

Court of Appeals No. 48627-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DONALD RUTHERFORD, an individual and
ROBERTA CRAWFORD, an individual,

Appellants,

vs

IBEW HEALTH & WELFARE TRUST OF
SOUTHWEST WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Trial Court's entry of Default Judgment against Donald Rutherford and Roberta Crawford ("Appellants") was proper given their failure to appear for or respond to the action brought against them. Respondent IBEW Health and Welfare Trust of Southwest Washington ("IBEW") brought an action against Appellants in Pierce County Superior Court to recover monies wrongfully paid on behalf of Appellants as a result of their fraudulent behavior spanning more than ten years.

In addition to the fraud claim, IBEW, a health and welfare plan ("Plan") governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), asserted Appellants' actions caused such harm to the Plan as to give rise to a claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

The Trial Court not only maintained jurisdiction to hear and adjudicate IBEW's state law fraud claim, but also to determine whether such a claim is preempted by ERISA and therefore subject to exclusive federal jurisdiction. The Trial Court, having been fully informed of the issues of the case, determined that Default Judgment was proper.

The time for Appellants to assert the defenses they have presented was prior to entry of Default Judgment. Appellants were given Notice of

the Default Judgment, yet still failed to respond. They are now attempting to use this Court to plead their case. Appellants should not be rewarded for failing to timely respond to IBEW's Complaint.

II. COUNTER STATEMENT OF THE ISSUES

1. The Pierce County Superior Court correctly maintained jurisdiction over this matter.

2. ERISA § 502(a)(3) does not preempt IBEW's state law fraud claim.

3. The allegations, as enumerated in IBEW's Complaint satisfy the requirements for notice pleading and the heightened standard of pleading a common law fraud claim.

4. IBEW asserted its claims well within the applicable statute of limitations.

5. Attorneys' fees are appropriately granted under ERISA § 502(g)(1) where the Trial Court, in its discretion, has awarded such fees upon entry of Default Judgment.

III. STATEMENT OF THE CASE

IBEW established a health and welfare plan to provide medical benefits to eligible employees, their legal spouses and children. Clerks Papers ("CP") at 1. Appellant, Donald Rutherford, was an eligible participant in the IBEW Plan through his employment while a member of

IBEW Local 76. *Id.* at 2. On or about July 1, 2002, Appellant, Donald Rutherford, enrolled Roberta Crawford into the Plan, alleging that they were married on June 28, 2002, and that she was thus an eligible dependent. *Id.* The Appellants were not married at the time of enrollment, nor have they ever been married. *Id.* at 2-3.

The Plan's Third Party Administrative Agent, was at all times relevant Employee Benefit Administrators, Inc. ("EBA"). EBA's employee, Leroy Hare was responsible for enrolling participants and eligible dependents. CP at 93. Mr. Hare would only enroll individuals who were eligible under the provisions of the Plan. *Id.* at 94. A Plan participant requesting to enroll an individual as a dependent under the Plan would be required to complete an enrollment form indicating the relationship of the individual with the participant. *Id.* Mr. Hare never informed any Plan participant that an ineligible individual could be enrolled in the Plan and denied any requests to do so. *Id.*

The Plan conducted annual open enrollment during which Appellants never corrected their "married" status. The continued fraudulent assertion by the Appellants that they were married resulted in the Plan wrongfully paying benefits on behalf of Appellant Roberta Crawford in the amount of \$55,158.96. CP at 32-33.

In March 2012, Mark Wheir, also employed by EBA, conducted

an additional dependent verification process during which it was discovered that Appellants, Donald Rutherford and Roberta Crawford were never legally married. CP at 31-32. Upon this discovery, Ms. Crawford's eligibility under the Plan was terminated. *Id.*

After IBEW's demands to Appellants for reimbursement went unsatisfied, on July 31, 2013, IBEW initiated litigation in Pierce County Superior Court against the Appellants to recover amounts wrongfully paid on behalf of Ms. Crawford due to the fraudulent assertions of Appellants, as well as recovery of attorney fees and costs incurred. CP at 1-5. The Appellants were properly served on August 30, 2013. CP at 8-9. Attorney Antonin Froehling appeared on behalf of Appellants on September 6, 2013 and subsequently withdrew on February 13, 2014. CP at 17. Other than Mr. Froehling's appearance, Appellants were nonresponsive despite IBEW counsel's efforts to contact them. *Id.* As Appellants failed to respond or answer, on April 1, 2014 IBEW moved for and obtained an Order of Entry of Default, followed by entry of Default Judgment on May 15, 2014 in the amount of \$57,141.69. *Id.* at 27-28 and 50-51. In November 2014, IBEW initiated garnishment proceedings in Multnomah County, Oregon where Mr. Rutherford is currently employed. CP at 87.

On May 18, 2015, more than a year after judgment was entered,

Appellants filed a Motion to Vacate the Default Judgment through attorney Chad E. Ahrens of Smith Alling, P.S., alleging, among other things, that the Trial Court lacked subject matter jurisdiction. CP at 53-66. On June 19, 2015, the Court entered the Order to Vacate, stating that “Defendants shall be required to pay Plaintiff \$5,000.00 as terms within 60 days in order for the vacation of the Order of Default Judgment to remain in effect.” CP at 139-140. Appellants did not submit the required payment to IBEW, nor did they make any motion to the Court in the 60 day period. CP at 241-243. Appellants ultimately filed a Motion to Confirm Compliance and Release Funds, and a Motion to Dismiss on January 13, 2016 and January 14, 2016, respectively. CP 146-156 and 170-179. As a result, the Trial Court entered an Order: 1) denying both the Motion to Confirm Compliance and the Motion to Dismiss finding that Appellants had not complied with the terms of the Order to Vacate, 2) finding it maintained subject matter jurisdiction over the issues; and 3) reinstating the Default Judgment. CP at 241-243.

Appellants then filed their Notice of Appeal on January 26, 2015. CP at 246-251.

IV. ARGUMENT

A. The Trial Court properly asserted jurisdiction over the claim.

“In order to be removable to federal court, a claim concerning a plan governed by ERISA must be preempted by ERISA and fall within the scope of ERISA’s enforcement provisions.” *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1171 (9th Cir. 2004) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). ERISA’s enforcement provisions state, in part, that an ERISA plan sponsor may bring a civil action against a participant to enforce plan provisions or obtain other appropriate equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Appellants are correct to point out that federal courts maintain exclusive federal jurisdiction over ERISA § 502(a)(3) claims. 29 U.S.C. 1132(e). However, Appellant’s actions give rise to a common law fraud claim which is not preempted by ERISA and for which relief is legal monetary damages, not equitable relief. As such, courts have recognized the need for remedies outside of ERISA in circumstances such as this. *McDowell* at 1173.

1. The Trial Court maintains jurisdiction to hear and decide whether a claim is preempted by ERISA.

Under ERISA preemption, ERISA’s provisions will generally “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a). However, a determination must then be made as to whether an ERISA claim

preempts a concurrent state law claim, warranting exclusive federal jurisdiction. “[A]n ERISA preemption claim is not one that may be brought only in federal court; rather state courts amply are able to determine whether a state statute or order is preempted by ERISA.” *Delta Dental Plan of Cal. V. Mendoza*, 139 F.3d 1289, 1296-97 (9th Cir. 1998). ERISA nowhere makes federal courts the exclusive forum for deciding ERISA status of a plan or fiduciary and, unless instructed otherwise by Congress, state and federal courts have equal power to decide federal questions. *Int’l Ass’n of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1269 (8th Cir. 1995).

The reference to ERISA in the Complaint is not, in and of itself, sufficient reason to apply ERISA preemption and enforce exclusive federal jurisdiction. *Behavioral Sciences Institute v. Great-West Life*, 84 Wn.App.863, 870-72, 930 P.2d 933 (Wash.App.Div.I 1997). “Rather than basing preemption on the mention of an ERISA plan in the complaint, we choose to apply a holistic approach to ERISA preemption emphasizing congressional intent and the purpose of ERISA.” *Id.* at 872.

IBEW asserted a state law fraud claim against Appellants, which based on the ERISA status of the Plan, also gave rise to an ERISA § 502(a)(3) claim to recoup the benefits wrongfully paid as a result of the fraudulent behavior. CP at 1-5. The Pierce County Superior Court is a

court of general jurisdiction which expressly maintained jurisdiction over the claims asserted. The entry of Default Judgment was within the Court's discretion and was proper.

2. ERISA does not preempt the state law fraud claim.

Appellants argue that simply because IBEW is an ERISA governed plan, preemption should apply. This argument lacks merit.

Under ERISA preemption, ERISA's provisions will generally "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A state law claim is deemed to "relate to" an employee benefit plan when such a claim "has a connection with or reference to such plan." *McDowell* at 1172 (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)). "[T]he Supreme Court has recently admonished that the term [relate to] is be read practically, with an eye toward the action's actual relationship to the subject plan." *Id.* (Emphasis added).

First, to determine whether a common law claim has a "reference to" an ERISA plan, "the focus is whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival." *McDowell* at 1172. The IBEW Plan's status as an ERISA plan does not affect the common law fraud claim

asserted against Appellants. The relief sought is solely to recover wrongfully paid benefits which resulted from Appellants' continued fraudulent representations of married status. IBEW relied on Appellants' false representations which resulted in the damages now sought.

Next, for ERISA preemption to apply, the claim must have a "connection with" an ERISA plan. *McDowell* at 1172. To make this determination, the Ninth Circuit utilizes a relationship test, which addresses the "genuine impact the action has on a relationship governed by ERISA, such as the relationship between the Plan and a participant." *Id.* Again, regardless of the IBEW Plan being governed by ERISA, Appellants committed fraud in order to obtain health benefits. This common law fraud claim exists whether or not the IBEW Plan is otherwise governed by ERISA.

The Ninth Circuit has determined that a breach of contract claim to enforce a plan provision does not have a "connection with" or "reference to" an ERISA plan when "adjudication of [the] claim does not require interpreting the plan or dictate any sort of distribution of benefits." *McDowell* at 1172. Additionally, the Washington State Appellate Court Division I has opined that there is a presumption that ERISA does not preempt a state law fraud claim, and that "preemption does not occur ... if the state law has only a tenuous, remote, or

peripheral connection with covered plans.” *Kahn v. Salerno*, 90 Wn.App. 110, 132-34, 951 P.2d 321 (Div. I 1998).

Similarly here, the Pierce County Superior Court was not required to interpret the Plan or distribute benefits. The Court properly addressed IBEW’s claims against Appellants for which IBEW sought monetary recovery.

3. *The remedies available through the Trial Court are appropriate in this case.*

Under ERISA’s civil enforcement provisions, a civil action may be brought by a fiduciary ...

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate *equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; (29 U.S.C. § 1132(a)(3), Emphasis added).

Under ERISA, relief available to fiduciaries, such as IBEW, the Plan sponsor, for enforcement of plan provisions is limited to equitable relief. ERISA § 502(a)(3), U.S.C. § 1132(a)(3). The relief available under ERISA 502(a)(3) does not extend to legal relief such as ordinary monetary damages from the general assets of the individual. *McDowell* at 1173-74 (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S.

204, 220, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002)) see also *Montanile. Bd. Of Trustees of the Natl. Elevator Indus. Health Benefit Plan*, ___ U.S. ___, 136 S.Ct. 651, 193 L.Ed.2d 556 (2016). While IBEW’s claim involves the Plan’s eligibility provisions based on marital status, the recovery available is monetary relief due to actionable fraud.

The civil enforcement provisions of ERISA offer equitable relief only. As such, the U.S. Supreme Court has acknowledged that other remedies outside of ERISA may be available to fiduciaries, to recoup monies. *McDowell* at 1173. The Trial Court recognized the IBEW Plan’s right to recovery in State Court pursuant to common law remedies, and as such, the Trial Court correctly asserted jurisdiction over this matter and ordered an award of monetary relief.

B. IBEW has properly asserted a common law cause of action for fraud.

Appellants contend that IBEW has failed to satisfy the pleading requirements for a common law fraud claim. CR 9(b) states that “the circumstances constituting fraud or mistake shall be stated with particularity.” Appellants correctly state that the nine elements of fraud are:

- (1) a representation of an existing fact;
- (2) the fact is material;
- (3) the fact is false;
- (4) the defendant knew the fact was false or was

ignorant of its truth; (5) the defendant intended the plaintiff to act on the fact; (6) the plaintiff did not know the fact was false; (7) the plaintiff relied on the truth of the fact; (8) the plaintiff had a right to rely on it and (9) the plaintiff had damages.

Baddeley v. Seek, 138 Wn. App. 333, 338-39, 156 P.3d 959 (2007).

The facts listed in paragraphs 3.1 through 3.12 of the Complaint particularly identify the actions of the Appellants which give rise to the fraud claim. CP at 2-4. The Complaint states: Donald Rutherford enrolled himself and Roberta Crawford in the Plan alleging as if they were married; this was later determined to be false; Donald Rutherford and Roberta Crawford fraudulently induced IBEW to provide medical benefits; IBEW relied on the representations made by Defendants (Appellants); IBEW overpaid medical benefits because of the false representations; and Donald Rutherford and Roberta Crawford were unjustly enriched due to the fraud. *Id.* The circumstances surrounding the common law fraud claim are stated in the Complaint with particularity.

Appellants err in stating that the only cause of action alleged in the Complaint is pursuant to ERISA, not a common law fraud claim. Paragraph 4.1 of the Complaint realleges the allegations contained throughout the Complaint, which include the facts alleging fraud. CP at 4. Additionally, paragraph 4.2 specifically states that the above actions “*rise*

to the level of fraud and/or serious wrongdoing and thus give rise to a restitution claim under 29 U.S.C. § 1132(a)(3).” *Id.* (Emphasis added). As drafted, the Complaint clearly states a cause of action in fraud, and that, secondarily, this fraud gives rise to a claim under ERISA.

Appellants’ argument that IBEW’s requested relief does not reflect a common law fraud claim is without merit. The Complaint clearly states that IBEW seeks the amount of benefits that had been wrongfully paid, in addition to attorneys’ fees and costs pursuant to contract and ERISA, and any further relief the Court deems just and equitable. CP at 4. The Complaint clearly identifies the Appellants’ fraudulent actions and the resulting loss to the Plan, for which IBEW seeks relief. *Id.* at 1-5.

In a holistic review of the Complaint, as Appellants’ suggest this Court take, allegations of fraud and the underlying elements of the claim are stated with particularity. IBEW satisfied the requirements of notice pleading and the heightened standards of CR 9(b).

Furthermore, Appellants lost any ability to assert a CR 12 defense when they failed to timely answer or respond to the Complaint. “In general, if specific defenses are not affirmatively pled, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, they will be deemed to have been waived and may not thereafter be considered as triable issues in the case.” *Rainier Nat. Bank v. Lewis*,

30 Wn.App. 419, 422, 635 P.2d 153 (Wash.App. Div 1 1981) (citing *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 76, 549 P.2d 9 (1976)). The Trial Court's entry of Default Judgment against the Appellants was proper and should stand.

C. The Statute of Limitations does not preclude IBEW's recovery.

Appellants allege that IBEW is precluded from part of the recovery awarded by application of the statute of limitations. Appellants' argument is conclusory. Appellants claim that IBEW had access to information identifying that Appellants were not married and that, through due diligence, should have discovered the fraud prior to 2012. There is no evidence in the record to support this claim.

Fraud is identified as an action limited to three years under RCW 4.16.080(4) which includes:

“[a]n action for relief upon the ground of fraud, the cause of action in such a case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.” (Emphasis Added).

Appellants fraudulently represented that they were married in 2002 in order to obtain medical benefits under the Plan for Ms. Crawford. CP at 3. The Appellants continued to represent that they were married for

ten years despite annual open enrollment where Appellants did not correct their “married” status. This ongoing fraud was only discovered through an additional verification process in March of 2012. CP at 96. On July 31, 2013, IBEW initiated litigation in Pierce County Superior Court against Appellants to recover amounts wrongfully paid on behalf of Ms. Crawford, well within the three-year period of limitation, following the discovery of the fraud. CP at 1-5.

The above notwithstanding, Appellants’ failure to timely answer or respond to the Complaint, precludes their assertion now of a statute of limitation defense. Again, “[i]n general, if specific defenses are not affirmatively pled, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, they will be deemed to have been waived and may not thereafter be considered as triable issues in the case.” *Rainier* at 422.

D. The Trial Court, in its discretion, properly awarded attorney fees under ERISA § 502(g)(1)

Under ERISA 502(g)(1), 29 USC § 1132(g)(1) reasonable attorney fees are available to either party at the discretion of the court. In *Hardt v. Reliance Standard Life insurance, Co.*, the Supreme Court found that an award of attorney fees is appropriate when a party has achieved “some degree of success on the merits.” *Hardt v. Reliance Standard Life*

Insurance, Co., 560 U.S. 242, 244-45, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). The Court found that “a claimant does not satisfy that requirement by achieving trivial success on the merits or a purely procedural victory, but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquiry into the question whether a particular party’s success was substantial or occurred on a central issue.” *Id.*

After the decision in *Hardt*, several courts considered the availability of fees under ERISA 502(g)(1) where a default judgment was obtained. The United States District Court for the Eastern District of North Carolina held “[h]aving determined that plaintiffs are entitled to default judgment on their ERISA claims, the court finds that plaintiffs are eligible to recover their litigation costs pursuant Rule 54(d)(1) of the Federal Rules of Civil Procedure, as well as reasonable attorney fees and other expenses under 29, U.S.C. § 1132(g)(1). *Mineo Corp., v. Rowe*, No. 2:07-CV-57-H (U.S. Dist. Ct., E.D. N.C. March 3, 2011). The United States District Court for the District of Maryland held “[w]here liability is established by default judgment, plaintiffs are eligible to recover their litigation costs as well as reasonable attorneys’ fees and expenses.” *United Food and Commercial Workers Unions and participating Employers Health and Welfare Fund v. Moore*, Civil Action No. AW-12-

00802 (U.S. Dist. Ct. D. Md. May 14, 2012). Furthermore, the Court found that “[u]pon entry of default, the facts set forth in the Fund’s Complaint are deemed admitted, and Moore’s liability established. *Id.*

In this case, upon entry of the Default Judgment against Appellants, the facts were deemed admitted and liability was established. The Court was acting within its discretion when it awarded attorneys’ fees to IBEW.

V. CONCLUSION

There are no grounds to overturn the Pierce County Superior Court entry of Default Judgment against Appellants. IBEW filed the Complaint alleging that the Appellants’ actions constituted those of a common law fraud claim which resulted in a loss to IBEW and therefore gave rise to an ERISA § 502(a)(3) claim. The allegations were comprised of both a state law claim and an ERISA claim. Given the claims asserted, the Court maintained jurisdiction to hear and adjudicate this claim and rightfully entered an Order of Default Judgment and an award of attorney fees and costs. The Appellants did not timely answer or respond to the Complaint and should not now be allowed to use this Court to avoid their liability. The Default Judgment entered by the Trial Court was proper. We respectfully request that the Appellants’ appeal be denied on all of the issues asserted.

Respectfully submitted this 25th day of July, 2016.

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