

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**TRUSTEES OF THE LABORERS'
DISTRICT COUNCIL AND
CONTRACTORS' PENSION FUND,**

Plaintiff,

v.

JERRY L. MASSIE,

Defendant.

Case No. 2:14-cv-102

Judge Peter C. Economus

MEMORANDUM OPINION AND ORDER

This matter is before the Court for consideration of United States' Magistrate Judge King's Report and Recommendation ("R & R") (ECF No. 9) to deny Plaintiffs', Trustees of the Laborers' District Council and Contractors' Pension Fund of Ohio ("Plaintiffs"), motion for default judgment. Plaintiffs filed an Objection (ECF No. 10) to the R & R. For the reasons that follow, the Court hereby **ORDERS** that an evidentiary hearing be held before deciding the pending Objection.

I. Background

A. Procedural History

Plaintiffs administer a multiemployer pension fund pursuant to a trust agreement ("The Trust Agreement"). On May 29, 2012, Plaintiffs filed a separate action in this Court against Excel Contracting, Inc. ("Excel"), and I Construct, LLC ("I Construct"). *Trustees of the Laborers' District Council and Contractors' Pension Fund of Ohio v. Excel Contracting, Inc. et al.*, No. 2:12-cv-00462 (S.D. Ohio) (hereinafter "2:12-cv-00462"). In 2:12-cv-00462, Plaintiffs alleged violations of the Trust Agreement and the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments of 1980 ("MPPA"), 29 U.S.C. § 1001, *et seq.* Specifically, Plaintiffs alleged that Excel withdrew from

the multiemployer pension fund and was thereby subject to withdrawal liability pursuant to the terms of the Trust Agreement and the MPPA amendments to ERISA.

Plaintiffs moved for summary judgment in that case. On April 3, 2014, Magistrate Judge King recommended that Plaintiffs' Motion for Summary Judgment be granted and that Plaintiffs be awarded a total of \$273,837.44 in withdrawal liability, interest, liquidated damages, attorneys' fees, and costs for the period of January 8, 2012 until January 7, 2014. (2:12-cv-00462, *Report and Recommendation*, ECF No. 42.) On May 20, 2014, the undersigned issued an Order adopting the Magistrate Judge's R & R. (2:12-cv-00462, ECF No. 45.)

While 2:12-cv-00462 was proceeding, Plaintiffs filed this action on January 28, 2014 against Defendant Jerry L. Massie ("Defendant"). In this case, Plaintiffs allege that Defendant, an individual, owned one hundred percent of the outstanding shares of Excel and one hundred percent of the membership shares of I Construct. (ECF No. 1.) Plaintiffs also allege that Excel executed a collective bargaining agreement that bound Excel to the terms of the Trust Agreement and required Excel to submit contributions to the pension fund administered by plaintiffs. *Id.* Plaintiffs further asserted that Excel withdrew from the pension plan and thereby incurred withdrawal liability.

After filing the Complaint in this action, Plaintiffs executed service of process pursuant to S.D. Ohio Civ. R. 4.2. Defendant failed to respond to the Complaint. Thereafter, on March 16, 2014, the Clerk entered default pursuant to Rule 55(b)(1) of the Federal Rules of Civil Procedure. (ECF No. 7.) Plaintiff then filed the Motion for Default Judgment pursuant to Fed. R. Civ. P. 55(b)(2).

B. Magistrate Judge King's Report and Recommendation

Magistrate Judge King issued an R & R, recommending that Plaintiffs Motion for Default Judgment be denied and that this case be dismissed. (ECF No. 9.) In the R & R, the Magistrate

Judge found that Plaintiffs' Complaint failed to allege facts establishing Defendant's individual liability.

In the Complaint, Plaintiffs allege that Defendant "is and was, at all times a member of the same controlled group as Excel within the meaning of the Internal Revenue Code and ERISA, 29 U.S.C. §§ 1301(b)(1)." Plaintiffs assert that as the member of a common controlled group, Defendant can be held individually liable.

Magistrate Judge King noted that although common control permits related business entities to be held liable as a single employer, common control cannot be used against the individual defendants absent allegations that the corporate veil should be pierced or that employer was alter ego of the defendant. *See Board of Trustees of Plumbers, Pipe Fitters, Mechanical Equipment Service, Local Union 392 Pension Fund v. Airstream Mechanical*, No. 1:08cv901, 2010 WL 3656036, at * 6 (S.D. Ohio Aug. 11, 2010) ("Because the MPPAA refers only to 'trades or businesses' under common control, individual shareholders or officers are generally not liable for withdrawal liability under the MPPAA unless they can be considered sole proprietorships or can be reached through an alter ego or veil piercing theory."); *Id.* ("Although the 'common control' theory permits business entities to be held liable as a single 'employer,' the same theory cannot be used against the individual defendants."). The Magistrate Judge found that Plaintiffs allege no facts that would pierce the corporate veil and that would establish Defendant's individual liability. (EFC No. 9 at 7.)

Plaintiffs filed an Objection to the R & R. (ECF No. 10.)

II. Standard of Review

A district court must review *de novo* those portions of a magistrate judge's report to which a specific objection has been made, and may accept, reject, or modify any of the

magistrate judge's findings or recommendations. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). "However, the district court need not provide *de novo* review where the objections are . . . general. The parties have the duty to pinpoint those portions of the magistrate's report that the district court must specially consider." *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (internal quotation marks and citations omitted). "The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious." *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

III. Analysis

A. Plaintiff's Objections

1. *Plaintiffs Object to the Magistrate Judge's Determination that Plaintiffs did not Support their Motion with a Sworn Statement.*

Plaintiffs have remedied their failure to file the appropriate sworn statement for default judgment. Therefore, the issue is moot, and the Court sustains Plaintiffs' first objection.

2. *Plaintiffs Object to the Magistrate Judge's Recommendation to Dismiss this Case Because Plaintiffs Did Not Sufficiently Plead Facts that Could Render Defendant Liable for Damages in His Individual Capacity*

Plaintiffs argue that Defendant can be held liable under common control theory. Plaintiffs agree with the Magistrate Judge that they offered to no allegations or argument regarding piercing the corporate veil. (ECF No. 10.) Instead, Plaintiffs assert a different theory altogether, *i.e.*, Plaintiffs assert that Defendant can be held individually liable because he operated a sole proprietorship in a controlled group with Excel Contracting, Inc., and I Construct LLC.

The Court notes that Plaintiffs did not fully articulate this argument in the Complaint. In the Complaint, Plaintiffs asserted the following:

14. Defendant Jerry Massie, at all times relevant, owned 100% of the outstanding shares of Excel in 2010 and 2011.

15. Defendant Jerry Massie, at all times relevant, was the imputed owner of 100% of the membership shares of i Construct LLC in 2010.

16. Defendant Jerry Massie, in 2010, was a landlord of, and collected rent from Excel in connection with, Excel's headquarters at 356 and 360 Conley Drive in Enon, Ohio.

17. Defendant Jerry Massie, in 2010, was a landlord of, and collected rent from i Construct LLC in connection with, I Construct LLC's headquarters at 356 and 360 Conley Drive in Enon, Ohio.

18. In 2010, Defendant Jerry Massie was a landlord and collected building rent from i Construct LLC in the amount of 10,000.00.

19. In 2010, Defendant Jerry Massie was a landlord and collected building rent from Excel.

20. In 2011, Defendant Jerry Massie was a landlord and collected building and database rent from i Construct LLC in the amount of 30,000.00.

21. On or before December 31, 2010, Excel permanently ceased to have an obligation to contribute to the Pension Fund and permanently ceased making contributions to the Pension Fund, thereby effectuating a complete withdrawal from the Pension Fund, as defined in Sections 4203 and 4041a of ERISA, 29 U.S.C. §§ 1383 and 1341a.

22. At the time of Excel's complete withdrawal from the Pension Fund, Defendant Jerry Massie, in his individual capacity, was engaged in a trade or business of renting property.

(ECF No. 1 at 4.) Plaintiffs' Complaint is not the model of clarity. Plaintiffs never used the word sole proprietorship. Moreover, Plaintiffs did not clearly allege that Defendant operated the specific type of unincorporated business that allows for individual liability under the MPAA. Plaintiffs asserted only that Defendant was engaged in a trade or business of renting property. Given the allegations in the Complaint, the Magistrate Judge could not fully address whether Defendant is liable as a sole proprietor.

Plaintiffs Objection, however, does state that Defendant operated a sole proprietorship. In the objection Plaintiffs argue the following:

Defendant Massie was a landlord at the time of Excel's complete withdrawal. Because being a landlord to Excel and I Construct is considered a trade or business, *Messina Prods., LLC*, 706 F.3d at 882-84; *Marvin Hayes Lines, Inc.*, No. 3-84-0906, 1989 U.S. Dist. LEXIS 7888; *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 537-38; *Posnik*, No. 87CV72155DT, 1988 U.S. Dist. LEXIS 17900, Defendant Jerry Massie, who is treated as 100% owner of the sole proprietorship under 29 U.S.C. § 1301(b)(1) and associated regulations, was in a controlled group of employers with Excel.

Plaintiffs argue that Defendant, through rental activities, acted as a sole proprietor. Plaintiffs assert that Defendant, as a sole proprietor, is a member of the same control group found responsible for withdrawal liability in 2:12-cv-00462. Plaintiffs conclude that Defendant is jointly and individually liable through a common control theory.

Plaintiffs' argument is well taken. "All businesses under common control are treated as a single employer for purposes of collecting withdrawal liability, and each is liable for the withdrawal liability of another." *Airstream Mech.*, 2010 WL 3656036, at *9. "To impose withdrawal liability on an organization other than the one obligated to the Fund, two conditions must be satisfied: 1) the organization must be under 'common control' with the obligated organization, and 2) the organization must be a trade or business." *Bd. of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 854, 858 (E.D. Mich. 2010) (quoting *McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 577 (7th Cir.2007)). "If common control does exist among a group of trades or businesses, the commonly controlled group of trades or businesses is treated as a single employer [and] . . . each trade or business would possess joint and several liability for withdrawal liability." *Cent. States, Se. & Sw. Areas Pension Fund v. Bay*, 684 F. Supp. 483, 485 (E. D. Mich. 1988).

In the instant action, Plaintiffs allege that Defendant operated a sole proprietorship leasing arrangement. "A sole proprietorship leasing arrangement clearly constitutes a trade or business includable in a controlled group for purposes of withdrawal liability." *Bay*, 684 F. Supp.

at 485; see, e.g., *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. LaFrenz*, 837 F.2d 892 (9th Cir. 1988); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009 (9th Cir. 1987); *United Food and Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633 (D. N.J. 1986). Therefore, if Defendant operated a sole proprietorship leasing arrangement, as alleged, he can be held individually liable.

B. Evidentiary Hearing

Although Plaintiff correctly states that Defendant can be held individually liable as a sole proprietor. Plaintiffs do not present any evidence that Defendant actually acted as a landlord and collected rent from Excel and I Construct. Without evidence, this Court, in good conscience, cannot grant default judgment. The Court simply does not have sufficient information to discern whether Defendant acted as a sole proprietor. The Court looks to Rule 55(b)(2) of the Federal Rules of Civil Procedure for guidance. Rule 55(b)(2) provides the following:

The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

Fed. R. Civ. P. 55. Therefore, the Court will hold an evidentiary hearing to determine whether Defendant actually operated as a sole proprietor.

IV. Conclusion

For the reasons discussed above, the Court hereby **ORDERS** that an evidentiary hearing be held Tuesday January 6, 2015 at 11:00 a.m., to determine whether Defendant acted as a sole

proprietor through leasing activities.

IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE