

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

DEBORAH A. KENSETH,

Plaintiff,

v.

DEAN HEALTH PLAN, INC.,

Defendant.

ORDER

08-cv-1-bbc

This case for breach of fiduciary duty under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, is on appeal after I concluded that plaintiff Deborah Kenseth failed to show that she was seeking any “equitable relief” within the meaning of 29 U.S.C. § 1132(a)(3). Plaintiff has filed a “motion to supplement the record” to include factual developments that have occurred in the case since judgment was entered. I am denying the motion because plaintiff has failed to make any attempt to show that she is entitled to the relief she seeks.

Initially, plaintiff filed her motion with the Court of Appeals for the Seventh Circuit under Fed. R. App. P. 27. However, that rule simply addresses the procedural requirements for filing any motion; it has nothing to do with supplementing the record. The court of

appeals denied plaintiff's motion without prejudice "to renewal after presentation to the district court." This suggests that the court of appeals construed plaintiff's motion as a motion to correct or modify the record under Fed. R. App. P. 10(e), which is generally filed first with the district court.

Fed. R. App. P. 10(e) "is meant to ensure that the record reflects what really happened in the district court, but not to enable the losing party to add new material to the record in order to collaterally attack the trial court's judgment." United States v. Banks, 405 F.3d 559, 567 (7th Cir. 2005) (internal quotations omitted). Because plaintiff is seeking to add new material that I did not consider, she cannot supplement the record under Rule 10.

Plaintiff seems to realize that she is not entitled to relief under Rule 10 because she does not cite it in her motion. Instead, she cites Fed. R. Civ. P. 60(b)(6), which allows a district court to vacate the judgment for "any other reason that justifies relief" and Fed. R. Civ. P. 62.1, which addresses motions filed with the district court while a case is on appeal. Thus, although plaintiff calls her motion one to "supplement the record," in fact she wants this court to ask the court of appeals to remand the case so that I can vacate the judgment and reconsider the decision in light of the new facts.

One problem with plaintiff's motion is that she develops no argument in support of it. The only authority she cites is City of Los Angeles v. Lyons, 461 U.S. 95, 100-01 (1983), but that case addresses the question whether events that occur after a complaint is filed can

moot the case. It does not address the standard under Rule 60 or for submitting new evidence after judgment has been entered.

In her motion, plaintiff seems to treat the matter as a technical one that can be granted by this court as a matter of course, but that is not how Rule 60 motions work. “As a general rule, relief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances.” Bakery Machinery & Fabrication, Inc. v. Traditional Baking, Inc., 570 F.3d 845, 848 (7th Cir. 2009) (internal quotations omitted). See also Musch v. Domtar Industries, Inc., 587 F.3d 857, 861 (7th Cir. 2009) (affirming denial of motion under Rule 60(b)(6) because plaintiff “failed to present evidence of extraordinary and exceptional circumstances”). Because plaintiff does not even attempt to show that she has met that standard in this case, I cannot grant her motion or ask the court of appeals to remand the case at this time.

ORDER

IT IS ORDERED that plaintiff Deborah Kenseth’s “motion to supplement the

record,” dkt. ## 111 and 115, is DENIED.

Entered this 2d day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge