KENNETH L. MOGCK, Plaintiff, v. UNUM LIFE INSURANCE COMPANY OF AMERICA, a Maine Corporation; GROUP LONG TERM DISABILITY INSURANCE POLICY, NON PARTICIPATING, AN EMPLOYEE WELFARE BENEFITS PLAN UNDER ERISA, Defendants.

Civil No. 99 CV 201-CGA

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2001 U.S. Dist. LEXIS 25129

January 8, 2001, Decided
January 8, 2001, Filed

SUBSEQUENT HISTORY: Subsequent appeal at, Remanded by *Mogck v. UNUM Life Ins. Co. of Am., 292 F.3d 1025, 2002 U.S. App. LEXIS 10970 (9th Cir. Cal., 2002)*

DISPOSITION: [*1] Plaintiff's motion to retax costs granted.

COUNSEL: For PLAINTIFF: THOMAS M MONSON, SUSAN L HORNER, MILLER MONSON PESHEL & POLACEK, SAN DIEGO CA.

For DEFENDANTS: EDWIN A OSTER, ROBERT K RENNER, BARGER & WOLEN LLP, IRVINE CA.

JUDGES: CYNTHIA G. AARON, United States Magistrate Judge.

OPINION BY: CYNTHIA G. AARON

OPINION

ORDER GRANTING PLAINTIFF'S MOTION TO RETAX COSTS

[Docket # 47]

This matter is before the Court on Plaintiff's motion to retax costs. On September 22, 2000, the Court granted Defendant's motion for summary judgment on the basis that Plaintiff's claims are time barred pursuant to the terms of Plaintiff's Group Long Term Disability Insurance policy. The Court entered judgment in favor of Defendant on October 2, 2000.

On October 16, 2000, pursuant to *28 U.S.C. § 1920*, *Fed. R. Civ. P. 54(d)* and *Rule 54.1* of the Local Rules, Defendant filed an application to tax costs with the Clerk of Court. Defendant's application included a Bill of Costs totaling $ 5,610.42. Subsequently, Defendant withdrew the request for miscellaneous costs in the amount of $ 3,505.02.

Plaintiff objected to Defendant's application to tax costs, arguing that Defendant should have applied [*2] to the Court for costs pursuant to *ERISA § 502*, rather than applying to the Clerk pursuant to Local *Rule 54.1*. On November 14, 2000, the Clerk of the Court denied Plaintiff's objection, and awarded costs in the amount of $ 1,559.20.

Plaintiff now seeks to have the Court retax costs for the same reasons he objected to Defendant's original application for costs, i.e. the Court should have determined whether an award of costs was appropriate

pursuant to *ERISA § 502*, rather than the Clerk awarding costs to the "prevailing party" pursuant to *Fed. R. Civ. P. 54(d)* and Local *Rule 54.1*.

In arguing that the Court should have determined whether an award of costs against Plaintiff was appropriate in this case, Plaintiff first points to the language of *Fed. R. Civ. P. 54(d)(1)*, which states, in part:

> (1) **Costs Other Than Attorneys Fees**
>
> *Except when express provision therefore is made either in a statute of the United States* or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

(emphasis added)

Thus, *54(d)(1)* governs the award of costs *unless* Congress has specifically [*3] provided for cost shifting pursuant to separate rule or statute. In the case of an ERISA claim, Congress has specifically provided for cost shifting, pursuant to *Section 502(g)*. Unlike *Fed. R. Civ. P. 54(d)*, which allows for the shifting of costs to the "prevailing party" as a matter of course, *§ 502(g)* allows the Court "in its discretion" to award a reasonable attorney's fee and costs of action to "either party." *ERISA § 502(g)(1)*; *29 U.S.C. § 1132(g)*.

In determining whether to award costs and fees in an ERISA case, the Ninth Circuit has utilized the five factor test set forth in Hummell v. S.E. Rykoff & Co.,: "(1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees against the opposing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all plan 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." *Hummell, 634 F.2d 446, 453 (9th Cir. 1980)*. Although these [*4] five factors are generally applied in the context of an application for fees, the Ninth Circuit has routinely applied the Hummell factors to requests for costs as well. See *Franklin v. Thornton, 983 F.2d 939, 943 (9th Cir. 1993)*; *Tingey v. Pixley-Richards West, Inc., 958 F.2d 908, 910 (9th Cir. 1992)*. In addition, the Ninth Circuit has held that the Hummell test applies equally to plaintiffs and defendants. See *Carpenters S. Cal. Admin. Corp. v. Russell, 726 F.2d 1410 (9th Cir. 1984)*; *Estate of Shockley v. Alyeska Pipeline Service Co., 130 F.3d 403, 408 (9th Cir. 1997)* (rejecting the suggestion that court favors one side or the other in ERISA fee cases).

Although Local *Rule 54.1* directs parties to file an application for costs with the Clerk of the Court, because ERISA sets up its own provisions for the award of costs which are inconsistent with the provisions set forth in *Fed. R. Civ. P. 54(d)(1)*, the Court agrees with Plaintiff that the Court, rather than the Clerk, should decide whether an award of costs is warranted.

In considering a cost application from an ERISA defendant, the Ninth Circuit has stated [*5] that careful consideration should be given to the Seventh Circuit's analysis in Marquardt v. North *American Car Corp., 652 F.2d 715 (7th Cir. 1981)*. In that case, the Court declined to award fees on the grounds that the plaintiff's case was neither frivolous nor brought in bad faith, the plaintiff had limited means to satisfy an award of fees, an award of fees would have little value in deterring other potential plaintiffs in the plaintiff's position, and the defendant did not benefit other plan beneficiaries in the action. See *id. at 718-19*. The Court noted, "the reason for awarding fees to defendants is to discourage frivolous suits, . . . it is important not to punish plaintiffs whose actions fail even though they seemed reasonable at the outset." *Marquardt, 652 F.2d at 720*. The Court further observed that consideration of the five Hummell factors will seldom warrant an award of fees or costs against an ERISA plaintiff. See *id. at 719-20*; see also *Arizona State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 718 (9th Cir. 1997)*.

Applying the five*Hummell* factors to the facts [*6] of this case, the Court finds that an award of costs against Plaintiff is not warranted.

The Court first considers the first and fifth factors, Plaintiff's "culpability or bad faith," and the "relative merits of the parties' positions." Defendant does not contend that Plaintiff's action was brought in bad faith. Rather, Defendant maintains that Plaintiff is "culpable" in that, based upon information contained in the administrative record, it was clear from the start that Plaintiff's claim accrued on either July 1, 1995 or September 29, 1995, and that Plaintiff did not file the present lawsuit until after the contractual limitation period had expired.

Plaintiff maintains that based upon the state of the law at the time he filed his complaint, he was justified in believing that his lawsuit was timely filed. However, while the parties' cross-motions for summary judgment were pending before this Court, the Ninth Circuit overruled key cases upon which Plaintiff relied in arguing that his complaint was timely filed. [1] Given the change in the law concerning the statute of limitations for ERISA actions which occurred after Plaintiff had filed his complaint, the Court finds that Plaintiff [*7] was not "culpable" in erroneously believing that his claim may have had merit. Nor was Plaintiff's action brought in bad faith. Thus, these factors weigh against awarding costs of suit against Plaintiff.

1 On July 26, 2000, the Ninth Circuit overruled *Nikaido v. Centennial Life Ins. Co., 42 F.3d 557 (9th Cir. 1994)* and *Williams v. Unum Life Ins. Co. of Am., 113 F.3d 1108 (9th Cir. 1997)*. See *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000)* (en banc).

The next factor the Court considers is Plaintiff's ability to satisfy an award of costs. Plaintiff maintains that because he has been unable to work for over seven years, and cannot even afford his own medical expenses, he does not have the ability to satisfy an award of costs in any amount. Defendant, on the other hand, maintains that based upon Plaintiff's ongoing receipt of governmental benefits, and his current assets, Plaintiff has the ability to satisfy the [*8] "relatively small award of costs." Because neither party has submitted any documentation supporting its assertions concerning Plaintiff's ability to satisfy an award of costs, the Court cannot resolve this issue at this time. [2]

2 Even assuming that Plaintiff could satisfy an award of costs in this case, as discussed below, the Court finds that the balance of factors weighs against awarding Defendant costs.

With respect to factors three and four, whether an award of costs would deter other from acting under similar circumstances, and whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA, the Ninth Circuit has stated that these factors are "more appropriate to the determination of whether to award fees to a plaintiff than an defendant." *Tingey, 958 F.2d at 910*. The Ninth Circuit has further stated "we see little benefit to be had by charging individual plan-beneficiary plaintiffs . . . [*9] with costs for policy reasons that speak more appropriately to institutional litigants in the ERISA arena." *Id.* This Court agrees with the Ninth Circuit's analysis of these factors and finds that factors three and four weigh against awarding Defendant costs in this instance.

For the reasons discussed above, the Court finds that the balance of factors weighs against awarding costs against Plaintiff. Accordingly, the Court hereby GRANTS Plaintiff's motion to re tax costs.

IT IS SO ORDERED.

Dated: Jan. 8, 2001

CYNTHIA G. AARON

United States Magistrate Judge