UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Estate of Amanda G. Criswell, by her Personal Representative, Judy Criswell, Plaintiff, v. Aetna Life Insurance Company, Defendant.	Civil Action No.: 4:15-cv-04831-RBH **ORDER**

This matter is before the Court on Defendant Aetna Life Insurance Company's ("Aetna") [ECF No. 17] motion to dismiss for failure to state a claim and to strike certain damages and Plaintiff's jury demand.

Background

On October 23, 2015, Plaintiff filed a complaint in the Horry County Court of Common Pleas in Horry County, South Carolina against Aetna alleging breach of contract, bad faith, and negligence over Aetna's refusal to pay on a $100,000.00 Supplemental Life Insurance Policy that insured the life of Amanda Criswell. According to the complaint, Amanda Criswell was employed by The Myrtle Beach Sun News, which is owned by The McClatchy Company. In December 2013, Ms. Criswell purchased a Supplemental Life Insurance Policy in the amount of $100,000.00 through her employer. The Supplemental Life Insurance Policy at issue in this case was optional life insurance that was offered as part of The McClatchy Company Comprehensive Welfare Benefit and Cafeteria Plan. Plaintiff alleges that Ms. Criswell passed away on January 21, 2015, and that Aetna has wrongfully and in bad faith refused to pay benefits under the $100,000.00 Supplemental Life Insurance Policy.

Aetna removed this case to this Court on December 4, 2015, pursuant 28 U.S.C. § 1331, contending that Plaintiff's claims involved an employer sponsored benefit plan and are governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et. seq. (ERISA). Aetna then filed the current motion to dismiss and motion to strike Plaintiff's jury request arguing that Plaintiff's state law claims of breach of contract, bad faith, and negligence were preempted by ERISA. On September 6, 2016, the Court denied Aetna's motion without prejudice and allowed the parties 60 days within which to conduct discovery on the issue of whether the safe harbor provision set forth in 29 C.F.R. § 2510.3-l(j) applies to this case, i.e. whether or not this case is governed by ERISA.

On November 7, 2016, Aetna refiled its motion to dismiss under Rule 12(b)(6) arguing that Plaintiff's state law claims are preempted by ERISA. Aetna attached a copy of the summary plan description and employee welfare benefit plan as Exhibits A and B to its motion to dismiss. Aetna also filed a declaration of Gail Drake, a consultant with Aetna, and a declaration of Chris Klyse, Director of Compensation and Benefits with the McClatchy Company, in support of its motion to dismiss. In response to the motion to dismiss, Plaintiff filed an affidavit of Chris Klyse and attached a payroll record showing that the employer did not contribute to the premiums for Criswell's supplemental life insurance policy.

After reviewing the parties' submissions, the Court, pursuant to Rule 12(d), issued a Text Order notifying the parties of the Court's intention to convert Aetna's motion to dismiss into a motion for summary judgment under Rule 56. The Court allowed the parties the opportunity to supplement the record with any appropriate materials outside the pleadings which either party believed should be considered in determining whether the supplemental life insurance policy at

issue is governed by ERISA.

On May 12, Aetna filed a supplemental brief and an additional affidavit from Gail Drake. Plaintiff filed a supplemental brief, affidavit from Plaintiff Judy Criswell, Aetna's denial letter, and the autopsy results of Amanda Criswell.

Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (2010). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . .; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

When no genuine issue of any material fact exists, summary judgment is appropriate. *See Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

"Once the moving party has met [its] burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show that there is a genuine issue for trial." *Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir. 1992). The nonmoving party may not rely on beliefs, conjecture, unsupported speculation, or conclusory allegations to defeat a motion for summary judgment. *See Baber*, 977 F.2d at 875. Rather, the

nonmoving party is required to submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

Discussion

Aetna argues that Plaintiff's state law claims for breach of contract, bad faith, and negligence are due to be dismissed because the Supplemental Life Insurance Policy at issue is part of an employee welfare benefit plan and is governed by ERISA. Therefore, Aetna argues, Plaintiff's state law claims are completely preempted by ERISA. Aetna further argues that Plaintiff is not entitled to a jury trial and is not entitled to recover compensatory or punitive damages under ERISA.

Plaintiff responds that the Supplemental Life Insurance Policy is not preempted by ERISA because the safe harbor exception to ERISA preemption set forth in 29 C.F.R. § 2510.3-l(j) applies. Importantly, Plaintiff concedes that the other provisions of The McLatchy Company's Comprehensive Welfare Benefit and Cafeteria Plan are "clearly covered by ERISA because they do not meet the requirements of 29 C.F.R. § 2510.3-l(j)." [Plaintiff's Response to Aetna's Motion to Dismiss, ECF No. 20 at 8]. Plaintiff argues the Court should not confuse the purchase of optional supplemental life insurance policy coverage with the other provisions of The McClatchy Company's Comprehensive Welfare Benefit and Cafeteria Plan.

The safe harbor exception provides as follows:

> (j) Certain group or group-type insurance programs. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
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> (1) No contributions are made by an employer or employee

> organization;
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> (2) Participation [in] the program is completely voluntary for employees or members;
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> (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
>
> (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j). When a plan meets each of the four criteria listed above, "it is deemed not to have been established and maintained by the employer, thus it would not meet the requirements of an employee welfare benefit plan." *Hall v. Standard Ins. Co.*, 381 F. Supp. 2d 526, 529 (S.D.W.Va. 2005).

Plaintiff's argument that the safe harbor exception applies is based on her assumption that the Supplemental Life Insurance Policy at issue can be examined independently from the rest of McClatchy's insurance benefits plan. Plaintiff argues that factors 1, 2, 3, and 4 are met with respect to the Supplemental Life Insurance Policy because: 1) McClatchy made no contributions as this was optional life insurance coverage; 2) participation in the optional life insurance program was completely voluntary; 3) McClatchy did not endorse the plan, and 4) McClatchy received no consideration in the form of cash or otherwise in connection with the optional life insurance program. Alternatively, Plaintiff requests that if the Court finds that the Supplemental Life Insurance Policy is governed by ERISA, that Plaintiff be permitted to replead the action.

Aetna argues that McClatchy made contributions to the Supplemental Life Insurance Policy by virtue of its contributions to the Plan as a whole. Relying on appellate court cases from the First, Sixth, Tenth and Eleventh Circuits, Aetna argues that where an employer makes contributions to a plan, a component of the plan not paid for by the employer cannot be severed from the larger plan and is not exempt from ERISA. *See Gross v. Sun Life Assur. Co. of Canada*, 734 F.3d 1, 10 (1st Cir. 2013) (finding the safe harbor exception did not apply to plaintiff's claims relative to her long term disability policy where the employer fully funded life and AD&D insurance for its employees and the policies were all part of a larger employee welfare benefits plan); *Helfman v. GE Group Life Assur. Co.*, 573 F.3d 383, 391 (6th Cir. 2009) (holding "that if an employer contributes to any employee's payment of premiums, ERISA must apply to the entirety of the particular insurance program, regardless of whether one or more employees pays his own premiums in full"); *Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.3d 460, 463 (10th Cir. 1997) (holding plaintiff could not sever her optional disability coverage from the rest of the benefits she received through her employer's plan "because the [optional] coverage was a feature of the Plan, notwithstanding the fact that the cost of such coverage had to be contributed by the employee"); *Glass v. United Omaha Life Ins. Co.*, 33 F.3d 1341, 1345 (11th Cir. 1994) (holding that the Elect life insurance policy cannot be severed from the plan in order to defeat ERISA coverage because the Elect life feature is part and parcel of the whole group insurance plan and thus ERISA governs it). Aetna notes that while Ms. Criswell made premium payments for the supplemental life insurance coverage, the premiums for basic life insurance and other components of the Plan were paid by McClatchy.

Plaintiff does not address Aetna's argument that Plaintiff cannot sever her optional supplemental life insurance coverage from the rest of the benefits Ms. Criswell received through the

McClatchy Plan. Plaintiff has offered no authority for the proposition that the Supplemental Life Insurance Policy should be viewed in isolation in determining whether the safe harbor exception applies. In her supplemental brief, Plaintiff argues that the competing affidavits of Chris Klyse demonstrate a question of fact as to whether the safe harbor provision is applicable.

Aetna also argues that the Supplemental Life Insurance Policy was endorsed by McClatchy as evidenced by: 1) multiple references to McClatchy as the "Policyholder," 2) the name of the Plan - the McClatchy Company Comprehensive Welfare Benefit and Cafeteria Plan, 3) McClatchy's role as Plan Administrator, and 4) McClatchy's negotiation of the benefits as part of the Group Policy, which it secured and contributed to for the benefit of its employees. Aetna argues that a reasonable employee would conclude that the Supplemental Life Insurance Policy at issue in this case was endorsed by McClatchy.

According to the Plan documents attached to Aetna's motion to dismiss, the Supplemental Life Insurance Policy at issue in this case is but one part or feature of The McClatchy Company Comprehensive Welfare Benefit and Cafeteria Plan. [ECF No. 24-3 at 100, 107-08]. The Summary Plan Description states that the McClatchy Plan "is an umbrella plan that covers all health, life, accident, long-term disability and wellness plans and programs for the employees who are part of The McClatchy Company controlled group." [ECF No. 24-2 at 4]. The Schedule of Benefits indicates the available coverage under the Plan and includes basic life insurance, supplemental life insurance, accelerated death benefits, and accidental death and personal loss coverage. [ECF No. 24-3 at 107-112]. The Plan documents also establish that McClatchy is the policyholder and that McClatchy is required to pay premiums and fees in advance. [ECF No. 24-3 at 45, 52]. The Plan documents indicate the employer and employee as the source of contributions for the Plan. [ECF

NO. 24-3 at 100]. As stated in Gail Drake's (Consultant for Aetna) affidavit, supplemental life insurance coverage is only available to eligible employees who are enrolled in the basic life insurance component of the McClatchy Plan. [Drake Aff., ECF No. 34-1]. The supplemental life insurance coverage is not available independent of the basic life insurance coverage. *Id*. Plaintiff does not dispute these important facts and has not offered any authority for the proposition that the Supplemental Life Insurance Policy features of the Plan can be severed from the other benefits for purposes of ERISA coverage. While the Fourth Circuit Court of Appeals does not appear to have ruled on the issue, the weight of authority, as indicated by *Gross*, *Helfman*, *Gaylor*, and *Glass*, would suggest that McClatchy's contribution to the premiums for some components of the Plan disqualifies the Supplemental Life Insurance Policy from the safe harbor provision. However, the Court need not reach that issue because McClatchy clearly endorsed the Supplemental Life Insurance Policy as explained below.

The First Circuit has held that "an employer will be said to have endorsed a program within the purview of the Secretary's safe harbor regulation if, in light of all the surrounding facts and circumstances, an objectively reasonable employee would conclude on the basis of the employer's actions that the employer had not merely facilitated the program's availability but had exercised control over it or made it appear to be part and parcel of the company's own benefit package." *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir. 1995); *see also* ERISA Op. Letter No. 94–26A, 1994 WL 369282, at *3 (July 11, 1994) (stating that endorsement occurs "if the [employer] engages in activities that would lead [an employee] reasonably to conclude that the program is part of a benefit arrangement established or maintained by the [employer]").

As noted above, the Supplemental Life Insurance Policy is part of a larger plan called The

McClatchy Company Comprehensive Welfare Benefit and Cafeteria Plan. McClatchy is the named policyholder and is also designated as the plan administrator. [ECF No. 24-3 at 45; ECF No. 24-3 at 100]. When an employer is the plan administrator, it endorses the plan for ERISA purposes and the plan does not fall within the safe harbor exemption. *See Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 493 (9th Cir. 1988) (stating "[i]t is clear that, at a minimum, [employer] does not merely advertise the group insurance, but rather, as the administrator of the plan, 'endorses' it within the meaning of 29 C.F.R. § 2510.3-1(j)(3)"). McClatchy prepared and drafted the Summary Plan Description and determined eligible employees for coverage. [Drake Aff., ECF No. 34-1]. The Plan documents state that "[t]his is an ERISA plan, and you have certain rights under this plan. Please contact your Employer for additional information." [ECF No. 24-3 at 107]. The Plan states that McClatchy selected the products and benefit levels under the plan and is a source of contributions to the Plan. [ECF No. 24-3 at 65; ECF No. 24-3 at 100]. McClatchy's role as plan administrator for all components of the Plan, including Supplemental Life Insurance coverage, establish that McClatchy did more than merely publicize the program to employees or collect premiums through payroll deductions.[1] Based on the unchallenged Plan documents, an objectively reasonable employee would conclude that McClatchy had not merely facilitated or advertised the Supplemental Life Insurance Policy's availability, but exercised control over it and made it appear to be part and parcel of the company's own benefit package.

Because McClatchy endorsed the Plan, the Supplemental Life Insurance Policy at issue in

[1] Plaintiff fails to address the significance of McClatchy's role as plan administrator in the analysis of whether McClatchy "endorsed" the plan.

this case fails to qualify for the safe harbor exception set forth in 29 C.F.R. § 2510.3-l(j).[2] Accordingly, the Supplemental Life Insurance Policy is governed by ERISA and Plaintiff's state law claims for breach of contract, bad faith, and negligence are preempted.

Nevertheless, dismissal of Plaintiff's case at this juncture would be inappropriate. "[W]hen a complaint contains state law claims that fit within the scope of ERISA's § 502 civil enforcement provision, those claims are converted into federal claims." *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 187 (4th Cir. 2002); *Casselman v. American Family Life Assur. Co. of Columbus*, 143 Fed. Appx. 507, 511 (4th Cir. 2005) ("We do not dismiss a claim that is preempted by ERISA, but rather 'treat it as a federal claim under [29 U.S.C. § 1132]'"). Plaintiff has requested that in the event the Court finds that the Supplemental Life Insurance Policy is an ERISA policy, that she be permitted to replead the action. Aetna has represented to the Court that Plaintiff, through counsel, has already exhausted her administrative remedies. As such, Plaintiff shall file an amended complaint seeking relief under ERISA's civil enforcement provisions within 15 days from the date of this Order.

Because Plaintiff's state law claims are preempted by ERISA, Plaintiff must bring her claim pursuant to ERISA's civil enforcement provisions. *See* 29 U.S.C. § 1132(a)(1)-(3). Section 1132 limits a plaintiff to equitable relief. *Darcangelo*, 292 F.3d at 195. Therefore, Plaintiff is not entitled to compensatory or punitive damages on her claim brought pursuant to ERISA. *Id.*; *Eweka v. Hartford Life and Acc. Ins. Co.*, 955 F. Supp. 2d 556, 568 (E.D.Va. 2013); *Gauldin v. Honda Power*

[2] Because the employer endorsed the plan, the Court need not address the fourth factor under 29 C.F.R.§ 2510.3-1(j) - whether the employer received consideration in connection with the program. *See Casselman*, 143 Fed.Appx. at 509. To qualify for the safe harbor provision, the plan must meet each of the four criteria listed in 29 C.F.R.§ 2510.3-1(j). *Hall*, 381 F. Supp. 2d at 529.

Equip. Mfg., Inc., 351 F. Supp. 2d 455, 458 (M.D.N.C. 2005) (noting that compensatory and punitive damages are not available under ERISA §§ 409 or 502).

Similarly, Plaintiff's jury trial demand is due to be stricken. *Phelps v. C.T. Enterprises, Inc.*, 394 F.3d 213, 222 (4th Cir. 2005) ("[P]roceedings to determine rights under employee benefit plans are equitable in character and thus a matter for a judge, not a jury"); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir.1985) (finding that plaintiffs in ERISA actions are not entitled to a jury trial);

Conclusion

For the reasons stated above, the Court **GRANTS** Aetna's [ECF No. 17] motion to dismiss, which the Court converted to a motion for summary judgment pursuant to Fed. R. Civ. P. 12(d). Plaintiff's state law claims are dismissed and Plaintiff's jury demand is stricken. Plaintiff is also not entitled to compensatory or punitive damages. Because the Supplemental Life Insurance Plan at issue is governed by ERISA, Plaintiff shall file an amended complaint seeking relief under ERISA's civil enforcement provisions within 15 days from the date of this Order.

IT IS SO ORDERED.

July 19, 2017
Florence, South Carolina

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge