, however § 506 "requires that the claim must be held by a 'creditor.'" 4 Collier on Bankruptcy ¶ 506.03[3]. Section 506 provides in part:

> **(a)(1)** An allowed claim of a **creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such **creditors'** interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such **creditors'** interest or the amount so subject to setoff is less than the amount of such allowed claim. . . .

11 U.S.C. § 506 (emphasis added). "Section 506 is to be applied by bankruptcy courts when a party in interest objects, pursuant to § 502, to the value of a proof of secured claim filed by a **creditor** in the bankruptcy proceedings." Bank One, Chicago, NA v.

Flowers, 183 B.R. 509, 514 (Bankr. N.D. Ill. 1995).

Trustee does not indicate who the creditor is in this case. Bala, however, does not broach this issue, but instead argues that § 506 is inapplicable because North Dakota contract law, not bankruptcy law, governs the "secured creditor" determination. Bala argues:

> Article 9 of the Uniform Commercial Code governs secured transactions. See Chapter 41-09 of the N.D.C.C. Article 9 does not apply to an assignment of a right of payment under a contract to an assignee that is also obligated to perform under the contract in this case by making the premium payments. N.D.C.C. § 41-09-09(4)(f). RSI was the assignee of a right to payment in the limited circumstance stated in the Assignment, and was also obligated to perform under the contract, "The Assignee accepts this assignment and agrees that as long as this assignment is in force, the Assignee will advance to the assignor each year as the premium on the Policy becomes due, the Assignee's Payment, as defined below or on the reverse." Exhibit 14. The Assignment is specifically excluded from Article 9 and does not create a security interest for RSI in the proceeds of the policy.

(Id. at 17.)

This Court, for reasons discussed in detail below, finds that a determination of whether § 506 applies and whether the property in question is a secured claim and/or created a secured interest for RSI, is not necessary to dispose of this matter. The only determination necessary to dispose of this matter is whether Bala has any interest in the cash surrender value of the Policy. That determination can be made upon review of the four-corners of the Policy and Assignment. Consequently, there is no need for the Court to determine whether the cash surrender value of the property is a secured claim of the estate.

D. Arguments of the Parties

Trustee argues the estate has a security interest in the cash surrender value of the

Policy. He points out the Policy was assigned to RSI and under the Collateral Assignment, RSI was given the right to collect, upon surrender of the Policy, cash surrender proceeds up to the amount of RSI's interest in the Policy. Trustee asserts RSI's interest in the Policy is the total amount of premiums paid on the date of surrender, and this interest is secured by the Policy itself. Trustee provides no argument about why it matters if the estate's interest in the Policy is secured or unsecured. Trustee argues, "the collateral for the amount of premiums which were advanced by [RSI] is the cash value of the Policy, which, in the instant case, is the $64,032.33 surrendered by Guardian Life Insurance to the trustee." (Trustee Mt., ECF Doc. No. 14, at 7.)

More specifically, Trustee argues:

> Under a split dollar collateral assignment, the employer, upon surrender or maturity of the insurance policy, is entitled to the lesser of the amount of premiums paid and the cash value of the policy. This is the employer's security interest in the policy. The owner of the policy is entitled to whatever cash value above the premiums paid is left over, if any. This is the owner's equity interest in the policy. In the present case, [RSI] has paid not less than $70,765.92 of premiums on the insurance policy, while the policy's cash value is only $64,032.33. Thus, because the cash value of the policy is less than the amount of premiums paid, the estate is entitled to the entire cash value of the policy. Because there is no cash value above the amount of premiums paid, Ms. Bala has no equity interest in the policy, and therefore is entitled to nothing from it.

(Id.)

Bala disagrees, and argues:

> The RSI Estate is not a secured creditor of Ms. Bala's policy proceeds. The cash proceeds of Ms. Bala's policy were a fully vested retirement benefit to her, neither of the circumstances has been met under the Assignment that would allow the cash proceeds to be assigned to the RSI Estate, and the RSI Estate breached a condition precedent and forfeited the ability to enforce the assignment when it stopped paying the premiums on the policy. Under no circumstance is the limited assignment enforceable now or at any time in the future.

(Bala Br., EFC Doc. No. 30, at 12.) Bala asserts that she is "solely entitled to the cash proceeds of her policy." (Id.)

E. Terms of the Policy and Collateral Assignment

The "Majority Shareholder Collateral Assignment (Split Dollar)" agreement provides in part:

> 1. The undersigned (herein called "Assignor" [Bala]) hereby assigns, transfers and sets over to Racing Services, Inc. of Fargo, ND (herein called "Assignee") to the extent of the total of any and all amounts heretofore or hereafter advanced by the Assignee to the Assignor for the payment of premiums or a portion of the premiums (herein called "Assignee's Interest") thereon, Policy No #3909537 issued by The Company indicated above (herein called "Insurer") and any supplementary contracts issued in connection therewith (said policy and contracts being called herein the "Policy") upon the life of Susan Bala subject to all the terms and conditions of the Policy and to all superior liens, if any, which the insurer may have against the Policy. The Assignor by this instrument agrees and the Assignee by the acceptance of the assignment agrees to the conditions and provisions herein set forth.
> 2. It is expressly agreed that **only** the following specific rights are included in this assignment and pass by virtue hereof to the Assignee and may be exercised solely by the Assignee:
>
> a. **The right to obtain, upon surrender of the policy by the Assignor, an amount of the cash surrender proceeds up to the amount of the Assignee's interest in the policy**.
>
> b. The right to collect the net proceeds of the policy when it becomes a claim by death or maturity up to the amount of the Assignee's Interest.
>
> . . . .
>
> **8. If this agreement is terminated, the Assignee shall transfer its interest in the Policy to the Assignor in exchange for an amount equal to the Assignee's interest, obtained by the Assignee** upon the security of the policy.

(Collateral Assignment, ECF Doc. No. 32-2, at 9 (emphasis added).)

Bala first argues that since she did not surrender the Policy under section 2(a) of

the Collateral Assignment, the bankruptcy estate does not have an interest in the cash surrender value. Trustee admits Bala did not surrender the Policy, but argues:

> To make it clear, RSI did not surrender the policy either. As set forth in Guardian Life Insurance Company of America's motion and in particular its response to Bala's reply (Docket No. 599), Guardian 'surrendered the policy'. . . . The split dollar plan does not require a particular entity to 'surrender' the policy. Guardian deemed the policy surrendered when compelled by the DOJ. (See Guardian Life Insurance Company of America's Response (Docket No. 599)).

(Trustee Br., ECF Doc. No. 14, at 10.)

Trustee is mistaken in part. Clause 2 lists specific rights that are transferred through the Collateral Assignment. Clause 2(a) provides: "The right to obtain, **upon surrender of the policy by the Assignor**, an amount of the cash surrender proceeds up to the amount of the Assignee's interest in the policy." (Collateral Assignment, ECF Doc. No. 32-2, at 9 (emphasis added).) Consequently, a particular entity—the Assignor—triggered surrender of the Policy under the Collateral Assignment. Bala was the "Assignor." Under Clause (2)(a) Bala would have to surrender the Policy. Both parties agree that Bala did not surrender the Policy, Guardian did. Accordingly Clause 2 (a) does not provide Trustee with a basis for relief.

If the Collateral Assignment ended after Clauses 2(a) and (b), it is arguable that Bala would be entitled to relief—as neither provision of Clause 2 occurred. However, when Clause 2 is read in conjunction with the remainder of the Collateral Assignment—which it must be under North Dakota law—it is clear that Trustee, and not Bala, holds an interest in the cash surrender value.

Bala argues that the language in Clause 2 limits RSI's ability to collect its interest in the Policy to only the two specific instances identified in subsection (a) and (b)—

surrender by the assignor or death/maturity of the Policy. The Court, however, disagrees. Bala's reading of the Collateral Assignment would make Clause 8 of the Collateral Assignment superfluous.

Clause 8 provides: "If this agreement is **terminated**, the Assignee shall transfer its Interest in the Policy to the Assignor in exchange for an amount equal to the Assignee's Interest . . . ." (Id. (emphasis added).) "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D. Cent. Code § 9-07-06. "'The intention of the parties to a contract must be gathered from the entire instrument, not from isolated clauses, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract.'" Haag v. Noetzelman, 598 N.W.2d 121, 123 (N.D. 1999) (quoting Nat'l Bank of Harvey v. Int'l Harvester Co., 421 N.W.2d 799, 802 (N.D. 1988)); see Spagnolia v. Monasky, 660 N.W.2d 223, 228 (N.D. 2003). Under this standard, Clause 8 must be given meaning, and must be read in conjunction with Clause 2 if possible.

The Court finds that Clause 8 controls. The Court acknowledges the Collateral Assignment includes language in Clause 2 that appears to limit the rights of Assignee only to the "following specific rights." However, the remaining six paragraphs (Clauses 3 – 8) provide additional rights and duties to the Assignee and the Assignor. The rights and duties involved in this case arise under Clause 8 and occur upon **termination** of the Collateral Assignment. Clause 2, on the other hand, only applies upon **surrender** of the policy, upon death, or at maturity. Clause 2 does not apply in cases of termination. Clause 8, however, does.

Bala was correct in arguing the Policy was not surrendered by Assignor (Bala) under Clause 2. That is not dispositive. The critical fact instead is that the Policy was

terminated—by either RSI or Court order—under Clause 8. Reading the Assignment any other way would render every clause, other than Clause 2 superfluous. This would be contrary to North Dakota contract law.

Two separate events proved to be a "termination" of the agreement. First, RSI's failure to pay the premium would be a breach of the Collateral Assignment, thus terminating the Assignment (and triggering Clause 8). The language of the Assignment reveals an intent to treat a breach as a termination under Clause 8. Bala agrees that RSI failed to continue payment of the Policy premiums but argues that was a breach of the Collateral Assignment which "was rendered unenforceable and nullified by the RSI Estate." (Bala Br., ECF Doc. No. 30, at 3.) Bala cites no language in the Policy or Collateral Assignment that supports her argument that failure to pay the premium nullified the Collateral Assignment.

Second, even were the Court to conclude that this failure by RSI to make payment did not terminate the Collateral Assignment, the Collateral Assignment and Policy were certainly terminated by the Court's April 27, 2009 Order. That order specifically canceled and required surrender of the Policy, and directed Guardian to deposit the cash surrender value with Trustee. Prior to that point, Bala had the option to cure the surrender by submitting a reinstatement application and remitting overdue premium and loan interest. Her failure to make these payments could be viewed as further evidence of termination. At a minimum, this Court's Order served as the "termination" that triggered Clause 8 of the Collateral Assignment.

The Court thus concludes, under Clause 8, the Collateral Assignment was terminated by Judge Hill's April 27, 2009 Order in the underlying Bankruptcy. At that time RSI should have transferred its interest in the Policy to Bala in exchange for an

amount equal to RSI's interest in the Policy—the cash surrender value. Consequently, RSI's bankruptcy estate, and not Bala, is entitled to the cash surrender value of the Policy under Clause 8 of the Collateral Assignment.

CONCLUSION

The language in the Policy and Collateral Assignment is clear, explicit, and does not involve an absurdity. The RSI bankruptcy estate holds an interest superior to Bala in the cash surrender value of the Policy and is entitled to the $64,032 (plus accrued interest), currently held in Trustee's separate interest-bearing account. Bala holds no interest in this amount.

WHEREFORE, Trustee's Motion for Summary Judgment is **GRANTED**. The cash surrender value of Guardian Whole Life Policy No. 3909537, currently held in an independent interest-bearing bank account by Trustee, up to the amount of $70,765.92, is property of the bankruptcy estate. Any amount over $70,765.92 is the property of Bala and should be distributed accordingly.

FURTHER, Defendant's Cross-Motion for Summary Judgment is **DENIED**.

FURTHER, the above-captioned adversary is dismissed. Judgment shall be entered for Plaintiff.

Dated: April 13, 2012

THAD J. COLLINS
BANKRUPTCY JUDGE
SITTING BY DESIGNATION

[1] This Chapter 7 and related adversary were originally before the Honorable William A. Hill. On August 14, 2011, after Judge Hill's retirement, this case was assigned to the undersigned, sitting by designation.

[2] The Court notes that both the Motion for Summary Judgment and Cross-Motion for Summary Judgment presented procedural deficiencies. Trustee's Motion for Summary Judgment did not include any supporting documentation, and instead directed the Court to its earlier filed motion which had already been denied. Further, while part of the brief, no "separate, short, and concise statement of material fact," was attached. See N.D. Bankr. Ct. L.R. 7056-1. Bala's response and Cross-Motion for Summary Judgment did not include a responsive statement of material facts or a statement in support of its cross-motion. By failing to file a responsive statement, the local rules provide that the statements of the moving party shall be deemed admitted. While both motions were procedurally deficient, the Court will overlook said deficiencies and analyze the claims on their merits.