UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 01-37578
	)	
Frank J. Kiss, Jr.	)	Chapter 7
Kristine J. Kiss	)	
	)	Adv. Pro. No. 02-3065
Debtors.	)	
	)	Hon. Mary Ann Whipple
Louis J. Yoppolo, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Singer Asset Finance, LLC, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT AND ORDER

Before she filed bankruptcy, Defendant/Debtor Kristine Kiss ("Ms. Kiss") assigned to Defendant Singer Asset Finance, LLC ("Singer") her rights in two payments, totaling $40,000.00, out of four future payments due under a structured personal injury settlement agreement with Defendant Motorists Mutual Insurance Company ("Motorists"). Singer paid Ms. Kiss $10,691.00 for her interest in the two future payments in July, 2000. In December, 2001, Ms. Kiss and her spouse, Debtor/Defendant Frank Kiss, filed a petition for relief under Chapter 7 of the Bankruptcy Code. Both Debtors and Plaintiff Louis J. Yoppolo, the Chapter 7 Trustee ("the Trustee"), challenge the validity of and seek to rescind Ms. Kiss' assignment to Singer. The Trustee also seeks authority to sell as property of the bankruptcy estate both the assigned payments and the two other future payments that were not assigned to Singer. Debtors contend that, even if the assignment to Singer is rescinded, none of the payments are property of the estate that the Trustee can sell because the settlement agreement established a spendthrift trust. The dispute focuses on the effects of an anti-alienation provision in the underlying structured settlement agreement and of a subsequent Ohio statute conditioning such assignments on prior state court approval.

This adversary proceeding is presently before the court on a motion for summary judgment filed by Debtors [Doc. #13] and the Trustee's opposition and cross-motion for summary judgment [Doc. ##18-19]. Also before the court is a cross-motion for summary judgment filed by Singer [Doc. #20], the Trustee's opposition to that motion [Doc. #29], Singer's reply [Doc. # 34] and Debtors' response to the Trustee's and Singer's motions for summary judgment [Doc. #26]. For the reasons that follow, Debtors' motion for summary judgment will be denied, the Trustee's motion will be granted in part and denied in part, and Singer's motion will be granted.

Factual Background

For purposes of the instant summary judgment motions, the following facts are undisputed. In 1983, Ms. Kiss (f/k/a/ Kristine Ehasz), who was then a minor, was injured in an automobile accident and asserted a claim against an individual insured by Motorists. In settlement of her claim, Ms. Kiss entered into a Settlement Agreement in which she agreed to release the insured and Motorists from any present or future claims arising out of the accident in exchange for Motorists' agreement to pay her a lump sum at the time of signing plus deferred payments, as follows:

Amount of Payment	Date Payment Due
$10,000.00	8/15/1994
$10,000.00	8/15/1999
$15,000.00	8/15/2004
$25,000.00	8/15/2009
$25,000.00	8/15/2014
$65,000.00	8/15/2019

[Doc. ##18-19, Trustee's Exh. A]. The Settlement Agreement further provides that "[i]f Kristine J. Ehasz dies before receiving all six (6) payments, the remainder of said payments will be made as due to Mary Lou and Kenneth Ehasz [her parents] equally...." [*Id.* at 3, ¶ IV.B].

Presumably, Ms. Kiss received the 1994 and 1999 payments. In any event, only the last four payments are at issue in this adversary proceeding.

The Settlement Agreement provides that Motorists shall secure its payment obligation by purchasing an annuity from Defendant Executive Life of New York ("Executive Life "), naming Ms. Kiss as the annuitant. The Settlement Agreement further provides that Motorists "shall be the owner of and shall retain

all rights of ownership to such annuity plan," and, in the event Executive Life fails to make any of the payments, Motorists guarantees that the payments will be made. [*Id.* ¶V].

Although the annuity itself is not part of the record, the parties do not dispute that Motorists purchased an annuity, with Motorists retaining all ownership rights to the annuity, as set forth in the Settlement Agreement. [Doc. #1, Complaint, ¶7; Doc. #6, Debtors' Answer, ¶7; Doc. #12, Singer's Answer, ¶12].

In addition, paragraph VI of the Settlement Agreement provides as follows:

> The periodic payments to be received by Claimant pursuant to Paragraph IV.B are not subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge or encumbrance by Claimant.

Notwithstanding this provision, the term "Claimant" is defined in the Settlement Agreement to mean Ms. Kiss, her parents Mary Lou and Kenneth Ehasz and "their heirs, executors, administrators, personal representatives, *successors and assigns*." [Doc. ##18-19, Trustee's Exh. A, p.1 preamble; emphasis added].

In June, 2000, Ms. Kiss entered into a Structured Settlement Payment Purchase Agreement ("Purchase Agreement") with Singer. [Doc. # 20, Singer's Exh. A]. Under the Purchase Agreement, Ms. Kiss assigned to Singer her rights to the payments of $15,000.00 due on August 15, 2004, and $25,000.00 due on August 15, 2009, in exchange for payment of $10,691.00 by Singer. [*Id.* at 1; Doc. ##18-19, Trustee's Exh. C]. The record does not show what, if anything, has been done by Ms. Kiss and Singer to account for the contingent interest of Ms. Kiss' parents in the future payments, facts that are not material insofar as Ms. Kiss' interest in the 2004 and 2009 payments. The Purchase Agreement also provides, however, that Ms. Kiss will cooperate with Singer "in obtaining any necessary consents and approvals" and that she will "take all further reasonable and necessary actions" to ensure that Singer receives the payments that it purchased. *Id.*[1] To that end, Ms. Kiss gave Singer a Power of Attorney allowing it to endorse

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In the Purchase Agreement, Ms. Kiss also represented that she had either consulted with a financial, tax and legal advisor of her choice, or had made a conscious decision not to do so. [*Id.* at 1-2]. In her memorandum in support of her summary judgment motion, the statement is made that Ms. Kiss did not secure independent legal advice and relied on unspecified representations of Singer in entering into the Purchase Agreement. [Doc. #13, at 2-3]. The court has disregarded the latter statement in deciding the pending motions, because it is not supported in the record in the manner required by Fed. R. Civ. P. 56(c) and (e).

checks made payable to her and provided a post office box that Singer controls as the address to which the annuity payment checks are to be

mailed. [Doc. #26, Kristine Kiss Aff. ¶¶ 3-4]. Debtors admit that Ms. Kiss has not assigned her interest in the payments due in 2014 and 2019. [Doc. # 6, Answer, ¶ 11].

Debtors filed their joint petition for relief under Chapter 7 of the Bankruptcy Code on December 10, 2001. Each payment due under the Settlement Agreement is listed individually as an asset of the bankruptcy estate. [Case No. 01-37578: Doc. # 3, Amended Petition, Schedule B]. In addition, Ms. Kiss claims $5,000.00 of the payment due in 2004 as exempt under Ohio Revised Code § 2329.66(A)(12)(c). [*Id.*, Schedule C].

The Trustee commenced this adversary proceeding seeking declarations that Ms. Kiss' assignment of the two future payments is void future and that all future payments to be made to Ms. Kiss under the Settlement Agreement are property of the bankruptcy estate. The Trustee also seeks authority to sell the estate's interest in all future payments. In addition to Debtors and Singer, the Trustee named and duly served Motorists and Executive Life as defendants. [Doc. ##1, 5]. Neither Motorists nor Executive Life have filed an answer or other pleading in this case, nor have they otherwise appeared. Kenneth Ehasz and Mary Lou Ehasz have not been made parties to this action.

<u>Law and Analysis</u>

I. Summary Judgment Standard and Record

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [she] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its

initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

When parties have filed cross-motions for summary judgment, as here, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that all parties simultaneously argue that there are no genuine factual issues does not necessarily establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed. R. Civ. P. 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

The parties each supported their motions with documents attached to their memoranda. None of the documents were authenticated through affidavits, and the copies of the Settlement Agreement between Ms. Kiss and Motorists in the record [Doc. #1, Complaint, Exh. A; Doc. ## 18-19, Trustee's Exh. A; Doc. #13, Kiss Exh. A] are not completely executed. The Purchase Agreement between Ms. Kiss and Singer refers to a number of exhibits, but none of them are attached to the copy in the record and it is not known whether they were attached to the original. [Doc. #20, Singer Exh. A]. Nevertheless, the parties stipulated at a hearing on the motions to the admission of all of the documents in the record. [Doc. #40, Order re Summary Judgment Record]. The annuity Motorists purchased from Executive Life, contemplated by the structured Settlement Agreement as the financing vehicle for Motorists' obligation to make payments to Ms. Kiss, is not part of the record. The court inquired of the parties at a hearing on the state of the summary judgment record whether any party had the annuity or intended to submit it as part of the record. Only Singer expressed an interest in potentially doing so. Singer was given leave to obtain a copy and to file it as part of the summary judgment record [Doc. ##40, 43], but ultimately did not file one. Ms. Kiss also filed an affidavit. [Doc. #26, Kiss Exh. A].

The summary judgment record thus consists of the pleadings, the documents admitted by stipulation

of the parties, the docket, petition and schedules from the underlying Chapter 7 case[2] and Ms. Kiss' affidavit. Based on this record, the court finds that no party has demonstrated any genuine

issues of material fact and that the legal issues presented can be decided through the summary judgment process.

II. Overview of Arguments

Debtors argue that none of the future payments under the Settlement Agreement are property of the estate. In support of their argument, Debtors contend that the anti-alienation provision in paragraph VI of the Settlement Agreement creates a spendthrift trust. Although not expressly set forth in their motion for summary judgment, presumably Debtors contend that, being in a spendthrift trust, the future payments are not property of the estate under 11 U.S.C. § 541(c)(2). Debtors also argue that Ms. Kiss' purported transfer of her interest in the payments due in 2004 and 2009 is void in light of the anti-alienation provision of the Settlement Agreement. To the extent that the payments are part of the estate, Ms. Kiss contends that she has properly claimed a $5,000.00 exemption to which the Trustee failed to timely object in the underlying Chapter 7 case.

While the Trustee agrees with Debtors that any assignment of Ms. Kiss' interests in the 2004 and 2009 payments was ineffective under the terms of the Settlement Agreement, he contends that § 541(c)(2) does not apply and that all of Ms. Kiss' interests in the future payments due under the Settlement Agreement are property of the estate. In so arguing, he also contends that Ms. Kiss has no exemption rights in the 2004 payment. Thus, the Trustee asks the court to issue an order under 11 U.S.C. § 105(a) approving the sale of Ms. Kiss' interest in all future payments by the Trustee to the highest bidder.

Singer, for its part, argues that the anti-alienation language in the Settlement Agreement is simply a promise not to assign, the breach of which may give Motorists a right to damages, but does not render the assignment itself ineffective. In any event, Singer contends that, having accepted the benefits of the assignment, Debtors, as well as the Trustee standing in the shoes of Ms. Kiss, are estopped from denying the validity of the assignment or have waived the nonassignment provision of the Settlement Agreement. [Doc. #12, Singer's Answer, ¶15 (affirmative defenses of estoppel and waiver)].

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[2] The court takes judicial notice of the contents of its case docket and the Debtors' schedules. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

The parties' motions for summary judgment present the following legal issues: (1) whether the Settlement Agreement creates a spendthrift trust enforceable under Ohio law, resulting in all of the future payments being excluded from property of the estate under § 541(c)(2); (2) whether the

Trustee, standing in the shoes of Ms. Kiss, is estopped from denying the validity of the assignment of her interest in the 2004 and 2009 payments and, if not, whether such assignment was valid; (3) whether Ms. Kiss has exemption rights in the 2004 payment as claimed in her bankruptcy petition; and (4) if any payments are part of the bankruptcy estate, whether the court should approve the sale of those future payments by the Trustee for the benefit of creditors.

III. Are the payments under the Settlement Agreement excluded from property of the estate under § 541(c)(2)?

When a bankruptcy petition is filed, an estate is created consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). The Bankruptcy Code generally provides that any restrictions imposed by either statute or contract on the transfer of the debtor's property are inoperative to prevent automatic inclusion of the property in the bankruptcy estate. 11 U.S.C. § 541(c)(1) . The one exception to this general rule overriding transfer restrictions is found in § 541(c)(2), which provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." An interest that falls within the scope of § 541(c)(2) does not become part of the bankruptcy estate. *See Patterson v. Shumate*, 504 U.S. 753, 755 (1992). Debtors bear the burden of proving that the future payments are excluded from the bankruptcy estate by § 541(c)(2). *Rhiel v. Adams (In re Adams),* 302 B.R. 535, 540 (B.A.P. 6th Cir. 2003); *In re Barnes*, 264 B.R. 415, 420-21(Bankr. E.D. Mich. 2001), citing *In re Fulton*, 240 B.R. 854, 862 n.4 (Bankr. W.D. Pa. 1999); *In re Quinn,* 299 B.R. 450, 453 (Bankr. W.D. Mich. 2003).

Although federal law identifies the property interests that are to be included in the bankruptcy estate, such property interests themselves are created and defined by state law. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000). The legislative history

of § 541(c)(2) shows that Congress meant to exclude from the estate those assets of "spendthrift trusts" traditionally beyond the reach of creditors under state trust law. *See* H.R. 95-595, 95th Cong., 1st Sess., 176, 368, 369 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6136,5323, 6324. *But see Patterson*, 504 U.S. at 758-59(notwithstanding legislative history, applicable nonbankruptcy law is not limited to state law under plain meaning of statute).

In this case, the Settlement Agreement provides that Ohio law governs its construction and interpretation. [Doc. ##18-19, Trustee's Exhibit A, ¶ XIII]. A spendthrift trust, enforceable under Ohio law, "is a trust that imposes a restraint on the voluntary and involuntary transfer of the beneficiary's interest in the trust property." *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St. 3d 39, 44, 577 N.E.2d 1077, 1081 (1991). Thus, future payments to be received by Ms. Kiss under the agreement are not property of the estate only to the extent that Ohio law would enforce the arrangement established by the Settlement Agreement as a spendthrift trust.

The predicate to application of § 541(c)(2) is that there be a trust. *In re Adams,* 302 B.R. at 539; *In re Barnes,* 264 B.R. at 429; *see Taunt v. General Ret. Sys. Of the City of Detroit (In re Wilcox)*, 233 F.3d 899, 904 (6th Cir. 2000). *But see Patterson*, 504 U.S. at 758 (Supreme Court uses phrase "any interest in a plan *or* trust"[emphasis added] in describing "natural" reading of § 541(c)(2) in the context of ERISA). To meet their burden of demonstrating creation of a trust, Debtors must generally prove "a manifestation of intent to create a trust, there must be created a trust corpus, and there must be created a fiduciary relationship between the trustee and the beneficiary."*In re Construction Alternatives Inc.*, 2 F.3d 670, 677 (6th Cir. 1993), citing *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 56 Ohio St. 2d 85, 382 N.E. 2d 1155, 1158 (1978); *see also In re Meyers*, 139 B.R. 858, 861 (Bankr. N.D. Ohio 1992). More specifically, "under Ohio law, an express trust requires: (1) 'an explicit declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created'; (2) 'an intention to create a trust'; and (3) 'an actual conveyance of . . . property . . . to [a] trustee[.]'" *Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 290-91 (B.A.P. 6th Cir. 2000), quoting *Ulmer v. Fulton,* 129 Ohio St. 323, 339-40, 195 N.E. 557, 564 (1935). And in articulating the difference between a trust and a debt under Ohio law, the Sixth Circuit has noted:

> It is a well-settled principle of law in this [Ohio] and other jurisdictions that if one person pays money to another it depends upon the manifested intention of the parties whether a trust or a debt is created. If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor, or a third person, a trust is created. If the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor or to a third person, a debt is created. The intention of the parties will be ascertained by a consideration of their words and conduct in the light of surrounding circumstances.

Federal Ins. Co. v. Fifth Third Bank, 867 F.2d 330, 333 (6th Cir. 1989), quoting *Guardian Trust Co. v. Kirby*, 50 Ohio App. 539, 543, 199 N.E. 81, 83 (1935). Moreover, the existence of an express trust under Ohio law must be proven by clear and convincing evidence. *Gertz v. Doria*, 63 Ohio App. 3d 235, 237, 578 N.E.2d 534, 535 (1989), citing *Hill v. Irons*, 160 Ohio St. 21, 113 N.E.2d 243 (1953).

Debtors rely wholly upon the terms of the Settlement Agreement and in particular the anti-alienation provision, as well as the existence of the annuity, as evidence manifesting an intention to create an express trust for the benefit of Ms. Kiss. Under Debtors' construction of the record, the trust res is the Executive Life annuity, under which Ms. Kiss is the annuitant, or "beneficiary," and the trustee is Executive Life.

As an initial matter, simply including nonassignment language in the Settlement Agreement does not alone evince an intent to create a trust. *See In re Myers*, 200 B.R. 155, 158 (Bankr. N.D. Ohio 1996)(no trust created where structured settlement agreement uses same anti-alienation language as in this case). While that language may amount to a "spendthrift" provision restricting alienation, it begs the question whether a trust was created in the first instance. Anti-alienation language is not limited to trust documents, as it appears in all kinds of contracts such as leases and construction or personal service contracts and sales agreements with warranties. And the other terms of the Settlement Agreement do not evidence a trust arrangement. The Settlement Agreement contains bilateral contractual obligations facially inconsistent with a trust document. Ms. Kiss releases Motorists and its insured from her claims and agrees to cooperate with Motorists in the future, something a trust beneficiary would not do. In consideration thereof, Motorists agrees to make payments to Ms. Kiss, both lump sum and periodic. These are contractual undertakings between a debtor (Motorists) and a creditor (Ms. Kiss). Consideration is irrelevant and unnecessary in a

trust arrangement, because the beneficiary generally has no obligations to the trustee. There is nothing in the Settlement Agreement showing that Motorists was setting aside any funds in a separate account as the putative corpus of a trust from which to make future payments to Ms. Kiss, or that it has undertaken any duties to her with respect to custody, maintenance or appreciation of a particular fund or property other than to make the agreed-upon payments on the agreed-upon dates.

Debtors point to the annuity as the corpus or res of the trust. The Settlement Agreement provides that Motorists will "secure" its obligation to make payments to Ms. Kiss by purchasing an annuity, which Motorists in turn owns. But Motorists nevertheless agrees to make the payments to Ms. Kiss as "Guarantor" should Executive Life fail to do so. Ms. Kiss is entitled to fixed payments under the annuity arrangement, clearly unrelated to the contents or performance of a particular fund or to payment(s) made by Motorists to Executive Life to buy the annuity. These types of fixed annuity arrangements are generally held by other courts to create contractual debtor-creditor relationships and not trust relationships. *See In re Adams,* 302 B.R. at 541 ("The purchase of an annuity ordinarily creates the relationship of debtor/creditor, not trustee/beneficiary."); *Walro v. Strigel (In re Strigel)*, 131 B.R. 697, 701 (S.D. Ind. 1991)("[C]ourts will not simply assume that an annuity is a trust in the absence of evidence that the parties had the specific intent to create a trust..."); *see also Barnes*, 264 B.R. at 436-37, and cases cited therein. There is no evidence that Executive Life has set aside a separate fund or account for the benefit of Ms. Kiss from which to fund its obligations under the annuity purchased and owned by Motorists. Likewise, there is nothing in the record evidencing that Executive Life has undertaken any fiduciary duties to Ms. Kiss with respect to a particular fund or property. And if it did so in the annuity, its terms are simply not in evidence. *Cf. In re Brooks*, 248 B.R. 99, 104, n.7 (Bankr. W.D. Mich. 2000)(structured settlement annuity itself contained provision that payments thereunder are held "in trust" for the payee, notwithstanding which the bankruptcy court upheld a prepetition assignment of rights under a structured settlement agreement).

In this case, there is insufficient evidence, let alone clear and convincing evidence, from which the court can find an express manifestation of an intent to create a trust under Ohio law, and the court does not so find. To the contrary, the Settlement Agreement establishes a contractual relationship between Ms. Kiss and Motorists and there is no evidence that the Executive Life annuity makes it otherwise. *But see J.G.*

Wentworth, SSC, L.P. v. Goins (In re Goins), No. 00-61087, Adv. No. 006067, 2002 Bankr. LEXIS 1736 at *40-*49 (Bankr. E.D. Ky. Dec. 19, 2002)(structured settlement arrangement creates a trust under Kentucky law and/or Internal Revenue Code provision governing structured settlements, a conclusion based upon legislative history of a forerunner bill that this court believes cannot be derived from the plain terms of the enacted statute, and upon the terms

of both the annuity and the settlement agreement). So although the Settlement Agreement contains a restriction on alienation, there is simply no trust in evidence. *See Taunt*, 233 F.3d at 904.

Moreover, another factor prevents the Settlement Agreement from being an enforceable spendthrift trust. While spendthrift trusts are generally enforceable under Ohio law and prevent creditors from reaching trust assets, where the grantor is also the beneficiary, the spendthrift trust is invalid as against public policy. *See Miller v. Ohio Dept. of Human Services*, 105 Ohio App. 3d 539, 543, 664 N.E.2d 619, 621 (1995); *Eisen v. Frangos (In re Frangos)*, 135 B.R. 272, 274 (Bankr. N.D. Ohio 1992); *In re Myers*, 200 B.R. at 158.

In *In re Myers*, the debtor, like Ms. Kiss, had been injured in an automobile accident while a minor. His mother, on his behalf, entered into a structured settlement agreement in 1986 and released all claims under the uninsured motorists provision of her automobile insurance policy. *Id.* at 156. In 1996, the debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. He argued that amounts yet to be received under the terms of the structured settlement agreement, which contained an anti-alienation clause identical to the provision in this case, met the requirements of a spendthrift trust and, thus, were not property of the estate. *Id.* at 156-57. The court rejected this argument. In addition to finding no manifestation of an intent to create a trust, the court found that, to the extent a trust existed, it was not enforceable under Ohio law because the debtor was, in effect, the settlor of the alleged trust. *Id.* at 158. The court reasoned as follows:

> Had [debtor] not settled his claim against Grange before filing his bankruptcy petition, a Chapter 7 trustee would have been entitled to assume the cause of action for the benefit of the bankruptcy estate. Similarly, had [debtor] settled his claim for a lump sum cash payment, a Chapter 7 trustee would have been entitled to those funds over and above any personal property exemption claimed by the Debtors. In this case, [debtor] has exchanged a prepetition cause of action for a contractual right to receive periodic payments in the

future. That he has exchanged one form of property for another should not entitle him to deprive his creditors of that property. *In re Cooper*, 135 B.R. 816, 819 (Bankr. E.D. Tenn. 1992).

> Because [debtor] exchanged one form of property for another which thereafter became the res of the alleged trust, [he] is treated as the settlor of that alleged trust.

Id.; see also Brooks, 248 B.R. at 104 (finding that debtor could be regarded as the settlor *and* the beneficiary of a spendthrift trust where debtor was involved in structuring a settlement that provided for annuity payments effectively funded with the proceeds of the debtor's cause of action); *Walro v. Strigel,* 131 B.R. at 701; *Turner v. Dees (In re Dees)*, 155 B.R. 238 (Bankr. S.D. Ala. 1992); *Vucurevich v. Stragalas (In re Stragalas)*, 208 B.R. 693, 695 (Bankr. D. Az. 1997). *But see In re Goins,* 2002 Bankr. LEXIS 1736 (Bankr. E.D. Ky. December 19, 2002)(structured settlement arrangement creates spendthrift trust under Kentucky law that is not self-settled).

The reasoning in *In re Myers,* which this court finds persuasive, is equally applicable to the facts in this case. In releasing her personal injury claim and entering into a structured settlement agreement, Ms. Kiss in effect funded her right to future payments under the agreement with the proceeds of her cause of action that resulted from her automobile accident. Thus, Ms. Kiss can be considered both the settlor and the beneficiary of the alleged trust, to the extent that a trust even exists. A self-settled spendthrift trust is not enforceable under Ohio law. *See Sherrow v. Brookover*, 174 Ohio St. 310, 313, 189 N.E.2d 90, 92 (1963), *overruled on other grounds by Scott v. Bank One Co., N.A.,* 62 Ohio St. 3d 39, 577 N.E.2d 1077 (1991); *Miller*, 105 Ohio App. 3d at 158; *In re Frangos*, 135 B.R. at 274.

The court also rejects Debtors' alternative argument that the Settlement Agreement should be viewed as a constructive trust. As an initial matter, this argument raises the legal issue whether a constructive trust is the type of trust even within the scope of the statutory exception of § 541(c)(2). The Ohio Supreme Court has explained that a constructive trust is an equitable remedy designed to rectify fraud, unjust enrichment or other inequity. *See Aetna Life Ins. Co. v. Hussey*, 63 Ohio St. 3d 640, 642, 590 N.E.2d 724, 726 (1992); *Belfance v. Bushey (In re Bushey)*, 210 B.R. 95, 104 (B.A.P. 6th Cir. 1997). The court in *In re Barnes* thoroughly and thoughtfully analyzed whether constructive or other than express trusts would be excluded as property of the estate by § 541(c)(2), concluding as follows:

> There is nothing in the text of § 541(c)(2) which suggests that Congress meant the term "trust" to carry some meaning other than that of an express trust. To the contrary, § 541(c)(2)'s reference to transfer restrictions is itself an indication that the statute's drafters had express trusts in mind. The legislative history reinforces the inference that § 541(c)(2) pertains solely to express trusts. It advises that the statute "continues over the exclusion from property of the estate of the debtor's interest in a *spendthrift trust* to the extent the trust is protected from creditors under applicable State law." H.Rep. No. 95-595, 95th Cong., 1st Sess. 176 (1977) (emphasis added). ...The ordinary meaning of the term "trust" does not include legal fictions created by courts or the legislature as a means of preventing or correcting an undesirable outcome. Rather, a "trust" is ordinarily understood to mean an express trust. There being no indication that the term carries an "extraordinary" meaning as used in § 541(c)(2), the natural conclusion is that this provision encompasses only express trusts.

264 B.R. at 430-31. *But see Booth v. Vaughan*, 260 B.R. at 290 (assumes without actually deciding that a constructive trust is within the scope of § 541(c)(2)). This court finds persuasive the reasoning and agrees with *In re Barnes* that constructive trusts are not within the scope of the exception from property of the estate in § 541(c)(2).

And to the extent § 541(c)(2) does except property impressed by a constructive trust from the estate, Debtors have not established that a constructive trust should be imposed in this case. Debtors have not established, nor do they allege, any fraud, unjust enrichment or other inequity that would justify a finding that the future payments due under the Settlement Agreement are or should be impressed with a constructive trust. *Poss v. Morris (In re Morris)*, 260 F.3d 654, 667 (6th Cir. 2001) (noting that as a prerequisite to the imposition of a constructive trust, a case must give rise to jurisdiction by a court of equity; that is, "[t]here must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine."); *cf. Wiggins v. Peachtree Settlement Funding (In re Wiggins)*, 273 B.R. 839 (Bankr. D. Idaho 2001)(structured settlement transfer agreement with eighteen year old who had suffered serious head injury and was mentally incompetent amounted to fraud by assignee).

Based on the foregoing reasons and authorities, the court holds that all of the future payments under the Settlement Agreement are generally property of the estate, absent an enforceable assignment of the right to a particular payment.

IV. Is any interest in the payments due in 2004 and 2009 property of the estate?

Having concluded that Ms. Kiss' interest in the Settlement Agreement and the future payments due thereunder are not excluded completely from the estate by § 541(c)(2), the next issue is identifying what interest she possessed, if any, that became property of the estate subject to administration by the Trustee. Under § 541(a), a trustee, standing in the shoes of the debtor, succeeds only to the interests in property that the debtor had at the commencement of the case. *Demczyk v. The Mutual Life Ins. Co. of New York (In re Graham Square, Inc.*), 126 F.3d 823, 831 (6th Cir. 1997); *French v. Superior Metal Products (In re Metropolitan Environmental, Inc.)*, 293 B.R. 896, 898

(Bankr. N.D. Ohio 2003). Specifically, "the trustee takes only those rights that the debtor had under state law." *Calvert v. Bongards Creameries (In re Schauer)*, 835 F.2d 1222, 1225 (8th Cir. 1987). And the bankruptcy estate takes those rights subject to all limitations and conditions that existed on the property prepetition, *Demczyk*, 126 F.3d at 831, because the commencement of a bankruptcy case "does not expand or change a debtor's interest in an asset; it merely changes the party who holds that interest." *In re Sanders*, 969 F.2d 591, 593 (7th Cir. 1992). This is a fundamental principle of bankruptcy law first set out in *Board of Trade of Chicago v. Johnson*, 264 U.S. 1 (1924). So whatever rights the Trustee has with respect to the future payments must derive from Ms. Kiss.

Ms. Kiss' (and hence, the Trustee's) right to receive the future payments is subject to the Purchase Agreement with Singer. The Trustee has asserted two causes of action, one denominated as seeking a declaratory judgment that the Purchase Agreement is void and one under 11 U.S.C. § 544 to avoid as unperfected any lien Singer has in the future payments. The pending cross motions for summary judgment of the Trustee and Singer raise the question of the nature of the Purchase Agreement as between a sale and a loan transaction. Did Ms. Kiss dispose of all of her right, title and interest in the 2004 and 2009 payments, or did Singer loan Ms. Kiss $10,691.00 the repayment of which is secured by her interest in the 2004 and 2009 payments?

Analysis of What Law Applies

In turn, these issues raise the threshold question of what law should apply. As explained above, the Settlement Agreement is governed by Ohio law. In contrast, the Purchase Agreement specifies that "it shall

be interpreted under the laws of the State of New York." [Doc. #20, Singer Exh. A, p.5]. The parties' memoranda do not directly address this question, and show that the answer is not necessarily clear in their minds. [Doc. #29, Trustee's memorandum in opposition, at 3-4 (considers application of New York law) and at 5-6 (considers application of Ohio law); Doc. #34, Singer's reply memorandum, at 5, 8, 13, 16-17 (applying Ohio law)]. Indeed Singer, which drafted the Purchase Agreement, seems to assume that Ohio law governs the outcome of this case.

Federal courts are divided over whether federal choice of law rules or the choice of law rules of the forum state apply to issues in a bankruptcy case involving claims based on state law. Compare, *e.g., Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 607-08 (2d Cir. 2001)(using choice of law rules of forum state) with *Lindsay v. Beneficial Reinsurance (In re Lindsay)*, 59 F.3d

942, 948 (9th Cir. 1995), *cert. denied*, 516 U.S. 1074 (1996)(using federal choice of law rules) and *Limor v. Weinstein & Sutton (In re SMEC, Inc.)*, 160 B.R. 86, 89-91 (M.D. Tenn. 1993)(thoughtfully articulating policy reasons for applying federal choice of law rules). No Sixth Circuit precedent clearly directs application of one set of choice of law rules or the other in this setting. In this instance, however, applying the Ohio choice of law rules and the federal choice of law rules leads to the same place. Both the Ohio choice of law rules and the federal choice of law rules in contract matters incorporate the Restatement (Second) of Conflict of Laws ("Second Restatement"). *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 476-77, 747 N.E.2d 206, 208-09 (2001); *Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc (In re Vortex Fishing Sys., Inc.)*, 277 F.3d 1057, 1069-70 (9th Cir. 2002). Accordingly, the court need not decide which set of choice of rules applies in this particular instance.

Section 187 of the Second Restatement provides that, subject to limited exceptions, the law of the state chosen by the parties will govern their contractual rights and duties. *See Schulke Radio Prod., Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 438-39, 453 N.E.2d 683, 686 (1983). Under Section 187, the law chosen by the parties will be applied unless: (1) either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice or (2) the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue. Restatement (Second) of Conflict of Laws § 187 (1971). In the

absence of a valid choice by the parties, Section 188 of the Second Restatement directs application of a most significant relationship test. *See Gries Sports. Ent., Inc. v. Modell*, 15 Ohio St. 3d 284, 473 N.E.2d 807 (1984).

In this case, Singer has not shown or even argued how the state of New York has any relationship to this transaction and these parties. Ms. Kiss is a resident of Ohio. She signed the Purchase Agreement and her power of attorney in Ohio. There is nothing in the Purchase Agreement that shows where Singer executed it. Singer clearly knew it was buying payments under a contract governed by Ohio law from an Ohio resident. It sent the payment to Ohio on letterhead showing offices in both New York and Florida, but not identifying from which the funds were sent. [Doc. ##18-19, Trustee's Exh. C]. And as a general matter, contractual choice of law provisions are not binding on third parties, such as Motorists, who is a party to the underlying contract that designates Ohio law as controlling. *See In re Eagle Enterprises, Inc.*, 223 B.R. 290, 294 (Bankr. E.D. Pa. 1998)

and cases cited therein. To the extent the Settlement Agreement were invalid under Ohio law, for example, it could not be reasonably argued that it could be resurrected or changed by Ms. Kiss and Singer, without Motorists' consent, by designating New York law as controlling in the Purchase Agreement. Based on the foregoing factors, it has not been shown that New York has a substantial relationship to the transaction and there has not been any reasonable basis shown for the parties' choice such that it should be effective. Under the circumstances, applying the factors identified by Section 188 of the Restatement Second to the limited extent shown in the record, Ohio law clearly has the most significant relationship to the transaction and the parties. Indeed Singer's arguments all assume without contest that Ohio law applies. Accordingly, the court will apply Ohio law in deciding the Trustee's and Ms. Kiss' claim that the Purchase Agreement is unenforceable.[3]

The Trustee's § 544 Claim

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In the final analysis, the court's address and resolution of this issue may very well amount to much ado about nothing, because having examined the law of both states, it does not appear to this court that they ultimately differ in any material way as to the issues in dispute. And while the parties have cited conflicting case law from many jurisdictions, they have not identified any manner in which the outcome of this case would be different if New York law instead of Ohio law is applied in construing the Purchase Agreement as raised by the Trustee's and Ms. Kiss' claims that it is void and unenforceable.

Analyzing the plain language of the Purchase Agreement, the court determines that the parties intended and that it constitutes a complete disposition of Ms. Kiss' right to receive the 2004 and 2009 payments, regardless whether the transaction is characterized as a sale or as an assignment. The following unambiguous terms of the contract [Doc. #20, Singer Exh. A] show that the parties intended a complete disposition of Ms. Kiss' right to receive the 2004 and 2009 payments:

- "Now, you want to sell Singer (or its assigns) your rights....."
- "Specifically, you are agreeing to sell the following payments due to you...."
- "...Singer will pay you $10691.00 (the "Purchase Price')...."
- "You own... the payments that you are selling us. No one else has any interest in, lien against, or claim to the payments that you are selling."
- "You will cooperate with us ... to ensure that we get the payments that we are buying from you."
- "You understand that there is a possibility that, by selling your payments..."
- "Singer is buying the payments..."
- "This transaction is intended to constitute a sale of the Assigned Payments and is not intended to be considered a loan."
- "No repurchase."
- "You and Your spouse understand that by selling the Assigned Payments, that you and your spouse are not receiving the same amount of money as if you waited for all of the Assigned Payments...."
- "You and your spouse have valid reasons for selling the Assigned Payments."

See In re Terry, 245 B.R. 422, 424, 427-28 (Bankr. N.D. Ga. 2000). Also indicative of a sale, under the Purchase Agreement Singer assumes the risk that the 2004 and 2009 payments will not be made due to the insolvency of the insurance company. [*Id.* at p.3 (Default part d.)]. And depending on whether and how Kenneth Ehasz's and Mary Lou Ehasz's contingent interests in the payments have been addressed by the parties, Singer also appears to be assuming the risk that Ms. Kiss will not survive until the 2004 and 2009 payments are due. [Doc. ##18,19, Trustee's Exh. A, p.3, ¶ IV.B].

The only language even arguably indicative of a loan is in the paragraph captioned

"Security Interest." [Doc. #20, Singer Exh. A, at p.3]. But the first sentence of that paragraph states "[t]his transaction is intended to constitute a sale...and is not intended to be a loan." Further, the granting of a security interest is then specified as a precautionary protection for Singer to the extent a court were to determine the arrangement effected a loan to Ms. Kiss. Because of its purely precautionary nature, this language and the giving of a security interest does not create ambiguity in or change the nature of the Purchase Agreement, which the court finds to be, as intended by the parties, a complete disposition of Ms. Kiss' rights to the 2004 and 2009 payments. "An outright sale of property, in the absence of any right of redemption or other agreement to the contrary, terminates the seller's interest in the property." *French v. Superior Metal Products,* 293 B.R. at 899 (applying Ohio law). Moreover, the same result is reached if the Purchase Agreement is more properly characterized as an assignment and not a sale, as an assignment is "properly the transfer of one's whole interest in an estate, or chattel or other thing." *Id.,* quoting *State ex re. Leach v. Price,* 168 Ohio St. 499, 504, 56 N.E.2d 316, 320 (1959). Either as a sale or as an assignment, the Trustee has no cause of action under 11 U.S.C. § 544(b) to avoid any alleged unperfected security interest granted

to Singer under the Purchase Agreement. *Cf. In re Gee, 124 B.R. 586* (Bankr. N.D. Okla. 1991)("collateral assignment" of annuity payment was intended and would be treated as an absolute assignment, even though parties had signed "security agreement"; thus perfection unnecessary and right to receive payment belonged to assignee and not debtors or estate); *Singer Asset Fin. Co., L.L.C. v. Bachus*, 741 N.Y.S.2d 618, 620-21(N.Y. App. Div. 2002)(transaction between Singer and structured settlement party "is not a loan but an absolute assignment, to which UCC article 9 does not apply...."). *But cf. Lustig v. Peachtree Settlement Funding, LLC (In re Chorney)*, 277 B.R. 477(Bankr. W.D.N.Y. 2002)(court finds structured settlement transfer agreement effected a loan transaction to which Article 9 applies). [4]

The Trustee's Claim for Rescission of the Purchase Agreement

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[4] Even if the arrangement created a security interest in Singer, which could then be attacked under § 544(b) if unperfected, the Trustee has not shown or created any genuine issue of material fact in the record before the court that Singer failed to perfect its security interest. The Trustee has the burden of proof under § 544(b), not Singer. He must accordingly prove that the security interest is unperfected; Singer is not required to prove that its security interest is perfected, as the Trustee seems to argue. [Doc. ##18-19, p.11- 13].

As the Trustee cannot avoid the Purchase Agreement under § 544, the 2004 and 2009 payments are subject to the terms of the Purchase Agreement between Ms. Kiss and Singer, unless it is otherwise determined to be of no effect. The Trustee characterizes his cause of action as a declaratory judgment action that the Purchase Agreement is void as a result of the anti-alienation provision. The court finds the more appropriate characterization of the Trustee's cause of action as one seeking rescission of the Purchase Agreement. In contrast to his Bankruptcy Code-based claim for avoidance under § 544, in seeking to rescind the Purchase Agreement, the Trustee is succeeding to Ms. Kiss' cause of action for rescission as a particular species of property of the estate under § 541(a)(1).[5] And consistent with the general principle that the trustee succeeds only to the debtor's

interest in property, *Demczyk,* 126 F.3d at 831, where the property interest in issue is a cause of action possessed by the debtor, the trustee is still subject to the same defenses that could have been asserted by the defendant had the action been instituted by the debtor. *Official Committee of Unsecured Creditors v. R. F. Lafferty & Co., Inc.*, 267 F.3d 340, 356 (3d Cir. 2001); *French v. Superior Metal Products*, 293 B.R. at 898; *In re Palace Quality Services Industries, Inc*, 283 B.R. 868, 880 (Bankr. E.D. Mich. 2002)("The effect of the Section 541(a)(1) transfer is neutral. The newly created estate receives no more or no less under Section 541(a)(1) than what the debtor had to transfer."); *see* 5 *Collier on Bankruptcy* ¶541.08 (Lawrence P. King 15th ed. Rev. 1997). The Trustee seeks to rescind Ms. Kiss' assignment to Singer of her interest in the payments due in 2004 and 2009 on the basis that the Purchase Agreement is invalid under state law because of the anti-alienation provision in the Settlement Agreement. In response Singer asserts an affirmative defense that Ms. Kiss is now estopped from challenging the validity of the

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5 Singer argues, incorrectly albeit not vociferously, that the Trustee does not have standing to pursue this claim. [Doc. #34 at 8-9]. To the extent that Singer is arguing that Ms. Kiss may not pursue such a claim, other than because of the claimed estoppel, the court disagrees. There is no basis in the terms of the Settlement Agreement to find that the anti-alienation provision was intended only for the benefit of obligor Motorists. Because the claim for rescission is now property of the bankruptcy estate, Ms. Kiss no longer has standing to assert a claim for rescission absent abandonment of the claim by the estate. So while Ms. Kiss may support the Trustee's arguments in this regard, for obvious reasons given her exemption claim, she does not now have and the court does not construe her to be asserting her own independent cause of action for rescission of the Purchase Agreement. It belongs to the Trustee as the representative of the estate.

assignment, having accepted the benefit of the Purchase Agreement.[6] Simply put, this is the proverbial situation of a litigant wanting to both have the cake and eat it, too. Ms. Kiss wants to rescind the Purchase Agreement but also to keep the money Singer paid her. To the extent Ms. Kiss is estopped by these circumstances from pursuing rescission of the Purchase Agreement, then so too is the Trustee. *R.F. Lafferty*, 267 F.3d at 356; *see Clark v. Reissig*, 164 F.Supp. 823, 825 (S.D. Ohio 1958)(applying Ohio law, those standing in the identical legal position of the person who accepted benefits will also be estopped).

Ohio courts have long recognized the principle that "a party will not be permitted to retain the benefits of a contract and at the same time repudiate it." *Railway Co. v. Williams,* 53 Ohio St. 268, 41 N.E. 261 (1895); *Buydden v. Mitchell*, 60 Ohio Law Abs. 493, 102 N.E.2d 21, 23,(1951); *see also Dayton Securities Assoc. v. Avutu*, 105 Ohio App. 3d 559, 563, 664 N.E.2d 954, 957 (1995).

"For an estoppel by acceptance of benefits to arise, the party accepting such benefits must do so with full knowledge of the facts and of his rights." *Dayton Securities Assoc.,* 105 Ohio App.3d at 563, 664 N.E.2d at 957. Estoppel applies, however, only where the party who seeks to invoke the doctrine demonstrates that "he will suffer an injury or detriment if the estoppel is not granted because he has been misled or induced to alter his position or status in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated." *Id.* at 564, 664 N.E.2d at 957-58.

In this case, Ms. Kiss expressly agreed through the Purchase Agreement with Singer to accept from Singer immediate payment

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Singer also asserts waiver as an affirmative defense. "Although waiver is typical of estoppel, estoppel is a separate and distinct doctrine. *Chubb v. Ohio Bureau of Workers' Compensation*, 81 Ohio St. 3d 275, 279, 690 N.E.2d 1267, 1270 (1998). Waiver focuses on one party's intention to relinquish a known right, but with estoppel it is not necessary to intend to relinquish a right. *Id.* Rather, estoppel focuses on the conduct of both parties. *Id.* The summary judgment record is not sufficient to conclude as a matter of law that Ms. Kiss intended to relinquish her rights under the anti-assignment clause when she signed the Purchase Agreement. It is, however, sufficient to conclude that she (and now the Trustee) is prevented by the doctrine of equitable estoppel from now asserting that provision against Singer.

in the amount of $10,691.00 in exchange for her interest in the two much larger lump sum payments due under the Settlement Agreement in 2004 and 2009. [Doc. #20, Singer's Exhibit A]. Ms. Kiss further agreed, among other things, to take all "reasonable and necessary actions" to ensure that Singer receive the payments that it was purchasing and not to claim ownership of the assigned payments in the future. [*Id.* at 1, 3]. She further represented that she had consulted with a financial, tax and legal advisor regarding the implications of the transaction or made a conscious decision not to seek such advice. *[Id.* at 1]. The Purchase Agreement's clear language was sufficient to inform Ms. Kiss of the facts and her rights with respect to the agreement, and that by entering into it and accepting funds from Singer she was selling her interest in the future payments for substantially less than if she survived and waited to receive the funds when due under the Settlement Agreement. Ms. Kiss was not a minor when the transaction occurred with Singer. Nor is there any evidence whatsoever that she was incompetent or under any disability to understand that she was foregoing through her contract with Singer her right to assert the anti-alienation provision in the Settlement Agreement and her right to receive $15,000.00 in 2004 and $25,000.00 in 2009 in exchange for the immediate payment of $10,691.00 in 2000. *Cf. Wiggins*, 273 B.R. at 839 (transfer of future payments by eighteen year old with severe head injury amounts to fraud). The terms of the Purchase Agreement itself show that Ms. Kiss accepted money from Singer with full knowledge of the facts. There is nothing in the record to the contrary to create a genuine issue of fact.

Looking to the second element of application of the doctrine of estoppel by benefit, the court also finds that Singer will be prejudiced if estoppel is not applied here. Singer has fully performed

its obligations under the Purchase Agreement by paying Ms. Kiss. There is no way that it can now be

restored to the status quo if the Purchase Agreement is rescinded, as there is no suggestion by Ms. Kiss or the Trustee that the funds Singer advanced to Ms. Kiss will be repaid. *See Stone Street Capital, Inc. v. Granati (In re Granati*), 270 B.R. 575, 586-587(Bankr. E.D. Va. 2001) (factoring company's right to specifically enforce an annuity purchase agreement is a property interest and not a dischargeable claim in debtor/transferee's bankruptcy case).

Under the undisputed circumstances shown by the record, the court finds that Ms. Kiss, and therefore the Trustee, is estopped from challenging the validity of the assignment of her interest in the payments due in 2004 and 2009. And neither Executive nor Motorists have appeared and challenged the assignment, despite having been named and duly served as parties and given the opportunity to do so. Likewise, although not specifically identifying the doctrine of estoppel by benefit, other bankruptcy courts have similarly noted in various procedural circumstances the basic inequity of a debtor accepting the consideration for a transfer of structured settlement payments and then attempting to repudiate the contract later. *Cf. In re Granati*, 270 B.R. at 584-85 (equities slightly favor the transferee that provided what it promised, and "to allow the debtor to keep both the $52,000 *and* the annuity payments she agreed to sell would plainly constitute unjust enrichment."[emphasis original]); *In re Terry*, 245 B.R. at 426 ("[A]lmost two years later, and because he needs money to fund his Chapter 13 plan, the debtor seeks to revive and attach meaning to the Settlement Agreement's anti-assignment provision. The Debtor's attempt to reverse the Wentworth transaction is both disingenuous and not supported by applicable law."); *Jones v. J. G. Wentworth S.S.C. Ltd. P'ship (In re Berghman)*, 235 B.R. 683,691 (Bankr. M.D. Fla. 1999)(in Chapter 7 trustee's action to determine interest in property, "[i]t is clear to the Court that the parties intended a sale of the right to receive payments and that deeming the transaction otherwise would clearly be unjust."). Because Ms. Kiss did not have an enforceable claim against Singer at the commencement of the bankruptcy case to rescind the Purchase Agreement, the 2004 and 2009 payments under the Settlement Agreement, having been previously sold to Singer, are not property of the estate that the Trustee may

sell.[7] *See In re Terry*, 245 B.R. at 427-28; *In re Berghman*, 235 B.R. at 691(right to payments from an annuity assigned by debtor prepetition are not property of the estate); *In re Freeman*, 232 B.R. 497, 503 (Bankr. M.D. Fla. 1999)(same).

V. Do Debtors have a valid exemption under Ohio Revised Code § 2329.66(A)(12)(c)?

In their petition, Debtors claimed a $5,000.00 exemption in Ms. Kiss' interest in the payment under the Settlement Agreement that is due in 2004. The exemption was claimed pursuant to Ohio Revised Code § 2329.66(A)(12)(c), which provides an exemption for "a payment, not to exceed five thousand dollars, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the person. . . ." Although Ms. Kiss now contends that she intended to claim the exemption as to the entirety of the payments due under the Settlement Agreement, Debtors' petition specifically listed each future payment (due in 2004, 2009, 2014 and 2019) individually but claimed the $5,000.00 exemption only as to the payment due in 2004.[8] [Doc. #3, Amended Petition, Schedule B & C]. Presumably, Debtors sought to obtain the benefit of the exemption sooner rather than later. But in light of the court's determination that Ms. Kiss' interest in the 2004 payment is not property of the estate, Debtors have not claimed a valid exemption in property of the estate, notwithstanding the Trustee's failure to object to it. The claimed exemption is moot. *See In re Barnes*, 264 B.R. at 421(no need for debtor to claim exemption in non-estate

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Having so determined, the court need not and does not address the parties' arguments regarding the enforceability of the anti-alienation clause and the validity of the assignment to Singer by Ms. Kiss. As illustrated by the memoranda filed by the parties, there is an extensive body of conflicting case law regarding the impact of anti-assignment provisions on sales of future payments under structured settlement arrangements, arising in a variety of bankruptcy and non-bankruptcy procedural contexts. *See generally* Gregory Scott Crespi, *Selling Structured Settlements: The Uncertain Effect of AntiAssignment Clauses*, 28 Pepp. L. Rev. 787 (2001). In the absence of a lack of capacity to contract, Ohio courts apply the principle of estoppel by benefit even where the contract in issue, here the Purchase Agreement, is claimed to be void, as the Trustee and Ms. Kiss argue. *Sun Oil Co. v. Dollbeer*, 21 Ohio Law Abs. (Ct. App. 1936)("The rule of law is well recognized that one cannot claim the benefits under a void contract and at the same time seek its revocation."); *see The London & Lancashire Indemnity Co. of America v. The Fairbanks Steam Shovel Co.*, 112 Ohio St. 136, 145-46, 147 N.E. 329, 332 (1925)("[W]here the *ultra vires* transaction is executed on one side, a private corporation is estopped from claiming that a transaction was *ultra vires* to the extent it has been performed by the other party."). Moreover, as a general rule under Ohio law, one party to a contract cannot unilaterally rescind an executed contract in the absence of fraud, duress, undue influence, bad faith or mistake, none of which are supported by the summary judgment record here. 18 Ohio Jur. 3d *Contracts* § 258 (2002).

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Under property claimed as exempt, Debtors list "Pers Injury Recovery-Exec Life of NY (2004)." [Doc. #3, Amended Petition, Schedule C].

property). The merits of the Trustee's objection are thus not ripe for decision. If and when Debtors' Schedule C is amended to claim an exemption in the 2014 or 2019 payments, the propriety of claiming such an exemption can then be addressed in the proper procedural context of any objection timely filed by the Trustee in the underlying Chapter 7 case.

VI. Can the Trustee sell future payments under the Settlement Agreement?

The Trustee seeks authority from the court to sell the estate's interest in future payments under 11 U.S.C. § 363(b)(1), which simply provides that a trustee "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." As other courts have recognized, § 363(b)(1) is simply an enabling statute "that gives the trustee the authority to sell or dispose of property if the debtors would have had the same right under state law."[9] *In re Schauer*, 835 F.2d at 1225; *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 494 (3rd Cir. 1997) (concluding that § 363(b)(1) does not preempt state laws limiting the assignability of tort claims belonging to the estate); *Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.),* 853 F.2d 1149, 1155 (4th Cir. 1988) (explaining that § 363(b)(1) provides a means within the context of a bankruptcy proceeding for the exercise of a debtor's pre-bankruptcy rights to dispose of its property). *But cf. In re Quinn*, 299 B.R. at 461(in dicta, court states, incorrectly in this judge's view, that "Section 363(b) provides Trustee with the authority to once again override the assignment restrictions contained within the annuity."). There are two potential restrictions on Ms. Kiss', and in her shoes, the Trustee's ability to dispose of Ms. Kiss' interests in the payments due in 2014 and 2019: the anti-alienation clause in the Settlement Agreement and the Ohio statute requiring prior state court approval of any payee's disposition of rights under a structured settlement agreement.

The court will first address the effect of the anti-alienation provision in the Settlement Agreement on the Trustee's rights.[10] Although the court does not find a basis in the Bankruptcy Code

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By contrast, § 363(l) permits a trustee, subject to the provisions of § 365, to use, sell or lease property "notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property."

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This issue exposes a fundamental contradiction in the Trustee's case. On one hand, he asserts that Ms. Kiss was bound by the anti-alienation clause in the Settlement Agreement and that it prevented her assignment to Singer. On the other hand, he takes the contradictory position that he is not bound by the anti-alienation provision. The provision cannot

to override the anti-alienation clause of the Settlement Agreement, the court does find a basis in state law for the Trustee's disposition of the 2014 and 2019 payments notwithstanding that provision. A contract provision made for the benefit of a party may be waived by the party in whose favor the provision is made. 13 *Williston on Contracts* § 39:24 (4th ed.); *see Systran Fin. Servs. Corp. v. Giant Cement Holding, Inc.,* 252 F.Supp. 500, 506 (N.D. Ohio 2003)("A party may waive any of its contractual rights..."); *see also Sandler v. AII Acquisition Corp., Inc.*, 954 F.2d 382, 385 (6th Cir. 1992) (applying Ohio law and finding that a "time is of the essence" clause may be waived when the party to be benefitted by that provision acts in a manner inconsistent with the supposition that he continues to hold the other party to his part of the agreement); *Loftus v. Vandahm*, 2001 WL 672884 (Mich. App. May 4 2001) (stating that a party to a contract can only waive provisions that exist for the benefit of that party); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 403, 144 N.E.2d 387, 503-4 (1957) (recognizing that a prohibition against assignment may be waived); *Taft v. McDowell Wellman Eng'g Co.*, 1979 Ohio App. LEXIS 12010, at *5 (Ohio, August 9, 1979)(appellate court notes that trial court held defendant had waived its rights under non-assignability clause of a construction contract).

A waiver is a voluntary relinquishment of a known right, *Chubb v. Ohio Bureau of Workers' Compensation*, 81 Ohio St.3d 275, 278, 690 N.E.2d 1267, 1269 (1998), that applies to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy, *State ex rel. Athens Cty. Bd. Of Comm'rs v. Gallis, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist. Bd. of Directors*, 75 Ohio St.3d 611, 616, 665 N.E.2d 202, 208 (1996). The elements of a waiver require that the relinquishment be voluntary, that the right being relinquished is known, and the right is being intentionally waived with full knowledge of all of the facts. *N. Olmsted v. Eliza Jennings, Inc.*, 91

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both be valid so as to make the assignment to Singer void and be ineffective as to any sale he attempts to make. The Trustee skillfully attempts a *sub-silentio* work- around for this problem by resorting to equity and 11 U.S.C. § 105. As will be explained further, the court disagrees that equity or § 105, either alone or in combination, provide a sound basis for disregarding either or both of the contractual restriction posed by the anti-alienation provision and the Ohio statute. As to the former, however, the doctrine of waiver permits him to sell the payments due in 2014 and 2019 notwithstanding the anti-alienation provision. But that doctrine does not apply to the Ohio statute because it explicitly provides that none of its provisions may be waived.

Ohio App.3d 173, 180, 631 N.E.2d 1130, 1134 (1993). In contrast to estoppel, which involves the conduct of both parties, waiver depends on what one intends to do. *Chubb*, 81 Ohio St.3d at 279, 690 N.E.2d at 1270. And a party may voluntarily relinquish a known right by words or by conduct. *Eliza Jennings*, 91 Ohio App.3d at 180, 631 N.E.2d at 1134.

When the Settlement Agreement was signed, Debtor Kristine Kiss was a minor. So to the extent that the clause was included in the Settlement Agreement to safeguard the interests of Ms. Kiss, as the party for whose benefit the anti-alienation provision was made, Ms. Kiss and, therefore, the Trustee standing in her shoes, may waive applicability of that provision. *Cf. Yellen v. Gilroy (In re Gilroy)*, 235 B.R. 512, 517(Bankr. N.D. Ill. 1999)(debtor's right to disclaim power of appointment under trust passes to Trustee upon commencement of case). The court finds that the Trustee has done so by filing his complaint explicitly seeking authority to sell the future payments that are property of the bankruptcy estate. He is clearly aware of the anti-alienation provision and wishes to act in spite of it, waiving any benefit it afforded Ms. Kiss and now the estate as the successor to Ms. Kiss' rights under the Settlement Agreement. Nor is waiver of the anti-alienation provision contrary to Ohio public policy. *See Kelm v. Kelm*, 92 Ohio St. 3d 223, 749 N.E.2d 299 (2001). Indeed the new Ohio statute, discussed below, evidences a state policy to permit transfer of such rights under certain circumstances. *See* Ohio Rev. Code Ann. § 2323.581, 2323.583(D) (Anderson 2003).

Only personal rights and privileges may be waived. So to the extent that the anti-alienation clause at issue was designed to benefit Motorists or Executive Life in any manner, *see, e.g., Singer Asset Fin. Co. v. CGU Life Ins. Co of America*, 275 Ga. 328, 567 S.E.2d 9 (2002)(discussing protection afforded to obligor by anti-alienation provision in structured settlement agreement), instead of Ms. Kiss, the court finds that Motorists and Executive Life have also waived application of the clause as against the Trustee. Both have been named as parties in this adversary proceeding and duly served with the summons and the complaint. They have elected not to contest the relief expressly sought by the Trustee, including the authority to sell the future payments. Having been sued by the Trustee in an action explicitly raising the right to transfer the future Settlement Agreement payments, Executive Life and Motorists have a duty now to speak up and assert the anti-alienation provisions to the extent it is part of the Settlement Agreement for their benefit. They have elected not to do so. Silence may amount to a waiver where either the duty to speak is imperative,

and the silence

clearly indicates an intent to waive, or the circumstances otherwise are such that equity will impute such an intent. *Allenbaugh v. Canton*, 137 Ohio St. 128, 133, 28 N.E.2d 354, 357 (1940). Parties have a legal duty clearly articulated by the summons, the applicable procedural rules and the concept of finality of judgments to respond to a lawsuit in a court with jurisdiction over the parties and subject matter, absent which they cannot later contest the relief granted by the court. *Sheskey v. Tyler-Smith*, 118 Ohio Misc.2d 169, 173, 770 N.E.2d 161, 164 (Ct. C.P. 2002)(judgment debtors'-defendants' failure to respond to summons and complaint and to notice from clerk of availability of excess funds in foreclosure proceeding constitutes waiver of statutory right to claim funds). And having failed to do so, Motorists and Executive Life have waived enforcement of the anti-alienation clause as against the Trustee. Declining to answer the complaint and to now contest the Trustee's right to sell the 2014 and 2019 payments on the basis of the Settlement Agreement provision is wholly inconsistent with any intent to raise in the future the anti-alienation provision as prohibiting such a transaction. *See* Doc. #18-19, Exh. D (letter from agent of Executive Life to Trustee raising anti-alienation provision, showing awareness of bankruptcy and of provision).

Next, the court addresses specific statutes recently enacted in Ohio dealing with the "Transfer of Structured Settlement Payment Rights." *See* Ohio Rev. Code Ann. § 2323.58 *et seq.* (Anderson 2003). They became effective after the Purchase Agreement between Debtors and Singer and did not apply to her actions thereunder. Under these statutes, no transfer of structured settlement payment rights is effective, and no structured settlement obligor or annuity issuer may be required to make any payment to a transferee of such payment rights, unless the transfer has been approved in advance by the Ohio court that approved the structured settlement agreement. Ohio Rev. Code §§ 2323.581, 2323.584(A). Such approval must be based on specific findings by the court, including that the transfer is fair and reasonable and in the best interests of the payee, who is now the Trustee.[11] Ohio

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The court notes that under 11 U.S.C. § 541(c)(1), Ms. Kiss' interests as payee under the Settlement Agreement pass to the bankruptcy estate notwithstanding any provision in the contract or applicable nonbankruptcy law, including Ohio Rev. Code §§ 2323.58 *et seq.*, restricting the transfer of such interest. Pursuant to that section, her interests are property of the estate and the Trustee is now a payee for purposes of the Ohio statute under the Settlement Agreement. Section 541(c)(1) does not, however, invalidate those restrictions insofar as the subsequent disposition by the estate. Nor, in the court's view, is there any other provision of the Bankruptcy Code that does so. *Cf.* 11 U.S.C. § 365(f)(1)(permits assignment of executory contracts free of most restrictions on assignment in either the contract or applicable law; the

Rev. Code § 2323.583. If, as here, the structured settlement agreement was not originally approved by an Ohio court, then an application for approval of the transfer of payment rights under the agreement may be filed in the probate division of the court of common pleas in which the payee, structured settlement obligor, or the annuity issuer resides. Ohio Rev. Code § 2323.584(A).

Significantly, the statute expressly provides that none of its provisions may be waived, Ohio Rev. Code § 2323.585(B), clearly evidencing an Ohio public policy against waiver of the requirements of the statutes. So while the Trustee may waive the contract provision, the doctrine of waiver will not apply to the statutes.

The Trustee acknowledges the applicability of these Ohio statutes. He argues that, in light of the statutes, the transfer and assignability of the periodic payments at issue is clear, notwithstanding the anti-alienation provision in the Settlement Agreement. Nevertheless, the Trustee asks the court to ignore the Ohio statutes and use its equitable power under § 105(a) to authorize the disposition of Ms. Kiss' interest in the future payments and to order Motorists and Executive Life to make payments to a successful bidder without requiring compliance with the statute. This the court declines to do.

Section 105(a) empowers the court to issue such orders as are "necessary or appropriate" to carry out the provisions of the Bankruptcy Code. But the equitable span of § 105 "does not authorize bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *United States v. Sutton,* 786 F.2d 1305, 1308 (5th Cir.1986). Equitable powers under § 105(a) must be exercised within the confines of the Bankruptcy Code. *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988). Thus, a court cannot freely ignore state law when exercising its equitable powers under § 105. *Unsecured Creditors' Comm. of Highland Superstores, Inc. v. Strobeck Real Estate, Inc.(In re Highland Superstores, Inc.)*, 154 F.3d 573, 578-79 (6th Cir. 1998). There are several specific sections of the Bankruptcy Code that invalidate some types of state and other applicable law in various bankruptcy contexts. *See, e.g.*, §§ 541(c)(1) and 365(f)(2). But none of them invalidate application of a statute such as Ohio Rev. Code § 2323.58 *et seq.* in the

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Trustee has not asserted that the Settlement Agreement is an executory contract subject to assumption and assignment under § 365).

disposition of property of the estate. These

provisions show that Congress made specific choices about when and how to invalidate state law. Section 105 cannot properly be stretched to do so with respect to the Ohio statutes in issue, no matter how desirable it would obviously be from the standpoint of ease of administration of the estate.

As explained above, under § 541, the trustee succeeds only to those interests in property that the debtor possessed at the commencement of the bankruptcy case and takes the property subject to the same restrictions that existed at that time. *In re Graham Square, Inc.*, 126 F.3d at 831. Under Ohio law, Debtor Kristine Kiss, and therefore the Trustee as the substituted payee, now has no right to sell future payments under the Settlement Agreement unless the requirements of §§ 2323.58 *et seq.* are met and approval is obtained from the state court. *See Grochocinski v. Crossman (In re Crossman),* 259 B.R. 301 (Bankr. N.D. Ill. 2001) (holding that trustee could not sell or assign debtor's right to future payments under a structured settlement agreement without complying with an Illinois statute requiring state court approval). Although not explicitly stated, by invoking the equitable powers of the court, presumably the Trustee seeks to further the federal interest of an expeditious administration of the bankruptcy estate for the benefit of creditors. But the court's use of such equitable powers in this instance would violate the basic principle that a court may not use § 105(a) to create substantive rights that are otherwise unavailable under applicable law. Accordingly, while the Trustee is authorized to sell Ms. Kiss' interest in the payments due under the Settlement Agreement in 2014 and 2019, he may do so only subject to compliance with Ohio Rev. Code §§ 2323.581, *et seq*.

Conclusion

For the foregoing reasons, the Trustee's motion for summary judgment will be granted only to the extent that he seeks a declaration that Ms. Kiss' interest in the future payments due under the Settlement Agreement in 2014 and 2019 are property of the estate, that Debtors' claimed exemption in the payment due in 2004 is not a valid exemption, and for authority to sell the payments due in 2014 and 2019; however, such authority to sell shall be subject to compliance with Ohio Revised Code §§ 2323.58 *et seq.* as well as the Bankruptcy Code and applicable Federal Rules of Bankruptcy Procedure for setting forth a specific time and manner of sale and the opportunity for notice and hearing within the underlying Chapter 7 case.

The Trustee's motion will be denied in all other respects. In addition, Singer's motion for summary judgment that the future payments due in 2004

and 2009 are not property of the estate will be granted, and Debtors' motion for summary judgment will be denied.

A separate final judgment in accordance with this memorandum of decision and order will be entered by the court. Accordingly,

IT IS ORDERED THAT Plaintiff Louis J. Yoppolo, Trustee's Motion for Summary Judgment [Doc. ##18-19] is **GRANTED** in part and **DENIED** in part, as set forth above; and

IT IS FURTHER ORDERED THAT Defendants Frank J. Kiss' and Kristine J. Kiss' Motion for Summary Judgment [Doc. #13] is **DENIED**; and

IT IS FINALLY ORDERED that Defendant Singer Asset Finance, LLC's Motion for Summary Judgment [Doc. #20] is **GRANTED**.

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge