

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

WAUSAU BENEFITS, INC.,

Plaintiff,

v.

MARK A. BALDINO,

Defendant.

ORDER

05-C-0007-C

A hearing was held on plaintiff Wausau Benefits, Inc.'s motion for a preliminary injunction on January 31, 2005, before United States District Judge Barbara B. Crabb. Polly M. Haley appeared on behalf of plaintiff. Defendant did not appear.

Although defendant filed documents purporting to show that neither he nor his counsel has possession of any of the funds disbursed to him as the result of a settlement with the tortfeasor, I am not persuaded that defendant has shown conclusively that plaintiff cannot obtain equitable relief under 29 U.S.C. § 1132(a)(3). It remains possible that plaintiff could trace funds that are identifiable, have not been dissipated and are still subject to defendant's control. Administrative Committee of Wal-Mart v. Varco, 338 F.3d 680, 687 (7th Cir. 2003).

RECORD FACTS

For the purpose of deciding plaintiff's motion, I find that defendant Mark Baldino was a covered person under the MGM Mirage Employee Group Health Plan, which is self-funded, that he was injured in an accident on or about October 9, 2003 and that the Plan paid medical benefits on his behalf in the amount of \$40,347.62. The Plan contains a subrogation, reimbursement and third party recovery provision that provides that the Plan will have a lien on any amount recovered by the covered person to the extent that it has paid medical expenses on his behalf. Under the Plan, the covered person agrees to repay to the Plan the benefits paid on his behalf out of any recovery he obtains from a third party or an insurer. Also, he agrees to recognize the Plan's right to subrogation and reimbursement.

Defendant's counsel, Richard Harris, settled claims relating to the October 9, 2003 accident for \$70,000. On January 22, 2004, defendant executed a reimbursement agreement, reaffirming his obligations under the Plan. Despite doing so, defendant has refused to reimburse the Plan in accordance with the Plan's terms.

OPINION

This action arises under the Employee Retirement Income Security Act, 29, U.S.C. § 1132(a)(3). The court has jurisdiction over the subject matter of the suit and the person of defendant. Venue is proper.

Under the Plan covering defendant, he was required to reimburse the Plan for any amounts it paid for medical expenses on his behalf and to do nothing to prejudice the Plan's right to subrogation. Because it appears that a res may exist that would allow the imposition of final equitable relief and plaintiff has demonstrated a clear claim to such relief, plaintiff has more than a nominal chance of prevailing on its claim for equitable relief. Plaintiff will suffer immediate and irreparable injury if its motion is not granted. It has no remedy at law. Finally, the balance of harms favors plaintiff.

ORDER

IT IS ORDERED that plaintiff Wausau Benefits, Inc.'s motion for preliminary injunctive relief is GRANTED. FURTHER, IT IS ORDERED that defendant Mark A. Baldino and all those acting in concert with him, including his counsel, Richard Harris and the Harris Law Firm, are ENJOINED from disposing of \$40,347.62 of the \$70,000.00 defendant received in settlement of his personal injury claims until the rights of the parties have been determined by this court.

The \$1,000.00 bond that plaintiff posted with the Clerk of Court pursuant to the court's entry of a temporary restraining order is a sufficient bond for this preliminary

injunction.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge