C/M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARILYN DeMARCO,	:	**DECISION AND ORDER**
Plaintiff,	:	12 Civ. 4313 (BMC)
- against -	:	
HARTFORD LIFE AND ACCIDENT INSURANCE CO. , c/o Hartford Financial Services Group Inc.,	:	
Defendant.	:	

COGAN, District Judge.

This case is before me on plaintiff's objections to the Report and Recommendation of Magistrate Judge Roanne Mann, dated April 8, 2014, in which she recommended denial of plaintiff's motion under Rule 60(b) to vacate this Court's judgment of dismissal. Familiarity with the R&R is assumed, but to summarize, Judge Mann recommended denial of the motion because the case was time barred on the date it was commenced.

In her objection, plaintiff asserts that Judge Mann was wrong because plaintiff is entitled to equitable tolling of the statute of limitations. There are two main problems with plaintiff's objection: (1) she has waived the equitable tolling argument because she never raised it before the R&R was issued and only raised it for the first time in her objections to the R&R; and (2) even if I were to consider her equitable tolling argument, she has not met the requirements for application of that doctrine.

As to the first point, it is well established that "a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could

have been raised before the magistrate but were not." Fisher v. O'Brien, No. 09 Civ. 42, 2010 WL 1286365, at *1 (E.D.N.Y. Mar. 30, 2010). When a dispositive motion is before a magistrate judge, the parties must present all of their arguments before the magistrate judge, "and cannot later add new arguments at subsequent stages of the proceedings without a compelling reason." Kennedy v. Adamo, No. 02 Civ. 1776, 2006 WL 3704784, at *1 (E.D.N.Y. Sept. 1, 2006) (internal quotation marks omitted). This applies even if the plaintiff is *pro se*. See Robinson v. Keane, No. 92 Civ. 6090, 1999 WL 459811, at *4 (S.D.N.Y. June 29, 1999); see also Pizarro v. Gomprecht, No. 10 Civ. 4803, 2013 WL 990997, at *2 (E.D.N.Y. Mar. 13, 2013). Therefore, plaintiff's equitable tolling argument is not properly before the Court.

However, even if plaintiff had not waived her equitable tolling argument, she has not met the requirements for its application. Although district courts in this Circuit have applied equitable tolling to ERISA cases, see MacLennan v. Provident Life & Acc. Ins. Co., 676 F. Supp. 2d 57, 62 (D. Conn. 2009) (citing cases), it is still considered to be "an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances." Veltri v. Building Serv. 32B-J Pension Fund, 393 F.3d 318, 322 (2d Cir. 2004) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)). To warrant equitable tolling, plaintiff "must demonstrate '(1) that [s]he has been pursuing her rights diligently, and (2) that some extraordinary circumstance stood in the way' and prevented timely filing." Viti v. Guardian Life Ins. Co. of America, 817 F. Supp. 2d 214, 227 (S.D.N.Y. Aug. 31, 2011) (quoting Lawrence v. Florida, 549 U.S. 327, 336 (2007)). As to the first requirement, plaintiff hasn't made any showing that she was pursuing her rights under ERISA during the time period in which she was supposed to file this action.

For equitable tolling to apply, plaintiff would have to show that she was incapacitated for the entire length of the limitations period and was unable to appeal the denial of benefits. MacLennan, 676 F. Supp. 2d at 63; see also Viti, 817 F. Supp. 2d at 229. The time period in which plaintiff was required to file her appeal was between January 3, 2007 (when she was required to file a proof of loss) and January 4, 2010. However, during this time, plaintiff applied for and received Social Security benefits (in late 2008) and maintained communication with Hartford, writing to defendant in August 2008 that she felt "abused by" defendant and that she intended to "file a complaint with the attorney general, the district attorney's office, and the Better Business Bureau against the Hartford and against JP Morgan Chase Human Resources for its cruel and abusive behavior against [her]." As one court has noted, a plaintiff's filing of an application for benefits (such as Social Security benefits) "demonstrates that he was able . . . to pursue his legal rights – which is enough, in and of itself, to disentitle him to equitable tolling. It is well settled that if the plaintiff was actually taking steps to protect his rights, even if he was mentally ill . . . he cannot receive any benefit from equitable tolling." Viti, 817 F. Supp. 2d at 230 (citing cases). The same is true here; plaintiff's own exhibits demonstrate that she was able to pursue her rights during the 3-year limitations period, and therefore she is not entitled to equitable tolling.

Additionally, for equitable tolling to apply, plaintiff must present "particularized" evidence of her mental illness. See Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506, 513 (2d Cir. 2002). This means that she must provide a detailed description of how her condition adversely affected her ability to pursue her rights. See Viti, 817 F. Supp. 2d at 228-29. Here, she has only stated that she "was in a mental illness phase" and that she had been

previously misdiagnosed; she has not stated any reason why this prevented her from filing this action in a timely manner.

Plaintiff claims that defendant "deceived" her by not informing her of her rights. She claims she didn't have a copy of the Plan, and that she "was not able to discern moving for ERISA." But defendant has shown that it sent to plaintiff two letters on October 31, 2008 and August 2, 2009 that explicitly told plaintiff that ERISA "gives you the right to appeal our decision and receive a full and fair review" and "[y]ou may bring a civil action under Section 502(a) of [ERISA]." This defeats plaintiff's argument that defendant attempted to deceive her.

I have considered plaintiff's remaining arguments and find them without merit. The R&R [25] is ADOPTED in full, and plaintiff's motion [8] to vacate the judgment is DENIED.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
July 10, 2014