IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOLLY and STEVE BOLLIG,

Plaintiffs,

v.

CHRISTIAN COMMUNITY HOMES AND SERVICES, INC.,

Defendant.

OPINION AND ORDER

02-C-532-C

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Plaintiffs Dolly and Steve Bollig sought this action, seeking payment for medical bills in excess of $100,000 under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, from the employee health insurance plan sponsored by defendant Christian Community Homes and Services, Inc. Defendant moved for summary judgment and for an award of attorney fees under 29 U.S.C. § 1132(g)(1). I granted the motion for summary judgment on July 10, 2003, finding that plaintiffs did not have Article III standing to bring the claim at issue because there was no evidence that they had ever been billed for the medical expenses or that they ever will be. In the same order, I denied defendant's request for attorney fees, first because it is questionable whether a court may award attorney

fees under § 1132(g)(1) when it lacks subject matter jurisdiction, as is the case when the plaintiffs lack standing to bring a claim, and second, because defendant failed to show that plaintiffs' suit was brought in bad faith.

Defendant seeks reconsideration of the July 10, 2003, decision denying attorney fees and costs because it believes that this court has jurisdiction to award fees and costs brought under § 1132(g)(1) and in the alternative, because 28 U.S.C. § 1919 permits an award of costs even when a court lacks jurisdiction. Because I have already decided that defendant is not entitled to attorney fees and defendant has shown no good reason to change that decision, I will deny defendant's motion under Fed. R. Civ. P. 59(e). However, because I conclude that plaintiffs' lawsuit is unjustified under settled law, I will grant defendant's request for costs under 28 U.S.C. § 1919.

OPINION

A. Rule 54(d) Motion for Attorney Fees, Costs and Expenses

Defendant acknowledges that it lost its first motion for attorney fees and costs, but argues that the decision was wrong. Although defendant styles its motion as one brought under Fed. R. Civ. P. 54(d), it is properly brought pursuant to Fed. R. Civ. P. 59(e), because the case has been closed. Once that happens, a party seeking reconsideration of the order disposing of the case or the judgment may file one of two kinds of motions in the district

court: a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59 or a motion for relief from the judgment or order pursuant to Fed. R. Civ. P. 60, which has no applicability in this situation. The purpose of Rule 59 is to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings. Charles v. Daley, 799 F.2d 343, 348 (7th Cir. 1986).

Motions to alter or amend a judgment pursuant to Rule 59(e) may be granted to (1) take account of an intervening change in controlling law; (2) take account of newly discovered evidence; (3) correct clear legal error; or (4) prevent manifest injustice. 12 Moore's Federal Practice, § 59.30[5][a][i] (Matthew Bender 3d ed.). Defendant does not demonstrate that any of these circumstances are present; instead it continues to assert its disagreement with the conclusion in the July 10 opinion and order that a court lacking subject matter jurisdiction also lacks authority to award attorney fees and costs. Among other cases, defendant cites Citizens for a Better Environment v. The Steel Company, 230 F.3d 923, 236 (7th Cir. 2000), for its holding that "a court may lack authority to resolve the merits of a claim yet have jurisdiction to award costs and attorneys' fees to the prevailing party." It is true that in certain situations and under certain statutes and rules, courts may award litigation expenses connected with a lawsuit even though the court lacks authority to decide the suit on its merits. Among these statutes and rules are 28 U.S.C. § 1919, 28 U.S.C. § 1447(c), and Fed. R. Civ. P. 11. See, e.g., Citizens, 230 F.3d at 926-27 ("a motion

under any of these rules or statutes is a case or controversy that may be adjudicated to the extent the movant has suffered at its adversary's hands an injury [that] may be redressed by a decision in its favor"); Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1078 (7th Cir. 1987) ("a court has jurisdiction to determine its jurisdiction and therefore may engage in all the usual judicial acts," such as supervising discovery, holding a trial and ordering the payment of costs, "even though it has no power to decide the case on the merits"). However, defendant seeks attorney fees and costs in the first instance under 29 U.S.C. § 1132(g)(1). The Court of Appeals for the Seventh Circuit has endorsed the conclusion that courts lack authority to award attorney fees under this statute when they lack subject matter jurisdiction over the case that gave rise to the attorney fees. Citizens, 230 F.3d at 929 ("We have no quarrel with [the] conclusion" in Cliburn v. Police Jury Association, 165 F.3d 315, 316 (5th Cir. 1999), that by dismissing plaintiff's suit for lack of subject matter jurisdiction, there was no "action" under ERISA and parties did not qualify as participants, beneficiaries or fiduciaries eligible to invoke 29 U.S.C. § 1132(g)(1)).

Given the decision in Citizens, it is immaterial whether defendant can distinguish the facts in this case from those in In re Knight, 207 F.3d 1115 (9th Cir. 2000), a case on which I relied in denying defendant's first request for fees and costs. I note, however, that Knight supports the conclusion I reach. In that case, the court cited several cases holding that, as a general matter, lack of subject matter jurisdiction precludes "a district court from applying

the fee-shifting provision of the substantive statute under which the suit was brought." Id. at 1117 (citing Branson v. Nott, 62 F.3d 287, 292-93 (9th Cir. 1995)); see also Cliburn, 165 F.3d at 316 ("Given that the district court lacked jurisdiction to hear Cliburn's claims under ERISA, it logically follows that the court lacked jurisdiction to entertain the Police Jury Association's request for fees, costs and expenses under ERISA."); Zambrano v. Immigration and Naturalization Service, 282 F.3d 1145, 1150 (9th Cir. 2002) (noting that subject matter jurisdiction is prerequisite in cases arising under ERISA, § 1988 and tax code because fee-shifting provisions implementing those statutes do not provide independent grant of subject matter jurisdiction).

As an alternate ground, defendant argues that plaintiffs' claim was frivolous and supports an award of attorney fees. Had defendant believed this when plaintiffs filed the lawsuit, it should have moved for sanctions under Fed. R. Civ. P. 11. Defendant notes that it "put plaintiffs on notice that their claim was frivolous and warned them that pursuing it would force [defendant] to seek attorney's fees, cost[s], and other expenses." Dft.'s Br., dkt. # 59, at 8. However, Rule 11 requires more than an informal notice to plaintiffs regarding sanctions. See, e.g., Divane v. Krull Electric Co., Inc., 200 F.3d 1020, 1026 (7th Cir. 1999) (finding that twenty-one day safe harbor period is not merely empty formality; party must be offered opportunity to withdraw or correct its actions to avoid imposition of sanctions.); see also Barber v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998) (noting that informal

warning of sanctions is insufficient under Rule 11(c)(1)A)). It is too late now for defendant to proceed under Rule 11.

Defendant reasserts its contention that plaintiffs brought this case for improper reasons. In the July 10 opinion and order I concluded that plaintiffs' suit was not intended to "harass or vex defendant." I am unpersuaded that this earlier ruling was in error. Therefore, I will deny defendant's motion for attorney fees and costs under Rule 59(e).

B. 28 U.S.C. § 1919 Motion for Fees, Costs and Expenses

In the alternative, defendant seeks attorney fees, costs and other expenses under 28 U.S.C. § 1919, a statute it did not mention when it made its first request for fees and costs. Because I addressed only the issue of attorney fees in the July 10 opinion and order, I will consider defendant's motion under § 1919 for costs.

Under § 1919, the district courts have authority to order the payment of "just costs" when an action or suit is dismissed "for want of jurisdiction." "Just costs" do not include attorney fees. See Signorile v. Quaker Oats Company, 499 F.2d 142, 145 (7th Cir. 1974) (finding that term "costs" in § 1919 excludes attorney fees, just as in 28 U.S.C. § 1920) (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 720 (1967)); see also Barron's Educational Series, Inc. v. Hiltzik, 987 F. Supp. 224, 225 (E.D.N.Y. 1997) (noting that there is not a "single reported case in the history of American jurisprudence in

which attorney's fees have been awarded under § 1919").

Congress enacted § 1919 to overturn the common law rule prohibiting an award of costs when a court lacked jurisdiction. Citizens, 230 F.3d at 926-27. According to the Court of Appeals for the Seventh Circuit, both § 1919 and 28 U.S.C. § 1447(c) emerged from the same law and both statutes permit courts to award "just costs" in particular circumstances (although § 1447(c) permits a court to award attorney fees). Id. at 927 (noting that Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 386-87 (1884), applied a new statute and held that costs may be awarded even when court to which action is removed lacks jurisdiction to decide merits and that statute is now split into 28 U.S.C. § 1919 and 28 U.S.C. § 1447(c)). Under § 1447(c), an award of fees and costs is proper when "[r]emoval [is] unjustified under settled law." Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) ("§ 1447 is *not* a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party"). In fact, under § 1447(c) the presumption is that the prevailing party is entitled to attorney fees. Id. at 411. A showing of bad faith on the part of the losing party on remand is not essential to an award under § 1447(c). Id. at 410.

Few courts have discussed in published opinions the circumstances in which an award of "just costs" would be appropriate under § 1919. However, because § 1447(c) and § 1919 originated in the same law and use the same"just costs" term, it is reasonable to assume that

the standard for awarding costs under either statute should be the same. The Court of Appeals for the Seventh Circuit has held under § 1447(c), an award of attorney fees and costs is proper when removal is unjustified under settled law. Garbie, 211 F.3d at 410. I conclude that an award of costs under § 1919 is appropriate if there is no justification for plaintiffs' pursuit of their case. I note that this standard is different from the standard outlined in Edward W. Gillen Co. v. Hartford Underwriters Insurance Co., 166 F.R.D. 25, 28 (E.D. Wis. 1996), in which the court found that an award of costs would be unjust as a general rule, absent exigent circumstances, such as financial hardship, prejudice to the parties or culpable delay by the opposing party. In Edward W. Gillen Co. the court concluded that, unlike Fed. R. Civ. P. 54(d), § 1919 does not carry a presumption of entitlement to costs by the prevailing party. Id. at 27. However, given the court of appeals' discussion in Citizens and Garbie concerning § 1919 and § 1447(c), I cannot conclude that a court considering a § 1919 motion for costs should follow the factors discussed in Edward W. Gillen Co. Rather, an award of costs can be appropriate if plaintiffs' arguments were not substantially justified. This standard requires an inquiry into the merits of the case, if only briefly, but does not necessitate deciding whether a presumption of an award of costs exists under § 1919. Regardless of the answer, plaintiffs' lawsuit is unjustified under settled law.

Defendant contends that because no one ever asked plaintiffs to pay for their son's medical expenses, they lacked justification for bringing an action against defendant,

particularly after they discovered that they would not be held liable for their son's medical bills under HFS § 104.01(12)(b). Dft.'s Br., dkt. #70, at 7. HFS § 104.01(12)(b) exempts from liability covered services furnished by certified providers under the medical assistance program. Plaintiffs acknowledge that this exemption applies to them. Plts.' Br., dkt. #66, at 8. Plaintiffs argue that despite this knowledge, they have never received any official notification from any entity that they will not be required to pay the medical bills after the conclusion of this litigation. Although plaintiffs' need for written reassurance is reasonable, it is unnecessary. (I note that the fiduciary of defendant's health plan could have helped plaintiffs acquire such written confirmation. See, e.g., Bowerman v. Wal-Mart Stores, Inc., 226 F. 3d 574, 590 (7th Cir. 2000) ("[W]e have made clear that fiduciaries must communicate material facts affecting the interests of plan participants or beneficiaries and that this duty to communicate exists when a participant or beneficiary 'asks fiduciaries for information, *and even when he or she does not*.'") (emphasis added) (internal citations omitted). The existence of HFS § 104.01(12)(b) serves as a type of written confirmation. Should Fairview University Medical Center attempt to bill plaintiffs, plaintiffs will have legal support to challenge such a claim against them.

As I noted in the July 10 opinion and order, plaintiffs are not the proper parties to be suing to recover medical expenses for which they have not been held responsible and for which they never will be responsible. Despite this ruling, plaintiffs continue to argue that

their case raises a novel question of law concerning the legal effect of a primary insurer's wrongful denial of a covered expense so that it will be submitted to medical assistance for payment. They maintain that as the primary insurer, defendant should have covered the costs of their son's liver transplant. Even if this is true, as I noted in the July 10 opinion and order, that is an issue for Fairview University Medical Center to pursue, since it is the entity that suffered a concrete injury in the form of more than $100,000 in unpaid medical bills. Plaintiffs had no standing to bring this case. Summary judgment in defendant's favor was appropriate. With a little more research, plaintiffs' lawyer could have discovered that filing a lawsuit for payment of bills was unnecessary. I find that plaintiffs' lawsuit was unjustified under settled law. I will grant defendant's request for costs under § 1919. However, because defendant has not yet itemized its costs incurred in defending this litigation, it may have until November 4, 2003, in which to file its bill of costs in compliance with 28 U.S.C. § 1920. Plaintiffs will have until November 11, 2003, to respond.

ORDER

1. The motion for attorney fees, costs and expenses of defendant Christian Community Homes and Services, Inc. under Fed. R. Civ. Pro. 59(e) is DENIED;

2. Defendant's motion for costs under 28 U.S.C. § 1919 is GRANTED;

3. Defendant has until November 4, 2003, to file an itemization of costs incurred in this litigation;

4. Plaintiffs Dolly and Steve Bollig have until November 11, 2003, to file a response to defendant's itemization of costs.

Entered this 27th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge