

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WAUKESHA COUNTY, WISCONSIN
and WAUKESHA COUNTY
DEFERRED COMPENSATION PLAN,

Plaintiffs,

v.

NATIONWIDE LIFE INSURANCE
COMPANY and NATIONWIDE
RETIREMENT SOLUTIONS, INC.,

Defendants.

OPINION AND ORDER

06-C-0656-C

This civil suit for money damages is before the court on a second motion to dismiss filed by defendant Nationwide Life Insurance Company and Nationwide Retirement Solutions, Inc. The case arises out of the amount of the payout made from a fixed annuity contract that defendants Nationwide Life Insurance Company and Nationwide Retirement Solutions, Inc. issued to plaintiff Waukesha County, Wisconsin, as a deferred compensation plan for the benefit of plaintiff's employees.

The suit was brought initially by plaintiff Waukesha County. On March 16, 2007, plaintiff filed a second amended complaint adding Waukesha County Deferred

Compensation Plan as an additional plaintiff. In an order entered March 21, 2007, I granted defendants' first motion to dismiss the first amended complaint in part and denied it in part. I dismissed count 6, alleging unfair trade practices under state law, and denied defendants' motion to dismiss plaintiff's claim in count 1 for breach of contract. Also, I denied defendants' motions to transfer venue to the Eastern District of Wisconsin and to dismiss the complaint as to defendant Nationwide Retirement Solutions, Inc.

Now defendants have filed a second motion to dismiss some of the claims of the second amended complaint, in which plaintiffs have alleged breach of contract, breach of the covenant of good faith, negligent misrepresentation, strict liability misrepresentation, intentional misrepresentation and unfair trade practices under Wis. Stat. § 100.18. I conclude that the newly added plaintiff, Waukesha County Deferred Compensation Plan, which I will refer to as Waukesha County Plan for convenience, cannot pursue claims for breach of contract (claim 1), because it is neither a signatory to the contract at issue nor a third-party beneficiary. Plaintiff Waukesha County cannot pursue a breach of contract claim against defendant Nationwide Retirement for breach of contract (claim 1) because Nationwide Retirement is not a party to the contract at issue. Neither plaintiff can proceed against either defendant for breach of the plan document (claim 7), which governs the terms of the deferred compensation plan that plaintiff Waukesha County set up for its employees and was never signed by either defendant. However, I will allow plaintiffs to proceed at this

time on their claim against defendants for breach of a fiduciary duty because it is not entirely clear that plaintiffs cannot show that defendants assumed a duty independent of any duties they had to plaintiffs under the contract.

For the purpose of deciding the motion to dismiss, I find that the following facts are fairly alleged in the complaint and attached exhibits.

ALLEGATIONS OF FACT

Plaintiff Waukesha County is a body corporate of the state of Wisconsin with its principal place of business in Waukesha, Wisconsin. Plaintiff Waukesha County Deferred Compensation Plan is a deferred compensation plan with its principal address in Waukesha County, Wisconsin. (I have some question whether plaintiff Waukesha County Plan is an entity capable of suing or being sued but defendants have not raised that issue.) Defendants Nationwide Life Insurance Company and Nationwide Retirement Solutions are both Ohio corporations with their principal places of business in Columbus, Ohio. The amount in controversy exceeds \$75,000.

Defendant Nationwide Life sells non-insurance investment vehicles in the state of Wisconsin. Defendant Nationwide Retirement acts as an agent of defendant Nationwide Life in connection with non-insurance investment vehicles.

Plaintiffs had two deferred compensation plan options available to plaintiff County's

employees. One was the plan at issue and was referred to by the parties as “Group Fixed Fund Retirement Contract Participating”; the other has no bearing on this case. Plaintiff County decided to terminate the contract it had with defendant Nationwide Life and seek a payout of the money under the contract; defendant Nationwide Life made the payout but plaintiff was dissatisfied with the amount it received and the manner in which the amount was calculated. It has brought this suit to challenge those calculations as well as defendants’ representations of the quality and safety of the assets in defendant Nationwide Life’s investment portfolio.

The contract attached to plaintiffs’ second amended complaint is signed by representatives of defendant Nationwide Life; it is not signed by any representative of defendant Nationwide Retirement and makes no reference to Nationwide Retirement.

Defendant Nationwide Retirement acts as administrator of plaintiff Waukesha County Plan.

OPINION

A. Breach of Contract Claim (Count One)

Defendants do not deny that plaintiff Waukesha County has stated a viable breach of contract claim against defendant Nationwide Life, although they do not concede that plaintiff can recover on the claim. They focus their motion to dismiss on plaintiffs’ attempt

to assert a breach of contract claim on behalf of plaintiff Waukesha County Plan, which is not a signatory to the contract, and on plaintiffs' assertion of the claim against defendant Nationwide Retirement, which, defendants assert, has never been a party to the contract.

Plaintiffs do not dispute defendants' assertion that Waukesha County Plan is not a party to the contract. Instead, they argue that this plaintiff has standing to sue because the contract with defendant Nationwide Life was entered into for the sole purpose of establishing and supporting plaintiff Waukesha County Plan, making it a third-party beneficiary of the contract. Plaintiffs cite Goossen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994), for the proposition that a party need not be a signatory to a contract to recover under that contract if the contract is made for the benefit of that party. This unexceptional statement of the law helps plaintiffs only if they can show that plaintiff Waukesha County Plan was an intended beneficiary of the contract.

It is no doubt true, as plaintiffs assert, that the contract was entered into to fund plaintiff Waukesha County Plan. But unless the plan operated improperly or completely unlike any other similar deferred compensation plan, defendant Nationwide Life invested the money it received not to benefit the plan, but to enable it to pay out the benefits owed to participants under the contractual provisions of the plan. Nothing in the contract suggests that it was the parties' intent to make plaintiff Waukesha County Plan a direct beneficiary, rather than an administrator of a plan for the benefit of plaintiff Waukesha

County's employees. The plan was no more a beneficiary of the investment contract with defendant Nationwide Life than a bank's trust officer is a beneficiary of a trust established at the bank by Jane Smith for the benefit of her son Tom. The trustor's contract with the bank to invest the corpus of the trust to generate funds so that the trust officer can pay Tom's expenses does not make the officer a beneficiary, even if his salary depends on trusts such as Smith's. "An indirect benefit, merely incidental to the contract between the parties, will not give rise to a third-party beneficiary claim." Goosen, 189 Wis. 2d at 249, 525 N.W.2d at 319 (citing Ampex Corp. v. Sound Inst., 44 Wis. 2d 674, 683, 172 N.W.2d 170, 174 (1969)).

As for the breach of contract claim against defendant Nationwide Retirement, plaintiffs do not argue that this defendant was a signatory to the contract, but suggest that it may have some liability to plaintiff Waukesha County because of some action it took in regard to defendant's obligations under the contract. Plaintiffs say, for instance, that this defendant may have made the market value adjustment that is at issue in the parties' dispute over the payout amount from defendant Nationwide Life. This may be true, but it does not impose any liability on Nationwide Retirement or negate defendant Nationwide Life's obligations to plaintiff Waukesha County under the contract. If defendant Nationwide Life used the wrong computations in making the payout, it will be liable to plaintiff Waukesha County, regardless of the source of those computations.

B. Unfair Trade Practice (Count Six)

_____ In count six, plaintiffs alleges unfair trade practice under Wis. Stat. § 100.18. In light of the order entered earlier in this case dismissing an unfair trade practice claim against defendants, plaintiffs concede that they have no claim under this statute. Therefore, defendants' motion to dismiss this claim will be granted.

C. Breach of Plan Document (Count Seven)

Although plaintiffs alleged in their second amended complaint that both plaintiffs had been damaged by defendants' alleged breach of the plan document, they seem to argue in their brief that only plaintiff Waukesha County Plan has rights and obligations under the document that it can assert against defendants. The apparent discrepancy is irrelevant because the document was never a contract between the plaintiffs and either or both of the defendants. The document attached to plaintiffs' second amended complaint (Exhibit 6) was never signed by either defendant. As written, it is a document with rights and obligations running to and from plaintiff Waukesha County and the plan participants. In fact, it provides explicitly that the issuers of any form of investment media used by the plan sponsor (plaintiff Waukesha County) are not parties to the plan and have no accountability to any participant with regard to the operation of the plan. Although the document includes

provisions to the effect that the plan administrator (in this case defendant Nationwide Retirement) must maintain an account with respect to each participant, it is clear from the document that the obligation of seeing that this is done rests with plaintiff Waukesha County. Nothing in the plan provides any ground for believing that either the plan participant or Waukesha County Plan has the right to enforce this obligation against defendant Nationwide Retirement. Plaintiffs do not explain how any document could create such an obligation on an entity that never signed the document.

D. Breach of Fiduciary Duty (Count Eight)

In count 8, plaintiffs allege that both defendants breached fiduciary duties to plaintiff Waukesha County Plan. Making out the exact contours of plaintiffs' claim is not easy and is not helped by plaintiffs' practice of treating the two plaintiffs as one and doing the same with the two defendants throughout the complaint. Plaintiffs allege that "Nationwide had fiduciary duties with respect to the Waukesha County Deferred Plan via both the Nationwide Group Contract and Restated Plan Document" and that "Nationwide breached their fiduciary duties with respect to the Waukesha Deferred Compensation Plan by, *inter alia*, making material misrepresentations regarding the quality and duration of the investments in the Plan and applying the MVA formula in a manner contrary to the terms to the Nationwide Group Contract and Restated Plan Document." Cpt., ¶¶ 88 & 89.

Plaintiffs may be alleging that the duties (if any) that the defendants had with respect to the plan extended to the plan itself *and* to the plan's sponsor, plaintiff Waukesha County or they may be alleging that the duties extended only to the plan. It is not clear.

Defendants have moved to dismiss the claim on the ground that Wisconsin law treats contract and tort claims as distinct and allows a plaintiff to sue for both only if the plaintiff can show an assumption of a duty that exists independently of the contract. Greenberg v. Stewart Title Guaranty Co., 171 Wis. 2d 485, 495, 492 N.W.2d 147, 151-52 (1992). See also Madison Newspapers, Inc. v. Pinkerton's Inc., 200 Wis. 2d 468, 476, 545 N.W.2d 843, 846 (Ct. App. 1996). "A fiduciary relationship arises from a formal commitment to act for the benefit of another (for example, a trustee) or from special circumstances from which the law will assume an obligation to act for another's benefit." Noonan v. Northwestern Mut. Life Ins. Co., 2004 WI App 154, ¶ 24, 276 Wis. 2d 33, 47, 276 N.W.2d 254, 260-61 (quoting Merrill Lynch, Pierce, Fenner, Inc. v. Boeck, 127 Wis. 2d 127, 136, 377 N.W.2d 605 (1985)).

Plaintiffs have not specified any formal commitment undertaken by either defendant to act for plaintiffs' benefit or any special circumstances implying an obligation to act for plaintiffs' benefit. It appears that the investment contract between plaintiff Waukesha County and Nationwide Life is an ordinary commercial contract in which the parties are exchanging services for money.

The cases cited by plaintiffs involve contracts in the nature of annuities or arising out of trust relationships. Zastrow v. Journal Communications, Inc., 2006 WI 72, ¶¶ 32, 37, 291 Wis. 2d 426, 446, 449, 718 N.W.2d 51, 60, 62 (suit against employees stock trust based on trustees' failure to disclose pertinent information); Noonan, 2004 WI App 154 (plaintiffs-annuitants suing issuer of annuity policies for issuer's unilateral change in way it distributed surplus profit to policyholders); Hammes v. First National Bank & Trust Co. of Racine, 79 Wis. 2d 355, 255 N.W.2d 555 (1977) (suit by trust beneficiaries against former trustee).

It seems unlikely that plaintiffs will be able to show that either defendant has any fiduciary duties to either or both plaintiffs, but at this early stage of the proceedings, I am reluctant to dismiss the count. Plaintiffs are short on facts and on explaining the basis on which they believe that defendants had fiduciary duties toward them and the nature of those duties, but they have alleged a breach of fiduciary duties. Fed. R. Civ. P. 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S. Ct. 2197 (2007) (internal quotations omitted.) If, as defendants maintain, they have evidence to show that defendant Nationwide Retirement did not hold any of the plan assets directed into the Fixed Contract, did not assess the market value adjustment and did not make any

representations about the quality of the investments, they may move for summary judgment on this claim.

ORDER

IT IS ORDERED that the motion filed by defendant Nationwide Life Insurance Company and Nationwide Retirement Solutions, Inc. is GRANTED as to claim 1 of the complaint as it relates to plaintiff Waukesha County Deferred Compensation Plan; it is GRANTED as to counts 6 and 7 and it is DENIED as to count 8.

Entered this 8th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge