

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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DENNIS P. RIVERA,

Plaintiff,

-against-

PIONEER FUTURES, INC., as a plan
affording long-term disability benefits,
PIONEER FUTURES, INC., as the plan
administrator of a plan affording long-
term disability benefits, and FIRST UNUM
LIFE INS. CO., as the claims administrator
and underwriter of a plan affording long-
term disability benefits,

Defendants.

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BARBARA R. KAPNICK, J.:

Plaintiff Dennis P. Rivera seeks through this action to challenge a long-term disability income benefit termination decision rendered by defendant First Unum Life Insurance Co. ("First Unum").

Plaintiff contends that he was a 'self-employed' commodities futures trader and floor broker, who, for a period of time, cleared New York Board of Trade and New York Mercantile Exchange trades through defendant Pioneer Futures, Inc., a clearing member firm. There is no dispute that plaintiff purchased long-term disability coverage underwritten by First Unum through an employee benefit plan ("the plan") that defendant Pioneer Futures, Inc. established for its employees and traders. The plan contained a clause that

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affords First Unum, as the claims administrator, discretion to determine a claimant's benefit eligibility.

It appears that plaintiff experienced a fainting episode while buying and selling at the Commodities Exchange in New York on October 17, 2000. A CAT scan later determined that he had a brain tumor. Plaintiff underwent a craniotomy on October 30, 2000 which resulted in the removal of a bony lesion in the left frontal sinus in the area of his brain. He had another fainting episode after the surgery, and a neuro-psychological evaluation in May 2001 documented difficulties with his memory, excessive functioning and processing information.

There is no dispute that Unum made payments of total disability benefits to plaintiff beginning in February 2001, but terminated those benefits by letter dated October 20, 2003, finding that there was insufficient evidence in the record to conclude that plaintiff continued to suffer from neurocognitive/psychological impairments. On or about January 14, 2004, plaintiff filed an administrative appeal, which was denied on or about March 31, 2004.

Plaintiff then brought this action seeking, inter alia, damages for breach of contract (first cause of action), negligent misrepresentation (second cause of action), violation of New York General Business Law § 349 (third cause of action), and pursuant to

the Federal Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq* ("ERISA") (fourth cause of action).¹

Specifically, plaintiff seeks to recover: (i) the sum of all long term disability benefits which plaintiff claims have been wrongfully withheld from him since October 19, 2003, together with pre-judgment interest; (ii) an amount sufficient to compensate him for the damages he sustained as a result of the conduct outlined in the second and third causes of action; and (iii) an award of attorney's fees, costs and disbursements.

Defendant First Unum interposed an Answer containing an affirmative defense alleging that this Court lacks jurisdiction, and that plaintiff has failed to state a claim upon which relief can be granted to the extent that plaintiff asserts a claim seeking to recover any relief other than: (a) monthly benefits allegedly due under the Policy, as to which an administrative determination has previously been made, and as to which plaintiff has exhausted his administrative remedies; or (b) other relief specifically provided for under ERISA.²

¹ Ordinarily, cases involving ERISA are brought in Federal Court and all the applicable case law is from the Federal Courts. Plaintiff, however, chose to commence this action in the State Supreme Court. Defendant First Unum then removed the case to the U.S. District Court, S.D.N.Y. (Baer, Harold J.) who sent it back to this Court for failure to comply with the "rule of unanimity."

² First Unum also asserted a counterclaim asserting that if plaintiff was not entitled to all, or any part of, any disability benefit payments made to him, it is entitled to recover same.

Defendant First Unum now moves by Order to Show Cause for an order: (i) granting summary judgment based solely on the administrative record, as required under ERISA and the discretionary clause of the subject plan, on the ground that its decision was not 'arbitrary and capricious'; (ii) confirming its administrative determination; and (iii) dismissing the complaint.

Plaintiff opposes the motion and cross-moves for an order pursuant to CPLR § 3211(b) dismissing the affirmative defense asserted in defendant First Unum's Answer.

Plaintiff contends that this dispute is not covered under ERISA because he was an independent contractor and not an 'employee' of Pioneer Futures, Inc., the subject plan's sponsor (See, Nationwide Mutual Insur. Co. v. Darden, 503 U.S. 318 [1992];³ see also, Caltagirone v. New York Community Bancorp, 414 F.Supp.2d 188 [E.D.N.Y. 2006]), and seeks discovery and a full adjudication of the merits of this dispute.⁴

³ Nationwide Mutual Insur. Co. v. Darden, *supra*, involved a claim brought under ERISA by a former agent of an insurance company seeking to recover retirement benefits. The Supreme Court remanded the matter for a determination, using traditional agency law criteria for identifying a master-servant relationship, as to whether that individual qualified as an "employee", as used in ERISA.

⁴ Plaintiff also argues that this Court should review the subject benefit termination decision *de novo* because the appeal was not timely decided within 60 days after receipt, as required under the applicable regulations. However, pursuant to 29 C.F.R. § 2560.503-1(i)(1), said period may be extended where, as here, the plan administrator determined that "special circumstances"

Plaintiff further contends, pursuant to a supplemental letter submission dated April 3, 2006, that this Court is not, as defendants argue, limited to a determination of whether defendant Unum's decision was 'arbitrary and capricious', and that a *de novo* review is appropriate since the Insurance Department of the State of New York issued a Circular Letter dated March 27, 2006 that states that the use of 'discretionary clauses', such as the one upon which defendant's assertion of entitlement to 'arbitrary and capricious' review in this case rests, violates New York Insurance Law §§ 3201(c) and 4308(a) because they "encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive, or contrary to law or to the public policy of this state." See, Circular Letter No. 8 (2006).

The New York State Insurance Department subsequently issued Circular Letter No. 14, (2006) on June 29, 2006 which supercedes Circular Letter No. 8. In Circular Letter No. 14, the Department reiterates that it "believes that the use of discretionary clauses are contrary" to applicable provisions of the Insurance Law. However, the Department does not mandate that such clauses in existing policies be given no effect. Rather, the Department indicates that it "is drafting regulations that would prohibit the

required an extension of time for processing of the claim. Specifically, First Unum requested additional information from plaintiff's counsel on or about February 27, 2004. The additional information was apparently provided on or about March 3, 2004, and First Unum rendered a determination of plaintiff's appeal shortly thereafter, on March 31, 2004.

use of discretionary clauses in all new and existing accident and health insurance policies, life insurance policies, annuity contracts and subscriber contracts upon renewal, modification, alteration or amendment on or after the effective date of the regulation (emphasis supplied)."

Defendant, on the other hand, contends that the subject plan is, in fact, governed by ERISA, since the Second Circuit has held "that if a benefits plan is an ERISA-qualified employee benefits plan in some circumstances, then it is an ERISA-qualified employee benefits plan in all circumstances." Arnold v. Lucks, 392 F.3d 512, 519 (2nd Cir. 2004); see also, Yates v. Hendon, 124 S.Ct. 1330 (2004), in which the Supreme Court held that the sole shareholder and president of a professional corporation could qualify as a "participant" in an ERISA plan, even though he was not a traditional "employee", but rather the employer who established the plan, so long as the plan covered one or more "common law employees" other than said individual and his wife.

Defendant further argues that the application of the federal ERISA statute preempts State law regarding disputes over plan benefits (see, Mertens v. Hewitt Associates, 508 U.S. 248 [1993]; Pilot Life Insur. Co. v. Dedeaux, 481 U.S. 41 [1987]; see also, 29 U.S.C. § 1132 which provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan").

Moreover, defendant argues that under ERISA, this Court may consider only the administrative record on which First Unum based its determination (see, Kinstler v. First Reliance Standard Life Insur. Co., 181 F.3d 243 [2nd Cir. 1999]), and that there is no need for any discovery in this case.

Plaintiff alternatively argues that even if ERISA controls this dispute, this Court should find that the administrative determination was 'arbitrary and capricious'.

Defendant, however, contends that its determination was not 'arbitrary and capricious' and that there was no abuse of discretion because plaintiff failed to meet his burden of demonstrating a continued disability.

Based on the papers submitted, including plaintiff's supplemental submission dated April 3, 2006 and defendant First Unum's supplemental submission dated April 13, 2006, and the oral argument held on the record on February 9, 2005 and May 24, 2006, this Court finds that the subject dispute is governed by ERISA, since it involves a claim by a beneficiary of a benefits plan which is an ERISA-qualified employee benefits plan in at least some circumstances. Arnold v. Lucks, supra.

Although plaintiff argues that "ERISA preempts State law only when a party with standing to sue under ERISA makes a claim" (Ritter v. Massachusetts Casualty Insur. Co., 786 N.E.2d 817, 821

[Sup. Ct. of Mass., Middlesex Co. 2003]), a private party has standing to sue to recover benefits under ERISA if he, like plaintiff, is a "participant or beneficiary" (29 U.S.C. § 1132(a)(1)(B) of an employee benefit plan ((Ritter v. Massachusetts Casualty Insur. Co., supra at 821)).

In addition, this Court finds that plaintiff has failed to meet his heavy burden of showing that defendant First Unum acted arbitrarily or capriciously or that it otherwise abused its discretion under the terms of the plan by terminating plaintiff's benefits.

Accordingly, this Court is constrained to grant defendant's motion for summary judgment and to deny plaintiff's cross-motion to dismiss defendant's affirmative defense.

The administrative determination is, therefore, confirmed, and the Clerk may enter judgment dismissing plaintiff's complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: August 31, 2006



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
SEP - 7 2006
COUNTY CLERK'S OFFICE
NEW YORK