

# **VELTO v. DEWEY ELECTRONICS CORPORATION**

DOCKET No. BER-L-5184-11

## **RIDER TO THE ORDER DATED November 4, 2011**

The defendant, Dewey Electronics Corporation (“Dewey”), filed the instant Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to R. 4:6-2(a) arguing that Plaintiff’s claims against Defendant for breach of contract and negligence, which are related to Plaintiff’s long-term disability benefits, is preempted by the doctrine of preemption pursuant to § 514(a) of ERISA.

In response, plaintiff Thom Velto (“Velto” or the “Plaintiff”) asserts that this Court has the authority to hear the underlying action and state law claims. While the Plaintiff concedes that the Defendant’s Long Term Disability Plan is an ERISA plan, he alleges that this Court does have jurisdiction to hear the state law claims for negligence and breach of contract because they are not “related to” or “connected with” an ERISA Plan. Rather, the breach of contract and negligence claims against Defendant arise out of the mere existence of the Plan, and will not require the assessment of Plaintiff’s rights arising under an ERISA plan.

The facts pertinent to the instant action are as follows. Plaintiff Thom Velto (“Velto” or the “Plaintiff”) was an employee of Dewey Electronics Company (“Dewey” or the “Defendant”), and accordingly was a participant of Dewey’s Long Term Disability Plan (the “Plan”) while he was employed. Although Dewey was the sponsor of the Plan, it did not serve as a claims administrator or claims fiduciary under the Plan, and had no authority in deciding to grant or deny benefits under the Plan. The Plan was administered

at different times by Metropolitan Life Insurance Company (“MetLife”) and Reliance Standard Life Insurance Company (“Reliance”).

In May 2006, Plaintiff’s employment with the company terminated. In or about May 2006, Plaintiff made an application for long term disability benefits to both of the Plan’s administrators, which were denied purportedly because Plaintiff did not meet the Plan’s requirements.

After the denial of these claims, Plaintiff filed an ERISA lawsuit in the United States District Court for the District of New Jersey. Ultimately, Plaintiff settled his ERISA claims for long term disability insurance benefits with both Met Life and Reliance. Therefore, on October 3, 2011, the federal ERISA lawsuits were dismissed.

On or about June 15, 2011, Velto filed the instant action against Dewey in the Superior Court of New Jersey, Bergen County. The Complaint alleges two common law causes of action against Dewey: breach of contract and negligence. The First Count alleges that Dewey breached its contractual obligation to provide long term disability insurance benefits to Velto pursuant to the Plan. The Second Count alleges that Dewey was negligent in failing to maintain long-term disability insurance coverage for Velto pursuant to the Plan.

Pursuant to R. 4:6-2(a), lack of subject matter jurisdiction is a non-waivable defense that can be raised at any time. See Macysyn v. Hensler, 329 N.J. Super. 476, 481 (App. Div. 2000).

New Jersey Courts have recognized ERISA preemption as a basis for a motion to dismiss under R. 4:6-2(a) for lack of subject matter jurisdiction. The New Jersey Supreme Court recognized that ERISA contains a sweeping preemption provision such



that ERISA preempts “any and all State laws in so far as they may now or hereafter relate to any employee benefit plan [covered by ERISA].” Board of Trustees of Operating Engineers Local 825 v. LBS Construction Co., 148 N.J. 561, 566 (1997) (quoting 29 U.S.C. § 1144(a)); § 514(a). The Supreme Court further noted that such preemption gives “full effect to ERISA’s purposes.” LBS Construction Co., 148 N.J. at 566-67 (citing Shaw v. Delta Airlines, 463 U.S. 85 (1983)).

When determining whether a matter is preempted by ERISA, a reviewing court must first establish whether the plan at issue in the underlying suit is covered by ERISA. Lichtenstein v. Personal Care Insurance, 2010 WL 4923463 (D.N.J. 2010). Second, if it is established that the plan at issue is covered by ERISA, a reviewing court must then determine whether the claims in the underlying lawsuit “relate to” or have a “connection with” the Plan, in which case the lawsuit may be preempted by § 514 of ERISA. Id. at \*3, citing Alson v. Atlantic Electric Co., 962 F. Supp. 616, 622 (D.N.J. 1997); LBS Construction Co., 148 N.J. at 566 (quoting Shaw v. Delta Airlines, 463 U.S. 85, 96 (1983)).

The key determination for purposes of complete preemption is whether Plaintiff’s claim challenges the administration of or eligibility for benefits, which falls within the scope of §502(a) and may be preempted, or whether the claim is properly the subject of state action.

Here, the Court finds that Plaintiff’s two claims against Dewey are not subject to ERISA preemption. First, while Plaintiff concedes that the Plan is an ERISA plan, whether or not Plaintiff’s claims clearly have a “connection with” or “relate to” the Plan is less clear. Neither of Plaintiff’s state law claims, breach of contract and negligence,

are related to the administrative responsibilities of an HMO or an insurance company, which would be expressly preempted. Count One of the Complaint alleges breach of contract in that Defendant failed to provide long-term disability insurance in breach of its employment contract to do so with Plaintiff, and Count Two alleges negligence in that Defendant failed to properly advise Plaintiff that a change in insurance carriers would affect his eligibility for coverage.

However, Plaintiff's requested relief appears to invoke ERISA preemption because Plaintiff ultimately seeks that Dewey, as the sponsor of the Plan as defined in ERISA, to pay disability benefits to Plaintiff pursuant to the terms of the Plan and pursuant to its alleged contractual duties. Therefore, the liability Plaintiff seeks to impose on Defendant arises out of the fact that Velto was not provided benefits pursuant to the Plan.

Both state and federal courts in New Jersey have ruled that claims somewhat similar to those brought by the Plaintiff are preempted by ERISA. In Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 278 (3d Cir. 2011), the Third Circuit held that "suits against insurance companies for denial of benefits, even when the claim is couched in terms of common law negligence or breach of contract are preempted by § 514(a)." Id. In Lichtenstein, the District Court found that Plaintiff's claims against Defendant were preempted by ERISA because the claims "could not exist if there were no health insurance plan" and thus were "related to" the Plan such that preemption applied. Lichtenstein, 2010 WL 4923463 (D.N.J. Nov. 29, 2010).

Both Lichtenstein and Pryzbowski are distinguishable from the instant matter because here Plaintiff is suing his former employer, which never served as an



administrator of the Plan, for breach of contract and negligence. While both claims exist only because of an ERISA plan, they are grounded in legal duties independent of Dewey's Plan and ERISA. Plaintiff is not asserting that Dewey's liability directly derives from its Plan, but rather that Dewey's liabilities arise from separate promises which merely reference the Plan. Establishing whether Defendant is liable under Plaintiff's common law claims will not directly implicate the propriety of an administrator's or employer's determination of benefits under the Plan. As such, ERISA's preemption provisions are not implicated. See Stevenson v. Bank of New York Co., Inc., 609 F.3d 56, 2010 WL 2365679 (2d Cir. 2010) (holding that Plaintiff's claims did not support a finding of ERISA preemption, as the claims did not derive from the administration of Defendant's established benefit plan, but rather as arising from separate promises referencing the plans).

In Aetna Health Inc. v. Srinivasin, 2010 WL 5392697 (D.N.J. Dec. 22, 2010), the District Court held that where the Plaintiff's claims were grounded in legal duties independent of ERISA, preemption did not apply. There Plaintiff sued a cardiologist to whom it had paid benefits, claiming insurance fraud under the New Jersey Insurance Fraud Prevention Act, common law fraud, misrepresentation, tortious interference and violations of the New Jersey Board of Medical Examiners' regulations. The cardiologist removed the case to federal court on the grounds of ERISA preemption; Aetna moved for remand. Citing Horizon Blue Cross Blue Shield of New Jersey v. East Brunswick Surgery Center, 623 F. Supp. 2d 568 (D.N.J. 2009), the District Court remanded the case, stating that preemption would exist only if the claims could have been brought under section 502 of ERISA and no other legal duty supported the claims. Although Aetna's

claims existed only because of an ERISA plan, they were grounded in legal duties independent of ERISA. Id. Therefore, ERISA preemption did not apply. Similarly, because Plaintiff's claims are independent from an assessment of whether he is entitled to benefits under the Plan, ERISA preemption does not apply.

In conclusion, for the aforementioned reasons, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

