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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TRUSTEES OF THE BRICKLAYERS &
ALLIED CRAFTWORKERS LOCAL 13
DEFINED CONTRIBUTION PENSION
TRUST FOR SOUTHERN NEVADA, *et*
al.,

Plaintiffs,

v.

COMMERCIAL UNION TILE & STONE,
INC., *et al.*,

Defendants.

Case No. 2:15-cv-02129-APG-NJK

ORDER

12 The plaintiffs filed a motion for summary judgment against defendants Commercial Union
13 Tile & Stone, Inc.; Vegas Affordable Stone and Tile, Inc.; and Jonathan William Canja. ECF No.
14 54. With respect to defendant Canja, the plaintiffs argued that unpaid contributions are trust
15 assets when the governing trust agreements identify them as such, and Canja is an ERISA
16 fiduciary with respect to those assets because he controlled whether Commercial Union made the
17 due and owing contributions. They asserted Canja breached his fiduciary duties by not making
18 the required contributions and instead paying his own personal expenses out of Commercial
19 Union accounts.

20 I ruled that of the six plaintiff trust funds, only one's declaration contains language similar
21 to that which courts have found clearly and expressly identifies unpaid contributions as plan
22 assets. Consequently, I ruled in favor of the Bricklayers & Allied Craftworkers Local 13
23 Vacation Fund (Local 13 Vacation Fund) against Canja. However, as to the other funds, the
24 plaintiffs either did not provide the trust declaration or the provided trust declarations' language
25 was "facially ambiguous and not anchored by the clear, shared intent of the parties." ECF No. 84
26 at 7 (quotation omitted). Consequently, I denied summary judgment against Canja with respect to
27 the other plaintiff funds. I also ordered that the plaintiffs (other than the Local 13 Vacation Fund)

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1 show cause why judgment should not be entered in favor of Canja. Only two of the plans
2 responded to argue that judgment should not be entered against them: the Bricklayers & Allied
3 Craftworkers Local 13 Health Benefits Fund and the International Masonry Institute. These two
4 funds argue that they previously had obtained a default judgment against Canja, so he knew the
5 funds interpreted the plans to impose fiduciary obligations over unpaid contributions. They assert
6 that Canja thereafter signed the collective bargaining agreement, which provided that Canja
7 agreed to the trustees' interpretations of the governing documents. The trusts thus argue Canja
8 knowingly agreed to be a fiduciary over unpaid contributions with respect to these two plans.

9 Additionally, the Local 13 Vacation Fund moves for attorney's fees and costs against
10 Canja under 29 U.S.C. § 1132(g)(1). The Bricklayers & Allied Craftworkers Local 13 Health
11 Benefits Fund and the International Masonry Institute also seek fees and costs against Canja if I
12 grant judgment in their favor.

13 **A. Trust Funds That Did Not Respond**

14 The following trust funds did not respond to my order to show cause: the Bricklayers &
15 Allied Craftworkers Local 13 Defined Contribution Pension Trust for Southern Nevada; the
16 Bricklayers & Trowel Trades International Pension Fund; and the Bricklayers & Trowel Trades
17 International Health Fund. I therefore grant judgment in favor of Canja against these plaintiffs.

18 **B. Local 13 Health Benefits Fund and International Masonry Institute**

19 The Bricklayers & Allied Craftworkers Local 13 Health Benefits Fund and the
20 International Masonry Institute have presented evidence raising an issue of fact that precludes the
21 entry of judgment in Canja's favor. These two funds have presented evidence that Canja agreed
22 to subject himself to the possibility of fiduciary liability because he knew how the funds
23 interpreted their plans, he knew a court had interpreted the plans to allow for fiduciary liability to
24 be imposed, and he nevertheless agreed to the collective bargaining agreement, which bound him
25 to the trustees' interpretations of their plans. However, because the declarations are ambiguous,
26 and because the prior court order resulted from a default judgment, there remain questions of fact
27 about the parties' intentions regarding Canja's fiduciary status, particularly because ambiguous
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1 contracts are construed against the drafter. *Anvui, LLC v. G.L. Dragon, LLC*, 163 P.3d 405, 407
2 (Nev. 2007) (stating contractual ambiguities are construed against the drafter and the “parties’
3 intentions regarding a contractual provision present a question of fact”). Consequently, I will not
4 grant judgment in Canja’s favor against these two funds, but I also will not grant judgment in
5 these funds’ favor.

6 **C. Attorney’s Fees Against Canja for Local 13 Vacation Fund**

7 The Local 13 Vacation Fund prevailed against Canja on summary judgment. It now seeks
8 attorney’s fees and costs under 29 U.S.C. § 1132(g)(1). There was no request for fees against
9 Canja under § 1132(g)(1) in the original motion for summary judgment. Instead, the funds sought
10 fees under § 1132(g)(2). *See* ECF No. 54.

11 Final judgment has not been entered in this case. Thus, the request for fees under
12 §1132(g)(1) is not untimely. *See* LR 54-14(a).

13 Section 1132(g)(1) provides that a court may, in its discretion, award reasonable
14 attorney’s fees and costs. To be eligible for fees, the requesting party must have “achieved some
15 degree of success on the merits.” *Simonia v. Glendale Nissan/Infiniti Disability Plan*, 608 F.3d
16 1118, 1120 (9th Cir. 2010) (quotation omitted). If so, then I must consider the so-called
17 “*Hummell*” factors in exercising my discretion under § 1132(g)(1). *Id.* at 1121. The *Hummel*
18 factors include:

- 19 (1) the degree of the opposing parties’ culpability or bad faith; (2) the ability of the
20 opposing parties to satisfy an award of fees; (3) whether an award of fees against
21 the opposing parties would deter others from acting under similar circumstances;
22 (4) whether the parties requesting fees sought to benefit all participants and
beneficiaries of an ERISA plan or to resolve a significant legal question regarding
ERISA; and (5) the relative merits of the parties’ positions.

23 *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980).

24 The Local 13 Vacation Fund prevailed on summary judgment. It thus achieved success
25 and is eligible to obtain a fee award. The *Hummel* factors support a fee award. It is unclear
26 whether Canja can satisfy a fee award, although the trust expresses the belief that he can do so.

1 ECF No. 90 at 5. I view this factor as neutral, as I am without any information to evaluate his
2 ability to pay.

3 All of the other factors support a fee award. Canja is culpable because, as stated in my
4 prior order, he paid personal expenses out of Commercial Union accounts but did not direct
5 contributions to the fund even though he could have done so. ECF No. 84 at 8. A fee award may
6 deter other fund fiduciaries from not making required contributions. The Local 13 Vacation Fund
7 sought to benefit all plan participants whose contributions went unpaid. Finally, the fund
8 obtained judgment in its favor and Canja did not oppose the summary judgment motion. Because
9 all but one of the *Hummel* factors favor a fee award, I grant Local 13 Vacation Fund's request for
10 attorney's fees and costs against Canja. Local 13 Vacation Fund has proposed a means of
11 apportioning the fees and costs based on the percentage of contributions due to the fund vis-à-vis
12 the other plaintiff funds. I find that allocation reasonable and I direct Local 13 Vacation Fund to
13 prepare a proposed form of judgment.

14 **D. Conclusion**

15 IT IS THEREFORE ORDERED that the clerk of court shall enter judgment in favor of
16 defendant Jonathan William Canja and against plaintiffs Bricklayers & Allied Craftworkers Local
17 13 Defined Contribution Pension Trust for Southern Nevada; Bricklayers & Trowel Trades
18 International Pension Fund; and Bricklayers & Trowel Trades International Health Fund.

19 IT IS FURTHER ORDERED that issues of fact remain as between plaintiffs Bricklayers
20 & Allied Craftworkers Local 13 Health Benefits Fund and the International Masonry Institute and
21 defendant Jonathan William Canja. A proposed joint pretrial order regarding the remaining
22 disputes is due 30 days from the date of this order.

23 IT IS FURTHER ORDERED that on or before September 29, 2017, plaintiff Bricklayers
24 & Allied Craftworkers Local 13 Vacation Fund shall file a proposed form of judgment on
25 attorney's fees and costs against defendant Jonathan William Canja.

26 DATED this 20th day of September, 2017.

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ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE