STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CVS 2620

BRIAN S. COPE, M.D.,

Plaintiff,

v.

MICHAEL P. DANIEL, M.D. and DANIEL UROLOGICAL CENTER, INC.,

Defendants.

DEFENDANTS' REPLY BRIEF

NOW COME Defendants Michael P. Daniel, M.D. and Daniel Urological Center, Inc., by and through their undersigned counsel and submit this Reply Brief in response to additional issues raised in Plaintiff's Response in Opposition to Defendants' Motion for Leave to Amend Answer.

ARGUMENT

A. Amendment to Assert Statute of Limitations Defense Should Be Allowed Where Plaintiff's Broad Claims Have Resulted in the Need To Review Many Years of Documents

Defendants should be allowed to amend their answer to assert a statute of limitations defense which will narrow the scope of this action and limit the claims to a manageable time period. The public policy concerns regarding avoiding litigation of stale claims would be well served by allowing Defendants to assert a statutes of limitations defense in this case.

Plaintiff has asserted that "Part of the prejudice to Dr. Cope flows from the substantial costs that Dr. Cope has incurred fighting over years worth of documents that, if valid, would be barred by a statute of limitations defense that was never previously raised." (Plaintiff's Brief, p. 4). However, another reason that the Plaintiff is forced to expend time reviewing over nine

years worth of documents is that the Plaintiff chose to assert very broad claims which spanned over a nine year period, and which are in large part beyond the relevant statutory limitations periods.

Plaintiff further argues that "Dr. Cope believes that had these defenses been raised in the beginning that at least partial summary judgment would have been appropriate given the intense year-by-year factual inquiry that is appropriate to a case of this nature." (Plaintiff's Brief, p. 4). Plaintiff argues that, had the issue of statute of limitations been previously raised, it could have been resolved on partial summary judgment and thereby avoided the need for review is a speculative one, as the timing of such a motion would likely have taken place after at least some discovery occurred.

Public policy and judicial economy would both favor the allowance of Defendants' proposed amendment which will serve to limit the scope of this action to a manageable time period as proscribed by the relevant statutes.

B. Plaintiff's Claims Clearly "Relate To" an ERISA Plan and are Pre-Empted by ERISA

"Federal subject matter jurisdiction of a plaintiff's state law claims will be proper pursuant to ERISA, and ERISA's provisions will preempt, that is, supersede, those claims, if they "relate to" any employee benefit plan covered by ERISA. *See* 29 U.S.C. § 1144(a). A state law claim "relates to" an ERISA plan "if it has a connection with or reference to such a plan." *Griggs v. E.I. Dupont de Nemours & Co., 237 F.3d 371, 377 (4th Cir.2001*) (finding a state law of general application, with only an indirect effect on a pension plan, may relate to that plan for preemption purposes). *Accord FMC Corp. v. Holliday,* 498 U.S. 52, 58, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) (ERISA's preemption provisions are broadly construed); *and Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 96-97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)." Church v. Wachovia

Securities, Inc., 2005 WL 3019239, *2 (W.D.N.C.,2005). "Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S.Ct. 478, 483 (U.S.Tex.,1990) (internal citations omitted).

"To determine whether ERISA preemption applies to a particular claim, courts are required to look to the four corners of the state-law complaint for a factual determination of the nature of a plaintiff's claim, rather than any label the plaintiff may have put on his claim." Clark v. BASF Corp., 229 F.Supp.2d 480, 484 -486 (W.D.N.C.,2002); Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 379 (4th Cir., 2001).

That a plaintiff "alleged his claims as common-law causes of action is not dispositive." Conner v. Elkem Metals Co., 2006 WL 1308123, 2 (S.D.W.Va.,2006). If a "plaintiff's claims relate to retirement income under an ERISA pension plan, they are preempted by ERISA." Id., citing Griggs, 237 F.3d at 378. Where "all of the claims plaintiff alleges turn on benefits that he allegedly should have received under [a] pension plan, they are by definition preempted by Section 514(a) of ERISA." Id.

In holding that an employee's claims for breach of contract, detrimental reliance and estoppel and unfair and deceptive trade practices were pre-empted by ERISA, the court in Lippard v. Unumprovident Corp. explained the broad application of ERISA pre-emption as follows:

> "In this case, none of the state laws under which Plaintiff claims relief were specifically promulgated to govern employee benefit plans. Nevertheless, state law claims which relate to the administration of an ERISA-governed plan, but which arise under general state laws which themselves have no impact on employee benefit plans, are within the scope of ERISA preemption. *Powell v. Chesapeake and Potomac Tel. Co.*

> *of Va.,* 780 F.2d 419, 421 (4th Cir.1985)…To the extent that ERISA redresses the mishandling of benefit claims or other misadministration of employee benefit plans, it also preempts analogous causes of action, whatever their form or label under state law. Accordingly, because Plaintiff's claims for breach of contract, detrimental reliance and estoppel, and unfair and deceptive trade practices relate to the administration of her Policy, all three state law claims are preempted by ERISA because they relate to an employee benefit plan."

261 F.Supp.2d 368, 375 (M.D.N.C.,2003).

In this case, Plaintiff attempts to avoid ERISA preemption by arguing that "Dr. Cope's causes of action are based on breach of an employment agreement, breach of *corporate* fiduciary duty, unfair and deceptive trade practices as well as conversion and fraud all with regard to corporate assets. No ERISA plan is a defendant, there is no separate count seeking benefits from any ERISA governed plan nor is there a count for fiduciary breach under ERISA." (Plaintiff's Brief, p. 7). However, the courts have repeatedly held that it is the factual nature of the claims, rather than the label assigned by the Plaintiff that determines whether ERISA pre-emption applies. See Clark, Griggs, supra.

Plaintiff further argues that the ERISA plan benefits are used merely as a measure of damages and discounts the connection to ERISA as too "tangential" to invoke pre-emption. (Plaintiff's Brief, pp. 7-13). The factual allegations of the Complaint reveal that Plaintiff's claims, regardless of the label assigned by Plaintiff, clearly "relate to" the ERISA plan. To wit, Plaintiff alleges in the Complaint that Dr. Daniel wrongfully paid himself "capital contributions" and "bonuses" that inflated his salary (Complaint ¶24), and that "[a]s a result of the discrepancies in salaries, Daniel was paid excess retirement benefits." (Complaint ¶25). The Complaint further alleges that "Daniel is a fiduciary under the practice's benefit plan," (Complaint ¶26) and that "Daniel breached his fiduciary duties… By making payments to himself that had the effect of inflating his salary versus that of Cope." (Complaint ¶38(e)).

"Claims challenging the administration of an employee welfare benefit plan fall squarely within the scope of § 502(a) of ERISA. Such claims include allegations that … an ERISA fiduciary breached a duty to a plaintiff by improperly denying a benefit based solely on financial motivations." Lippard v. Unumprovident Corp., 261 F.Supp.2d 368, 376 -377 (M.D.N.C.,2003). Notwithstanding the labels assigned by Dr. Cope, the Plaintiff's claims allege that Dr. Daniel was a fiduciary of an ERISA plan, and that by improperly allocating salary amounts to himself to which he was not entitled, Dr. Cope's salary and retirement benefits were decreased and Dr. Cope was damaged thereby. This connection is more than "tangential" or "incidental". The claims in this case "relate to" an ERISA plan as that term is broadly construed under the law to mean that the claims have some connection with or reference to such a plan in that they allege that Dr. Daniel, as the plan fiduciary, made false representations concerning the parties relative salary amounts and artificially inflated his own salary and benefits to the detriment of Dr. Cope's benefits. See Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 378 (N.C.,2001) (Court held that "ERISA preempts state common law claims of fraudulent or negligent misrepresentation when the false representations concern the existence or extent of benefits under an employee benefit plan. In fact, ERISA preemption is commonly understood to apply to state common law claims that an ERISA fiduciary misrepresented the nature or availability of retirement benefits, or failed to provide enough information to permit the retiring beneficiary to make an intelligent retirement decision.") Because the claims "relate to" and ERISA plan, they are pre-empted by federal law.

C. Defendant's Amendment Regarding Stock Redemption Is Unopposed and Should Be Allowed

In their motion to amend, the Defendants seek to assert a claim to redeem the stock of the Plaintiff pursuant to a stock redemption agreement. (Motion For Leave To Amend, ¶5(a)). In his

brief, the Plaintiff expressly notes that he does not oppose this amendment. (Plaintiff's Brief, p. 3 FN2).

However, Plaintiff further argues that "this proposed amendment is inconsistent with paragraph 26 of the Counterclaim already filed by Defendants that claims Cope "has forfeited all claims for stock repurchase of Daniel Urological."" (Id.) Defendants disagree with Plaintiff's assertion that the amendment is inconsistent with the prior pleading. While the termination of the shareholder's employment is an event requiring sale under the Stock Redemption Agreement (See 000091), the Employment Agreement expressly provides that Dr. Cope forfeits any rights to stock repurchase by competing against Daniel Urological Center in Alamance County (See D-10487, ¶20). Thus, while Dr. Cope has forfeited his the right to enforce the Stock Redemption Agreement, the corporation still has the option to enforce it. Additionally, the question of the value of the stock in the event of repurchase remains to be determined. Moreover, the North Carolina Rules of Civil Procedure expressly state that a party may plead a claim or defense in the alternative. Rules Civ.Proc., G.S. § 1A-1, Rule 8.

Therefore, the unopposed amendment regarding the stock redemption should be allowed, with Defendant's objections to Plaintiff's claims of inconsistent pleadings noted.

As set forth in their original Brief and in this Reply Brief, Defendants respectfully request that the court grant the motion to amend.

This the 17th day of April, 2008.

/s/ Pamela S. Duffy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the enclosed REPLY BRIEF was served on this date via electronic filing on the parties listed below:

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This the 17th day of April, 2008.

*/s/ Pamela S. Duffy*____________________
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CERTIFICATE OF COMPLAINT WITH RNCBC 15.8

The Defendants hereby certify that this brief complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

*/s/ Pamela S. Duffy*___________
Pamela S. Duffy
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