STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-2017-32

THE WITHAM FAMILY LIMITED PARTNERSHIP,

Plaintiff,

v.

D.B.L. ENTERPRISES, INC. and

LINDA SHELTON,

Defendants,

D.B.L. ENTERPRISES, INC.

Plaintiff,

v.

DAVID J. WITHAM and DAVID C. WITHAM

Defendants

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the court is the Plaintiff/Counterclaim Defendant Witham Family Limited Partnership's (WFLP) motion for partial summary judgment on all Defendants/Counterclaim Plaintiffs' counterclaims "related to" the Employee Benefit Programs.

I. Facts

WFLP and D.B.L. Enterprises, Inc. (D.B.L.) are the sole members of W.S. Atlantic, LLC.[1] (S.M.F. ¶ 1.) W.S. Atlantic, LLC owns and operates the Hampton Inn Hotel in Bar Harbor, Maine, which has been open for business since 2015. (S.M.F. ¶ 2.) WFLP claims it is the

[1] D.B.L. asserts that as a withdrawing member, WFLP no longer holds a 50 percent interest in W.S. Atlantic, LLC.

policyholder and administrator of the following: a health insurance plan entered into between Aetna Life Insurance Company and WFLP; a dental insurance plan entered into between Northeast Delta Dental and WFLP; a Group Life, Accidental Death and Dismemberment Insurance Plan funded by The Lincoln National Life Insurance Company; a Group Long Term Disability Insurance Plan funded by The Lincoln National Life Insurance Company; a Group Life and Dependent Life Insurance Plan funded by The Lincoln National Life Insurance Company; and a Weekly Disability Income Insurance Plan funded by The Lincoln National Life Insurance Company.[2] (S.M.F. ¶¶ 4-9.) WFLP is the plan administrator of the Witham Family, L.P. 401(k) Plan.[3] (S.M.F. ¶ 10.) Without authorization or agreement between WFLP and the LLC, WFLP requires LLC employees to participate in Employee Benefit Programs.[4] (S.M.F. ¶ 11.)

Counterclaim Plaintiffs' first amended counterclaim against WFLP states, "[t]he Witham Partnership has continued to administer employee benefit programs, such as health insurance and

[2] Counterclaim Plaintiffs object that the above-mentioned plans are not attached to the affidavit of Donna Mitchell as required by Rule 56(e), and therefore do not support WFLP's assertions related to these documents. M.R. Civ. P. Rule 56(e), states "sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Without a sworn or certified copy of the referenced documents, the summary judgment record does not support WFLP's assertions related to these documents. Counterclaim Plaintiffs also deny these statements.

[3] Counterclaim Plaintiffs objected that this plan was not attached to the affidavit of Donna Mitchell as required by Rule 56(e). Pursuant to M.R. Civ. P. 56(e), "the court may permit affidavits to be supplemented or opposed by . . . further affidavits." Counterclaim Defendant included a Supplemental affidavit of Donna Mitchell in its Reply Statement of Material Fact and attached as exhibits "Related Participating Employer Election Attachment," which was not executed, naming the "Witham Family Limited Partners 401(k) Profit Sharing Plan and Trust;" the "Witham Family, L.P. 401(k) Plan Participation Agreement;" and "Adopting Resolution." These documents were previously not produced during discovery, even though Counterclaim Plaintiffs asked for "documents relating to any retirement benefit or 401k plan" in a request for documents on September 19, 2017. The Participation Agreement and Adopting Resolution were signed by Donna Mitchell, yet Counterclaim Plaintiffs further object that WFLP has not provided evidence that Donna Mitchell was authorized to sign on behalf of the LLC. While WFLP did attach documents referencing the 401(k) plan, the plan itself was not attached.

[4] Counterclaim Defendant argues in its Reply to Counterclaim Plaintiff's Opposing Statement of Material Facts, "The cited testimony. . . supports only that two witnesses are unaware of . . . an agreement [for WFLP to provide benefits to the LLC]; it does not establish that such an agreement does not exist." Again, Counterclaim Plaintiffs argue Counterclaim Defendants did not provide evidence that Donna Mitchell was authorized to sign on behalf of the LLC, and therefore documents referencing an agreement are not valid.

retirement plans, when such programs are not in compliance with applicable law and when such programs should be administered and overseen by Shelton." (1st Amend. Countercl. ¶ 33.) Counterclaim Plaintiffs' counterclaim includes Count I Breach of Contract, Count II Specific Performance, Count III Declaratory Judgment,[5] and Count IV Breach of Fiduciary Duty.

II. Discussion

A. Standard of Review

Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). A motion for summary judgment must be supported by a separate statement of material facts with citations to record evidence that would be admissible at trial. *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 6, 770 A.2d 653. "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CityMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774 (quoting *Stewart-Dore v. Webber Hosp. Ass'n*, 2011 ME 26, ¶ 8, 13 A.3d 773). On a motion for summary judgment, the facts are viewed in "the light most favorable to the nonmoving party." *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶ 6, 816 A.2d 63.

Summary judgment is appropriate "if the defendant has moved for summary judgment, the evidence favoring the plaintiff is insufficient to support a verdict for the plaintiff as a matter of law." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18 (internal citation omitted). To survive a defendant's motion for summary judgment, the nonmoving plaintiff must demonstrate that material facts are disputed and must establish a prima facie case for every element of the plaintiff's cause of action. *Id*. at ¶ 8. Record references must "refer to evidence of a quality that

[5] Count III Declaratory Judgment was partially granted pursuant to a Combined Order dated July 26, 2019.

could be admissible at trial." *Doyle v. Dep't of Human Servs*., 2003 ME 61, ¶ 12, 824 A.2d 48 (quoting *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 6, 770 A.2d 653, 656).

B. Analysis

WFLP seeks partial summary judgment on all D.B.L. claims related to the Employee Retirement Income Security Act (ERISA) for a lack of subject matter jurisdiction. Whether a court has subject matter jurisdiction is a matter of law for the court. *Windham Land Tr. v. Jeffords*, 2009 ME 29, ¶ 19, 967 A.2d 690. WFLP argues the Superior Court lacks subject matter jurisdiction in this case because ERISA grants exclusive jurisdiction to district courts of the United States. 29 U.S.C. §§ 1001-1461 (2019). Pursuant to 29 U.S.C. § 1132, "[a] civil action may be brought . . . (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3). "[T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary." 29 U.S.C. § 1132(e)(1). Section 1109 provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of the Act.

29 U.S.C. § 1109(a).

Counterclaim Plaintiffs argue they are neither participants, beneficiaries, or fiduciaries of an employee benefit plan. "ERISA makes clear that the status of the parties is essential to an ERISA fiduciary duty claim." *Group Hospitalization & Med. Servs. v. Merck-Medco Managed*

Care, LLP, 295 F. Supp. 2d 457, 461 (D. N.J. 2003). Therefore, a central question to this jurisdictional issue is whether D.B.L. is a fiduciary under ERISA, because otherwise the claim would not fit within ERISA's framework and would therefore not be preempted.

> A person is a fiduciary with respect to an ERISA plan if
>
> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation . . . with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

ERISA's definition of fiduciary may seem broad. Despite its breadth, ERISA's definition of fiduciary does not attach liability to every person with a logical connection to the plan. According to Linda Shelton, "neither [she], nor D.B.L. exercises any control over the employee benefit programs sponsored and/or administered by the Witham Partnership." Aff. of Linda Shelton Line 7. There is no record evidence that Shelton or D.B.L. render investment advice. Nor is there any evidence that either of the aforementioned parties has any discretionary authority or responsibility in the administration of the plan. In fact, WFLP does not disagree with these propositions. WFLP admits throughout its filings that, not only is it the policy holder of the plans, but it is also the administrator of those plans. (Pl. Mot. for Summ. J. at 3-4.) Without some indication that Shelton or D.B.L. played a role in the management or administration of the Plan, neither Shelton nor D.B.L. can be accurately characterized as a fiduciary of the Employee Benefit Programs provided to employees of the LLC.

Even if D.B.L. had standing to bring an ERISA claim, the counterclaims do not sufficiently "relate to" ERISA. Congress has mandated that ERISA preempts all state law causes of action "insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.

§ 1144(a). The analysis thus involves: "(1) whether the plan at issue is an 'employee benefit plan' and (2) whether the cause of action 'relates to' this employee benefit plan." *McMahon v. Digital Equip. Corp.*, 162 F.3d 28, 36 (1st Cir. 1998).

ERISA applies to "any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce. . . ." 29 U.S.C. § 1003(a)(1). An "employee benefit plan" is "any plan . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan. . . provided retirement income to employees or results in a deferral of income." 29 U.S.C. § 1002(2)(A). While WFLP has not provided evidence of the named plans it deems part of the "employee benefits plan," this Court will nevertheless address whether the cause of action "relates to" an employee benefits plan to determine its jurisdiction over D.B.L.'s counterclaims.

In determining whether the counterclaims are preempted by ERISA, the Court must determine whether the cause of action "relates to" the employee benefit plan. "A law 'relates to' an employee benefit plan . . .if it has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983)). "[T]o determine whether a state law has the forbidden connection, [the court] look[s] . . . to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997) (quoting *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* 514 U.S. 645, 658-59 (1995)). As the Supreme Court has noted, there is a "frustrating difficulty" in defining the term 'relates to.' *Travelers,* 514 U.S. at 656. There is no doubt that Congress intended ERISA's preemption provision to have a broad reach, however, we know that

"pre-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *District of Columbia v. Greater Washington Bd. of Trade,* 506 U.S. 125, 130, n.1 (1992). This dichotomy has tasked courts with trying to hit a moving target. Common-sense and subtle guidance from the Supreme Court, however, slows the target and steadies the court's hand.

In *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* 514 U.S. 645 (1995), the Supreme Court held that a New York law which governed the surcharges that hospitals could collect from patients with different types of insurance plans "[did] not 'relate to' employee benefit plans within the meaning of ERISA's pre-emption provision . . . and accordingly suffer[ed] no pre-emption." *Travelers*, 514 U.S. at 649. In the Court's decision it makes clear that ERISA pre-empts more than just direct regulation of ERISA plans, but that does not mean ERISA subsumes all laws that only have an indirect or incidental effect on ERISA plans. *See id.* at 660. These laws of general applicability were not the object of Congress' intent in drafting ERISA's pre-emption provision. *See id* at 661-62. Finally, the Court confirmed what it had already announced in *Mackey* that laws of general applicability that only have a remote and indirect impact on ERISA plans are not pre-empted. *See generally id. See also Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825 (1988); *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990).

Counterclaim defendants argue that because counterclaim plaintiffs seek to remove WFLP as administrator of the employee benefits plan, the claims fall under ERISA. The Court concludes that WFLP's argument is misplaced, as the gravamen of D.B.L. and Ms. Shelton's counterclaim is to enforce their rights under the LLC Agreement, including their right to administer benefit plans to employees of the LLC. Given the nature of the dispute between the

parties, the Court views the Counterclaim as having a "tenuous, remote, or peripheral" connection to the ERISA plans in question such that any state action, including a state court judgment, would not be preempted. *See Ciampi v. Hannaford Bros. Co.* 681 A. 2d 4, 8 (Me. 1996).

In sum, D.B.L. is not an ERISA fiduciary, the 401(k) plan referenced in the documents attached to WFLP's reply may or may not qualify as an ERISA "employee benefits plan," and D.B.L.'s counterclaims are not sufficiently "related to" the employee benefits plan to warrant preemption of its counterclaims.

The entry is:

Plaintiff WFLP's Motion for Partial Summary Judgment is DENIED.

Pursuant to M.R. Civ. P. 79(a) the Clerk is hereby directed to incorporate this Order by reference in the docket.

Date: August 30, 2019

/s/
M. Michaela Murphy
Justice, Business and Consumer Court