

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BOB COGAN, et al.,)
)
 Plaintiffs)
)
 v.) **Docket No. 01-268-P-C**
)
 PHOENIX LIFE INSURANCE)
 COMPANY, et al.,)
)
 Defendants)

RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS

The defendants, Phoenix Life Insurance Company, Phoenix Home Life Mutual Insurance Company, Phoenix Home Life Mutual Insurance Company Group Sales Representatives Deferred Compensation Plan, and the Benefit Plans Committee of Phoenix Home Life Mutual Insurance Company, move to dismiss the complaint in this action alleging violation of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.*, breach of contract and promissory estoppel. I recommend that the court grant the motion.

I. Applicable Legal Standard

The defendants’ motion invokes Fed. R. Civ. P. 12(b)(6). Defendants’ Motion to Dismiss the Complaint and to Strike Plaintiffs’ Jury Demand (“Motion”) (Docket No. 3) at 1. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any

set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The complaint includes the following relevant factual allegations. The plaintiffs were formerly employed as sales representatives of Phoenix Home Life Mutual Insurance Company (“Phoenix I”), now known as Phoenix Life Insurance Company, and are participants in the Phoenix Home Life Mutual Insurance Company Group Sales Representative Deferred Compensation Plan (“the Plan”). Complaint (Docket No. 1) ¶¶ 1-33 & introductory paragraph at 2. The Plan is a non-qualified employee benefit plan subject to ERISA. *Id.* ¶ 36. Defendant Benefit Plans Committee of Phoenix Home Life Mutual Insurance Company (“the Benefit Plans Committee”) is the plan administrator. *Id.* ¶ 37.

The Plan was established in 1997. *Id.* ¶ 41. It provided for retroactive benefits for the years 1994-96. *Id.* ¶ 43. From 1997 through 1999 Phoenix I credited each plaintiff’s participant account in the Plan with a benefit amount calculated in accordance with Article 4.2 of the Plan. *Id.* ¶ 44. No such accounts were actually set aside, segregated or held in trust for any plaintiff; the aggregate amount of the accounts was and is part of the general assets of Phoenix I. *Id.* ¶ 45. The plaintiffs were and are general creditors of Phoenix I. *Id.*

At some point prior to January 1, 2000 Phoenix I formed a subsidiary known as Phoenix American Life Insurance Company (“Phoenix American”) and the plaintiffs became employees of that entity, although this change was not disclosed to the plaintiffs at the time. *Id.* ¶ 46. On or about December 13, 1999 GE Financial Assurance Holdings, Inc. (“GEFA”) announced that it had agreed to purchase Phoenix American from Phoenix I. *Id.* ¶ 47. This purchase closed on or about April 1, 2000. *Id.* ¶ 48. Since the closing, the plaintiffs have been employed by GEFA. *Id.* ¶ 49.

In conjunction with GEFA's purchase of Phoenix American the Benefits Plan Committee on March 28, 2000 adopted the First Amendment to the Plan. *Id.* ¶ 50. The First Amendment stopped all accruals to the Plan as of March 31, 2000 and made payment of benefits dependent on participants' employment relationship with GEFA. *Id.* Prior to the effective date of the First Amendment, each plaintiff would have been eligible to receive a lump-sum payment of his or her accrued benefits when his or her position with Phoenix I was eliminated. *Id.* ¶ 51. The First Amendment made each plaintiff's lump-sum payment option contingent upon elimination of his or her position with GEFA rather than Phoenix I. *Id.* ¶ 52.

The sale of Phoenix American and the adoption of the First Amendment effected a termination of the Plan. *Id.* ¶ 53.

III. Discussion

A. Breach of Contract

The defendants contend that the breach-of-contract claim is preempted by ERISA. Motion at 6-8. They are correct. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 62-63 (1987). The plaintiffs oppose the motion on this count, citing case law, e.g., *Kemmerer v. ICI Americas, Inc.*, 70 F.3d 281, 288 (3d Cir. 1995), that provides that "top hat" plans¹ subject to ERISA should be interpreted in keeping with contract principles. Plaintiffs' Memorandum of Law in Opposition to Defendant's [sic] Motion to Dismiss ("Plaintiffs' Opposition") (Docket No. 5) at 5-7. The fact that the terms of an employee benefit plan are to be interpreted in keeping with the principles of contract law does not and cannot mean that a separate cause of action for breach of contract is available when an action is brought, like this action, Complaint ¶¶ 39-40, 57, pursuant to 29 U.S.C. § 1132(a)(1)(B). The

¹ A "top hat" employee benefit plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1101(a)(1). *See Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 286-87 (2d Cir. 2000). The defendants do not dispute the plaintiffs' (continued on next page)

Supreme Court has already ruled definitively on this issue. The defendants are entitled to dismissal of Count II.

B. Equitable Estoppel

The defendants contend that Count III of the complaint fails to allege the necessary elements of a claim of promissory estoppel and that such a claim is not available when the terms of the benefit plan at issue are unambiguous. Motion at 8-9. The plaintiffs' response addresses neither argument. Plaintiffs' Opposition at 8. It is not necessary in any event to reach the second argument.

“ERISA preempts *state* equitable estoppel claims but a party may assert a *federal* equitable estoppel claim in an ERISA action.” *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 845 (9th Cir. 1994) (emphasis in original). “ERISA equitable estoppel is limited to situations where the wronged party can prove (a) the provisions of the plan at issue are ambiguous, and (b) oral representations interpreting the plan were made to the employee.” *Id.* at 845-46. The complaint does not allege that the provisions of the Plan were ambiguous or that any oral representations were made. Complaint ¶¶ 64-66. The First Circuit requires that

[t]o survive a motion to dismiss, plaintiffs must set forth “factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.” [*Gooley v. Mobil Oil Corp.*, 851 F.2d 513,] 515 [1st Cir. 1988)]. This court has previously plotted the dividing line between adequate “facts” and inadequate “conclusions”: “it is only when . . . conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that ‘conclusions’ become ‘facts’ for pleading purposes.” *Dartmouth Review [v. Dartmouth College]*, 889 F.2d 13,] 16 [(1st Cir. 1989)].

Cooperman v. Individual, Inc., 171 F.3d 43, 47-48 (1st Cir. 1999). Here, the complaint's allegations with respect to the equitable estoppel claim provide, in their entirety:

characterization of the plan at issue in this case as a “top hat” plan.

64. The Plan constitutes a promise to the Plan Participants (Plaintiffs herein), which could reasonably be expected to induce action or forbearance on their part.

65. Injustice to Plan Participants (Plaintiffs herein) can only be avoided by enforcement of the promise mandated by the Plan allowing the Plan Participants to receive lump-sum payment of all accrued benefits upon the sale of Phoenix American Life and consequent elimination of Plaintiffs' positions with Phoenix Home Life and effective termination of the Plan.

66. Plaintiffs are therefore entitle to obtain lump-sum payment of their accrued Plan benefits, along with additional consequential damages for delay in connection with payment of such accrued benefits.

Complaint ¶¶ 64-66.

The complaint does not contain factual allegations of ambiguity² or oral representations as required. Moreover, it fails to meet the requirements for the pleading of estoppel. “The principle of estoppel allows recovery upon a showing of (1) a representation of fact made to the plaintiff; (2) a rightful reliance thereon; and (3) injury or damage to plaintiff resulting from a denial of benefits by the party making the representation.” *Cleary v. Graphic Communications Int’l Union Supplemental Ret. & Disability Fund*, 841 F.2d 444, 447 (1st Cir. 1988). The complaint, liberally interpreted, fails to allege reliance, a material element of any estoppel claim. The defendants are entitled to dismissal of Count III.

C. The ERISA Claim

Count I of the complaint alleges that the defendants violated ERISA by failing to provide the plaintiffs with “immediate lump-sum payment of their accrued benefits” upon the sale of Phoenix American Life to GEFA. Complaint ¶¶ 49-53, 56-57. The defendants contend that the First

² I note further that none of the relevant sections of the Plan, Phoenix Home Mutual Life Insurance Company Group Sales Representatives Deferred Compensation Plan (Exh. A to Complaint) ¶¶ 2.4, 2.6, 5.1-5.3, 7.1-7.2, nor the First Amendment, can reasonably be construed as ambiguous in any way that could possibly affect the plaintiffs' claims as set forth in the complaint.

Amendment provides that the payment becomes due only on the termination of the plaintiffs' employment with GEFA, Motion at 5-6, an event which has not yet occurred by the terms of the complaint, Complaint ¶ 49. The plaintiffs respond that their employment positions with Phoenix American Life were "eliminated by the sale of P[hoenix] A[merican] L[ife] to GEFA," that the Plan has been terminated because it is no longer being funded, and that the First Amendment was enacted "to simply subvert" their right to a lump-sum payment of benefits upon the sale. Plaintiffs' Opposition at 3-4. The plaintiffs cite no authority in support of their necessarily-implied arguments that sale of their employer means as a matter of law that their employment positions were terminated and that cessation of funding of the Plan by GEFA means as a matter of law that the Plan has been terminated. In any event, as the defendants point out, Defendants' Reply Memorandum in Support of Their Motion to Dismiss, etc. ("Defendants' Reply") (Docket No. 6) at 2, the terms of the Plan itself preclude their claims.

The complaint is replete with references to specific sections of the Plan. Complaint ¶¶ 2-34, 42, 44, 51. Copies of the Plan and the First Amendment are attached to the complaint as Exhibits A and B, respectively. A court "may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint . . . without converting the motion [to dismiss] into one for summary judgment." *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996). The Plan provides, in relevant part:

7.1 The Company shall have the right to amend this Plan at any time and from time to time, including a retroactive amendment. Any such amendment shall become effective upon the date stated therein, and shall be binding on all Participants and Beneficiaries, except as otherwise provided in such amendment; provided, however that said amendment shall not adversely affect benefits accrued, but not yet payable as of the date of the amendment or benefits payable to a Participant or Beneficiary where the cause giving rise to such benefit (e.g., retirement) has already occurred.

7.2 The Company has established this Plan with the bona fide intention and expectation that from year to year it will deem it advisable to continue it in effect. However, the Company, in its sole discretion, reserves the right to terminate the Plan in its entirety at any time without the consent of any Participant; provided, however, that in such event, benefits shall not be affected where the cause giving rise to such benefit (e.g., retirement) has already occurred. All other benefits accrued hereunder shall immediately be vested and paid to the Participant in one (1) lump sum.

Phoenix Home Mutual Life Insurance Company Group Sales Representatives Deferred Compensation Plan ¶¶ 7.1-7.2.

The First Amendment provides, in relevant part:

1. Anything in Article IV of the Plan to the contrary notwithstanding, all benefit accruals under the Plan shall cease accrual of Benefits effective as of March 31, 2000.

* * *

3. All other terms, provisions and conditions of the Plan shall continue to apply except that for purposes of Section 5.2 and 5.3 referenced [sic] to “Company”, “Pension Plan” and “Welfare Benefit Plan” shall be applied to mean GE Financial Assurance Holdings, Inc. or such subsidiary or affiliate thereof by which a Participant is employed after the effective date hereof. . . .

4. The effectiveness of this Amendment is contingent upon the occurrence of the closing for the purchase of Phoenix American Life Insurance Company by GE Financial Assurance Holdings, Inc., and this Amendment shall be void and of no force or effect if such closing does not occur.

First Amendment to the Phoenix Home Mutual Life Insurance Company Group Sale Representative Deferred Compensation Plan (Exhibit [B] to Complaint). The complaint alleges that this amendment was adopted before the sale of Phoenix American Life to GEFA. Complaint ¶¶ 48, 50.

Because the employer expressly retained the right to amend the plan at any time, and the amendment was made before the sale, it applies to the plaintiffs. They are, by the terms of their complaint, currently employees of GEFA and will thus become eligible for a lump sum payment of their accrued benefits under the Plan when and if any of the contingencies set forth in Paragraph 5.2 of the Plan, including elimination of their positions by GEFA, occurs. They are not currently eligible

because their positions were not eliminated, within the unambiguous meaning of the Plan language.³ Nor was the Plan terminated by section 1 of the First Amendment, which discontinued accruals. That change, which again the employer expressly retained the right to make, by its terms did not deprive the plaintiffs of benefits already accrued by the terms of the Plan before amendment. By the terms of paragraph 3 of the First Amendment, the Plan continues to exist and the plaintiffs continue to be eligible for payment of the accrued benefits under certain conditions at some future time. Even if the First Amendment had terminated the Plan, however, the employer had also expressly reserved the right to do so in paragraph 7.2 of the Plan. *See Kemmerer*, 70 F.3d at 287-88 (employer may terminate plan after acceptance by performance by participants if explicit right to do so is reserved). For the purposes of this action, it is precisely because the Plan by its terms reserved to the employer the right to amend the Plan that the plaintiffs have failed to state a claim on which relief may be granted.

The plaintiffs argue in the alternative that even if they are not entitled to benefits by the terms of the First Amendment, “the decision by the Plan administrator to deny the benefits is a decision subject to de novo review by the Courts.” Plaintiffs’ Opposition at 4. To the contrary, where there is no factual allegation that would conceivably entitle the plaintiffs to the demanded benefits under the unambiguous language of this “top hat” plan, there is nothing for the court to review.

IV. Conclusion

³ Indeed, if the plaintiffs’ interpretation of the Plan language were correct, their positions would have been eliminated when Phoenix Home Life Mutual Insurance Company, the creator of the Plan, formed Phoenix American Life Insurance Company as a subsidiary and the plaintiffs became employees of that entity, rather than when Phoenix American Life was sold to GEFA. Complaint ¶46. For the reasons set forth in the text, that interpretation is also incorrect.

For the foregoing reasons, I recommend that the defendants' motion to dismiss this action be **GRANTED.**⁴

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 after 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.

Dated this 4th day of April, 2002.

David M. Cohen
United States Magistrate Judge

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⁴ If the court adopts my recommendation there will be no need to reach the defendants' alternative argument that the plaintiffs' demand for a jury trial should be stricken. Motion at 9-10. Should the court reach this issue, I note that the defendants' position is correct. There is no right to a jury trial on claims for benefits under ERISA. *McLaughlin v. Reynolds*, 886 F. Supp. 902, 907-08 (D. Me. 1995). The case law cited by the plaintiffs, Plaintiffs' Opposition at 8, in support of their argument to the contrary relies on *Sullivan v. LTV Aerospace & Defense Co.*, 850 F. Supp. 202 (W.D. N.Y. 1994), which was reversed on this issue, 82 F.3d 1251, 1258 (2d Cir. 1996).

defendant

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