

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM W. ADAMS, of)	
Millinocket, County of Penobscot,)	
et al., all of the State of Maine,)	
)	
Plaintiff)	
)	
v.)	Civil No. 00-12-B-C
)	
BOWATER INCORPORATED,)	
and BOWATER INCORPORATED)	
PENSION PLAN FOR CERTAIN)	
EMPLOYEES OF GREAT)	
NORTHERN PAPER, INC., and)	
DOES 1 THROUGH 20, all doing)	
business in the State of Maine,)	
)	
Defendants)	

RECOMMENDED DECISION

This matter is before the Court on two related motions, Defendants’ Motion to Dismiss Count IV of Plaintiffs’ Second Amended Complaint (Docket No. 39) and Plaintiffs’ Motion for Leave to File Third Amended Complaint (Docket No. 45). I recommend that the Court **GRANT** Defendants’ Motion to Dismiss and **DENY** the Plaintiffs’ Leave to Amend for the reasons set forth below.

Standards Applicable

In considering a Motion to Dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiffs’ favor, and determine whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory. See LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998).

Pursuant to Fed.R.Civ.P. 15(a), leave to amend a complaint should be freely given. Forman v. Davis, 371 U.S. 178, 182 (1962) (“In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be ‘freely given’”). However, there are certain instances when amendment need not be allowed, such as a situation where the amendment would be futile. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 59 (1st Cir. 1990) ([w]here an amendment would be futile or would serve no legitimate purpose, the district court should not needlessly prolong matters).

Background

On October 25, 2000, I conducted a telephone conference to address issues in connection with an amended scheduling order necessitated by the resolution of issues relating to Count I of the original complaint. Counts II and III remained pending and needed to be resolved. During that conference, Plaintiffs alleged that Defendants had engaged in certain conduct since this litigation commenced that amounted to a further breach of fiduciary obligations and requested leave to file an amended complaint. Over objection, I granted them leave to file any proposed amendment by November 1, 2000. (Docket No. 33). In response to that Order Plaintiffs filed and were granted leave to proceed upon their Second Amended Complaint. (Docket Nos. 36 & 37).

Count IV of the Second Amended Complaint alleged that Defendants had violated their fiduciary duty to provide accurate information and to refrain from making misrepresentations to Plan participants. The facts underlying this allegation related to a

September 2000 “Vested Termination Letter” which informed plan participants about their rights to a deferred vested pension benefit payable at age 65, and to a reduced 55/15 benefit option. This Vested Termination Letter did not inform participants of their rights under the much more favorable 55/30 benefit option or other optional retirement benefits. The allegation was that this Vested Termination Letter could possibly “trick” plan participants into applying for the 55/15 benefit and thus foregoing their rights to more favorable options in the future.

On December 8, 2000, Defendants filed a Motion to Dismiss Count IV, alleging that it failed to state a claim. (Docket No. 39.) Plaintiffs responded with the instant Motion for Leave to File Third Amended and Supplemental Complaint, alleging in a new proposed Count IV various violations of fiduciary duties by Defendants, including the September 2000 Vested Termination Letter. (Docket No. 45.) The “new” Count IV also alleges that the original August 1999 plan amendment was a breach of a fiduciary duty to all of the named Plaintiffs. It further alleges that the conduct complained of in Counts II and III was a breach of Defendants’ fiduciary duties. Finally, Plaintiffs allege that Defendants have acted imprudently and irresponsibly in regard to retaining and providing for plan assets. The “new” Count IV seeks the following forms of relief: (1) a declaration that the Plan Amendment of August 1999 was in violation of § 204 (g) of ERISA; (2) removal of the Plan Administrator and related fiduciaries and agents; (3) injunctive relief requiring the Defendants to amend the plan to incorporate the notice regarding supplemental distributions into the plan language; and (4) attorneys’ fees.

Discussion

1. Defendants' Motion to Dismiss Count IV of Plaintiffs' Second Amended and Supplemental Complaint

Defendants present three arguments in support of their claim that Count IV fails to state a claim. They argue that (1) there is no allegation that anyone has been harmed by the Vested Termination Letter; (2) the Vested Termination Letter did not contain any inaccurate or misleading information; and (3) the Vested Termination Letter, when read in conjunction with the Supplemental Distribution Notice sent to Plaintiffs, clarifies that they can “age into” other pension options other than the 55/15 option.

The Vested Termination Letter states the following:

As of September 1, 1999, you stopped accruing credited service under the Bowater Incorporated Pension Plan for Certain Employees of Great Northern Paper Inc. Effective the month following your sixty-fifth birthday [date of 65th birthday] you are eligible for a deferred vested pension benefit of [amount of benefits] from the Plan. This pension benefit is based on your credited service from Great Northern Paper from [date individual began working for GNP] through September 1, 1999.

Since you have completed at least 15 years of continuous service you may choose to receive your benefit beginning the first day of any month after your fifty-fifth birthday [date of 55th birthday]. You should apply for this benefit two months before the day you want benefits to begin. *At that time options will be explained to you.* [emphasis added].

Plaintiffs do not allege that this letter contained any inaccurate information, but rather that unknown individuals might have been “tricked into foregoing rights to more favorable [retirement] options” because the letter only identified the 55/15 benefit option.¹

¹ A court is permitted to rely on facts from documents outside the pleadings when the plaintiff relies upon those documents in framing the complaint. This sort of reliance does not convert a motion to dismiss under Rule 12(b)(6) into one for summary judgment. Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993).

Because this claim fails to allege either that anyone was actually harmed by the Vested Termination Letter or that the letter itself contained any inaccurate information, I do not find that it states a claim for breach of a fiduciary duty pursuant to ERISA. The majority of cases recognize the elements of a cognizable claim for breach of a fiduciary duty to include an allegation of resulting harm to the plaintiffs. See Int'l Union, UAW v. Skinner Engine Co., 188 F.3d 130, 148 (3rd Cir. 1999) (requiring a showing “that 1) the company was acting in a fiduciary capacity; 2) the company made affirmative misrepresentations or failed to adequately inform plan participants and beneficiaries; 3) the company knew of the confusion generated by its misrepresentations or its silence; and 4) there was resulting harm to employees”). Plaintiffs’ Complaint contains merely the unsupported hypothesis that some plan participants might be “tricked” by this letter.

It is true that at least one case has suggested that a misrepresentation alone without any detrimental reliance is sufficient to give a plaintiff standing under ERISA. Drolet v. Healthsource, Inc., 968 F.Supp. 757, 759-60 (D.N.H. 1997). Drolet’s facts, however, addressed the issue of the plaintiff’s standing to sue for prospective injunctive relief in a class action. The present case is not a class action and involves individual plaintiffs. At the time the seconded amended complaint was filed, the remaining plaintiffs in this case consisted of the ten individuals named in counts II and III. It is not clear from ¶ 61 of the seconded amended complaint exactly who is seeking relief, but I presume that the allegation pertaining to “Plaintiffs and other Plan participants similarly situated” is intended to encompass the original 500 or so Plaintiffs named in Count I. Even so, the conduct complained of in Count IV is not conduct akin to the alleged breach in Drolet, where the breach was alleged to be “actual and ongoing.” Id. at 760. In

contrast the specific conduct which forms the basis of Count IV is a one-time letter alleged to be misleading. I do not believe that Drolet is persuasive authority on the issues raised by Defendants' Rule 12(b)(6) motion.

I am also satisfied that even if this Court were to follow the suggestion in Drolet and conclude that the Plaintiffs do not have to allege any harm resulting from detrimental reliance on the alleged misrepresentation, there is nothing in the Vested Benefits Letter which could possibly amount to an actionable misrepresentation. The letter merely informs participants that they have crossed a threshold and are now eligible for certain benefits. If they choose to apply for those benefits, the letter states that options will be explained to them. If Plaintiffs alleged that they applied for the threshold benefits and no other options were explained in accordance with the company's practice, they might have a breach of fiduciary duty claim under the Drolet line of cases even without an allegation of detrimental reliance. However, the letter, which is the conduct that gives rise to Count IV, contains no falsehoods and promises to reveal other options. A letter of this nature, intended to advise a participant that he/she has crossed an eligibility threshold, could hardly be expected to contain an explanation of all the benefit possibilities under the Plan. The Vested Termination Letter which was sent to Plan Participants does not in and of itself give rise to a well-pleaded claim for breach of fiduciary duty under ERISA.

2. Plaintiffs' Motion for Leave to File Third Amended and Supplemental Complaint

One rather suspects that Plaintiffs themselves have recognized the inherent weakness of Count IV of their seconded amended complaint because they responded to Defendants' Motion to Dismiss with their own Motion for Leave to File Third Amended and Supplemental Complaint, containing a revised Count IV. The "new" Count IV

attempts to recast Count I, an allegation of a statutory violation, as a breach of fiduciary duty claim. It also realleges the breaches claimed and still pending in Counts II and III. The proposed Count IV also restates the claim relating to the Vested Termination Letter. The amendment lumps this conduct together as part of a “scheme” and also adds a new allegation relating to management of plan assets.

The Third Amended Complaint, at least as it pertains to these previously stated allegations, should be rejected as futile. The identical conduct relating to the October 5, 1999 Plan Amendment was scrutinized in Count I as a statutory violation of ERISA § 204 (g), and has been determined to be moot because the April 25, 2000 Plan Amendment cured any deficiency. Other allegations in the proposed Third Amended Count IV relate to the conduct described in Counts II and III. Those counts remain pending and there is no need to reallege the same conduct. The other conduct alleged in the proposed Third Amended Count IV relates to the Vested Termination Letter and I have explained above why that conduct fails to state any claim. In the context of this litigation, these allegations in the Third Amended Complaint, in addition to being untimely, would be futile.

The real crux of Count IV of the proposed Third Amended Complaint is the allegation contained within Paragraph 63, Subparagraph E, where Plaintiffs allege that Defendant Plan has “fail[ed] to retain and provide plan assets at prudent and responsible levels.” The details of this allegation are more completely explained in Plaintiffs’ Motion for Leave to File Supplemental Memorandum . . . and For Further Discovery.” (See Docket No. 77). Plaintiffs reveal that they became aware that the Defendant Plan had been merged by Bowater with other Bowater Incorporated Pension Plans on January 24,

2001. Plaintiffs go on to explain that “[m]erger of the Plans could increase the level of funding available to Plaintiffs and others similarly situated, or decrease the level of funding available[,] but the fact of the impact and adequacy of Plan funding cannot be discerned without further discovery.” Id. at 2.

If this court determines that Plaintiffs should be allowed to proceed with the allegation in Count IV, there would indeed be undue delay in the resolution of the pending case. Plaintiffs simply assert that their allegation in Count IV is supported by Exhibit 32 accompanying their reply to Defendants’ Opposition to Plaintiffs’ Motion to Amend Count IV (See Docket No. 54 at 18.) Exhibit 32 is a copy of the IRS Annual Return/Report of Employee Benefit Plan filed by Defendant Plan pursuant to its statutory obligations in October 2000. Plaintiffs state that this exhibit demonstrates that the Plan has been dramatically defunded although they do not allege in the proposed Count IV that the Plan is not in conformance with statutory or regulatory requirements. This Count is, in my view, nothing but a fishing expedition to open up discovery on issues that have never been presented by the pending litigation and that may or may not have a factual basis. If Defendant Plan has underfunded or mismanaged assets, a separate lawsuit may loom on the horizon. This court should not grant leave to amend the present complaint with a purely speculative allegation. Such a course of action would unreasonably delay the resolution of issues which have been pending for over a year. I would deny the Motion to Amend because the language in the proposed Count IV relating to Plan asset management does not contain anything more than pure speculation at this juncture.

Conclusion

Based upon the foregoing, I recommend that the Court **GRANT** Defendants' Motion to Dismiss and **DENY** the Plaintiffs' Motion for Leave to File Third Amended and Supplemental Complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated May 11, 2001

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defendant

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[COR LD NTC]

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[COR]

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BOWATER INC PENSION PLAN FOR DANIEL A. PILEGGI, ESQ.
CERTAIN EMPLOYEES OF GREAT (See above)
NORTHERN PAPER INC [COR LD NTC]
defendant

DOES 1-20
defendant