STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
Karen Petit, Plaintiff, vs. Phyllis Jean Krohn, USAA Federal Savings Bank, and USAA Investment Management Co., Defendants.	)	Civil Action No. 2017-CP-24-01343 **ORDER**

Defendants USAA Federal Savings Bank, and USAA Investment Management Co. (collectively "the USAA Defendants"), came before the Court for hearing on September 4, 2019. Jane H. Merrill appeared on behalf of Karen Petit ("Plaintiff"). Joshua S. Nasrollahi appeared on behalf of Phyllis Jean Krohn ("Krohn"). William S. Brown appeared on behalf of the USAA Defendants. Having heard the arguments and reviewed the record in this case and the submissions of the parties, the USAA Defendant's Motion for Summary Judgment is granted.

INTRODUCTION AND UNDISPUTED FACTS

Dr. Edward L. Petit ("Dr. Petit") held an Individual Retirement Account ("IRA") at USAA Federal Savings Bank (from 2002-2007), and subsequently with USAA Investment Management Co., from 2007 until 2014 (the "USAA IRA"). (USAA Def. Memo. at **Ex. A**; *Id.* at **Ex. B.**) On January 15, 2007, Dr. Petit completed a designation of beneficiary form, naming his two daughters, Plaintiff and Kathy Elise Petit ("Kathy"), as his beneficiaries. (*Id.* at **Ex. C.**)

On January 26, 2009, Dr. Petit completed a USAA Power of Attorney, naming Defendant Phyllis Krohn ("Ms. Krohn") as his Attorney-in-Fact. (*Id.* at **Ex. D**; Compl. ¶ 11.) Plaintiff claims that this Power of Attorney form prohibited the Attorney-in-Fact from changing the beneficiaries

of the USAA IRA. (Compl. ¶ 14.) Ms. Krohn did not sign or execute any documents under the January 26, 2009 USAA Power of Attorney. (Plaintiff Depo. at 151:11-20, 164:18-165:1, 166:25-167:10.) On November 9, 2010, Dr. Petit completed a subsequent USAA Power of Attorney, again naming Ms. Krohn as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. G.**) The November 9, 2010 Power of Attorney did not prohibit the Attorney-in-Fact from changing the USAA IRA's beneficiaries. (*Id.*) Again, the evidence does not show, nor does Plaintiff contend, that Ms. Krohn signed or executed any documents under the November 9, 2010 Power of Attorney. (Plaintiff Depo. at 151:11-20; Krohn Depo. at 76:12-19.)

On January 23, 2012, Dr. Petit executed a designation of beneficiary form which designated his two Granddaughters, Leaman Mosby ("Leaman") and Caroline Mosby ("Caroline") as primary beneficiaries, and Plaintiff and her sister Kathy as secondary beneficiaries. (*See* USAA Def. Memo. at **Ex. I**; Compl. ¶ 6.) The form was filled out by Ms. Krohn, but signed by Dr. Petit.

On February 27, 2012, Dr. Petit executed a Durable General Power of Attorney, naming Henry A. Dorn, ("Mr. Dorn") as his Attorney-in-Fact. (USAA Def. Memo. at **Ex. J**; *see also id.* at **Ex. K.**) On May 15, 2013, the Probate Court of Greenwood County declared Dr. Petit incompetent, however, it found that Dr. Petit was competent to execute the February 27, 2012 Power of Attorney granting Mr. Dorn power to make financial decision for Dr. Petit was valid, and that it would remain in effect. (*Id.*)

In the summer of 2014, Mr. Dorn transferred the entirety of the funds from the USAA IRA to a Wells Fargo IRA (the "Wells Fargo IRA"), and the USAA IRA was closed. (Compl. ¶ 10; Plaintiff Depo. at 96:13-24.) The beneficiaries of the Wells Fargo IRA were designated as Leaman and Caroline. (Plaintiff Depo. at 106:9-15.)

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On March 18, 2015, Dr. Petit passed away. (Compl. ¶ 4.) He was survived by Plaintiff, and his two granddaughters, Leaman and Caroline. (*Id.* ¶ 6.) At the time of his death, Dr. Petit's Wells Fargo IRA was worth approximately $454,332, and his USAA IRA was closed. (*Id.* ¶ 10; Plaintiff Depo. at 96:13-24.) Wells Fargo released the funds to Leaman and Caroline, as they were the beneficiaries of the Wells Fargo IRA. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.)

On November 8, 2017, Plaintiff filed this action. Plaintiff asserted three causes of action against the USAA Defendants: (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence. Plaintiff's claims are all based on the allegation that the beneficiaries of the USAA IRA were improperly changed. (*See* Compl.)

LEGAL STANDARD

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff must show the court the existence of a genuine issue of fact." *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). "In such a case, the plaintiff cannot defeat the defendant's motion by relying upon the mere allegations of his complaint but must disclose the facts he intends to rely on by affidavit or other proof." *Id.*

LEGAL FINDINGS

I. There is no evidence that Dr. Petit's beneficiaries were improperly changed.

Plaintiff's breach of contract, breach of fiduciary duty, and negligence claims all arise out of Plaintiff's basic allegation that the beneficiaries of the USAA IRA were changed improperly. However, there is no evidence that the USAA Defendants caused the execution of the designation

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of beneficiary form at issue. The allegations in the Complaint focus on the USAA Defendants allegedly accepting a designation of beneficiary form purportedly executed by Ms. Krohn through an allegedly deficient power of attorney. But, Plaintiff has conceded that Dr. Petit signed the 2012 designation of beneficiary form that made Caroline and Leaman the beneficiaries of the USAA IRA.

Further, the designation of beneficiary form was signed by Dr. Petit a month before he executed a Durable General Power of Attorney in the Greenwood County Probate Court, which was later ratified by the Court on May 15, 2013, providing some evidence that Dr. Petit was competent at the time he signed the designation of beneficiary form. Plaintiff argued that Dr. Petit had been hospitalized in the days before he signed the designation of beneficiary form. However, Plaintiff has presented no evidence that he was incompetent, as opposed to merely having health issues.[1] The fact that Dr. Petit signed the designation of beneficiary form after being released from the hospital is not evidence that he was incompetent at the time he signed the designation of beneficiary form. Thus, the record shows that Dr. Petit, and not an Attorney-in-Fact or Krohn, signed the designation of beneficiary form, which designated Leaman and Caroline as his beneficiaries. Therefore, there is no dispute of material fact regarding the liability of the USAA defendants. Accordingly, the USAA Defendants' Motion for Summary Judgment must be granted.

II. Plaintiff lacks standing to assert her causes of action.

Furthermore, the Plaintiff lacks standing to bring this lawsuit. Under South Carolina law, the beneficiary of an IRA has no right to sue for the benefits until her rights have vested. *Shuler v. Equitable Life Assur. Soc. of U. S.*, 184 S.C. 485, 193 S.E. 46, 48 (1937) (holding that a

[1] There is no evidence in the record that the USAA defendants were ever informed of the hospitalization to cause them to question the validity of the signature of Dr. Petit.

beneficiary of a life insurance policy had a mere expectancy while the policy holder was still alive, and thus, could not bring a claim for damages). A beneficiary's rights are not vested unless or until, (1) the accountholder lacks the ability to freely change the beneficiaries, or (2) the accountholder's death. *Stribling v. Stribling*, 369 S.C. 400, 406, 632 S.E.2d 291, 294 (Ct. App. 2006) ("IRA beneficiary merely has an expectancy in the IRA until the owner's death."); *Horne v. Gulf Life Ins. Co.*, 277 S.C. 336, 338, 287 S.E.2d 144, 146 (1982) ("Where the insured has reserved the right in his policy to change the beneficiary, the named beneficiary does not have a vested right during the insured's lifetime."); *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 171, 700 S.E.2d 280, 283 (Ct. App. 2010) ("[T]he rights of the existing beneficiary are inchoate and may be nullified by action on the part of the insured . . . .").

In this case, Plaintiff never had a vested right in the IRA funds. Although Plaintiff tries to argue that Dr. Petit's hospitalization could have impacted his ability to execute documents, no medical evidence has been presented to support this argument. Additionally, Plaintiff admits that Dr. Petit had the right to freely change the beneficiaries of his IRAs during his lifetime.[2] (Plaintiff Depo. at 116:24-117:11; 156:5-157:10.) Further, Plaintiff was not the beneficiary of the IRA at the time of Dr. Petit's death. Dr. Petit changed his beneficiaries in 2012, from Plaintiff and her sister, to his granddaughters, Leaman and Caroline, who were also set as the beneficiaries of the Wells Fargo IRA. In 2015, Dr. Petit passed away, and the rights to the Wells Fargo IRA vested in the beneficiaries of the Wells Fargo IRA, Leaman and Caroline. (Compl. ¶ 16; Plaintiff Depo. at 106:9-15.) Thus, under South Carolina law, Plaintiff has no vested rights in the USAA IRA or the

[2] Additionally, Mr. Dorn had the ability to designate and change the beneficiaries of Dr. Petit's IRAs during Dr. Petit's lifetime. (Plaintiff Depo. at 156:5-157:10.)

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Wells Fargo IRA. Accordingly, Plaintiff lacks standing to bring this action, and therefore, the USAA Defendant's Motion for Summary Judgment must be granted.

III. The Plaintiff's individual causes of action fail as a matter of law.

A. The USAA Defendants did not owe a fiduciary duty to the Plaintiff.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "a breach of that duty owed **to the plaintiff** by the defendant[.]" *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012) (emphasis added). Plaintiff has alleged that the USAA Defendants owed a fiduciary duty to Dr. Petit, not to her. (*See* Compl. ¶ 49.) Further, the Plaintiff could not articulate any fiduciary duty owed to her. Thus, the only party that could have brought a suit against the USAA Defendants for a claimed breach of a fiduciary duty owed to Dr. Petit is Dr. Petit's estate.[3]

"A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). A fiduciary relationship is an inherently personal relationship and arises out of a specific relationship between two parties. Thus, there can be no third-party beneficiary to a fiduciary relationship. Here, the Plaintiff and the USAA Defendants had no relationship, and a fiduciary duty between the Plaintiff and the USAA Defendants cannot arise out of Dr. Petit's relationship with the USAA Defendants. Accordingly, because the Plaintiff had no relationship with the USAA Defendants, there is no genuine dispute as to material fact that the USAA Defendants did not owe Plaintiff a fiduciary duty.

[3] Any claims by Dr. Petit's estate are barred by the statute of limitations because the IRA funds were disbursed by Wells Fargo more than three years ago. *See* S.C. Code Ann. § 15-3-530.

Nevertheless, the USAA defendants did not owe a fiduciary duty to either Dr. Petit or Plaintiff. A bank is not a fiduciary unless it: (1) intentionally separates a customer's funds into a special account, or; (2) "undertakes to advise the customer as part of the services the bank offers." *Rush v. South Carolina Natl. Bank*, 288 S.C. 560, 562, 343 S.E.2d 667, 668 (Ct.App. 1986). The court makes the determination regarding the equitable issue of whether a fiduciary relationship exists. *Cowburn v. Leventis*, 366 S.C. 20, 37, 619 S.E.2d 437, 447 (Ct.App. 2005).

Plaintiff did not allege in her Complaint, nor present any evidence that the USAA Defendants held Dr. Petit's funds in trust or separated Dr. Petit's funds into a special account, or that the USAA Defendants undertook to advise Plaintiff or Dr. Petit as part of the services it offers. (Compl. ¶¶ 46-50.) It is only under such limited circumstances that South Carolina courts have been willing to entertain the potential existence of a fiduciary duty between banks and their customers. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003); *Cowburn*, 366 S.C. at 43, 619 S.E.2d at 449. Plaintiff's only argument that the USAA Defendants undertook to advise Dr. Petit is that a Houston, Texas based agent traveled to Dr. Petit's home in Greenwood to discuss his account. (Krohn Depo. at 51:15-20). However, this alone is not evidence that the USAA Defendants undertook a fiduciary duty to advise Dr. Petit or that any such alleged duty was breached. Accordingly, there is no genuine issue as to material fact that the USAA Defendants did not owe Dr. Petit or the Plaintiff a fiduciary duty.

Further, although not recognized as one of two scenarios that create a fiduciary duty in a banking relationship under South Carolina law, Plaintiff alleged that the services the USAA Defendants provided for Dr. Petit, specifically, providing him with a Power of Attorney form, created a fiduciary duty. However, providing ministerial services, such as supplying form documents incidental to the IRA account does not create a fiduciary duty. *In re Int'l Payment Grp.*,

Inc., 733 F. App'x 98, 104 (4th Cir. 2018) (applying South Carolina law, holding that even where a depositor received unique services, no fiduciary duty was created because the relationship "did not differ significantly from the average depositor's relationship with the bank.") The USAA Defendants merely provided its client, Dr. Petit, with standard Power of Attorney and designation of beneficiary forms that he requested. This cannot be said to differ from the services that are provided to the average depositor. No fiduciary duty was owed to the Plaintiff or Dr. Petit, and Plaintiff's claim for breach of fiduciary duty fails as a matter of law. Accordingly, there is no genuine dispute as to material fact and summary judgment must be granted.

B. Plaintiff has presented no evidence of a duty created by any contract.

As discussed above, Plaintiff had no vested interest in the USAA IRA because Dr. Petit retained the ability to change beneficiaries during his lifetime, and because his granddaughters were the primary beneficiaries at the time Dr. Petit passed away. (Plaintiff Depo. at 116:24-117:11, 106:9-15; *see* USAA Def. Memo. at **Ex. I.**) Accordingly, the only legal duty was owed to Dr. Petit, the accountholder, and thus, the Plaintiff has no standing to bring this action.

Even if Plaintiff had standing to bring a claim for breach of contract, she does not specify a particular contract or any contractual provisions allegedly breached. (Compl. at ¶¶ 42-45.) The Complaint cites to the January 26, 2009 Power of Attorney between Dr. Petit and Ms. Krohn. "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014). However, the January 26, 2009 Power of Attorney is not a contract between Dr. Petit and the USAA Defendants, but an instrument purporting to confer authority on Ms. Krohn to perform tasks for Dr. Petit. Plaintiff cannot claim that the USAA Defendants breached an

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agreement to hold Dr. Petit's IRA funds by pointing to the provision in a Power of Attorney between Dr. Petit and a third party that was allegedly breached. Plaintiff does not allege that any provisions of any agreement between the USAA Defendants and Plaintiff or Dr. Petit were breached, and therefore, there is no genuine issue as to material fact that there is no breach of contract.

C. The USAA Defendants owed no common law duty to the Plaintiff.

The USAA Defendants owed no common law duty to the Plaintiff. Plaintiff contends that the USAA Defendants had a duty to ensure that Dr. Petit was the person signing his designation of beneficiary forms. As discussed above, Plaintiff has conceded that Dr. Petit signed the designation of beneficiary form, although Plaintiff argued Dr. Petit was incompetent to sign it on January 23, 2012. Additionally, In South Carolina, "the relationship between a general depositor and his bank is that of creditor and debtor[.]" *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116, 119 (1975). As such, a bank owes depositors no duty of care unless it is "created by statute, contract, relationship, status, property interest or some other special circumstance." *Cowburn*, 366 S.C. at 46, 619 S.E.2d at 451. It is incumbent upon "[t]he Court . . . to determine, as a matter of law, whether the law recognizes a particular duty." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* From the material submitted in this matter, the Court finds no common law duty owed by the USAA defendants to Plaintiff. Defendant's motion for summary judgment must be granted.[4]

[4] The USAA Defendants also raised issues regarding the statute of limitations. Because of the rulings made in this Order, the Court finds that it need not reach those issues.

CONCLUSION

For the reasons set forth above, as to all three causes of action the USAA Defendants' Motion to for Summary Judgment is GRANTED.

IT IS SO ORDERED

~~Honorable~~ Donald Hocker
Presiding Judge, Eighth Judicial Circuit

Laurens, South Carolina
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