IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICIA GARRITY,

Plaintiff,

v.

THE BUCHHOLZ PLANNING CORPORATION
and UNUM INSURANCE COMPANY OF AMERICA,

Defendants.

ORDER

12-cv-443-bbc

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In an order dated May 16, 2013, dkt. #55, I granted plaintiff Patricia Garrity's motion for summary judgment on her claim that defendant Unum Insurance Company of America violated the Employee Retirement Income Security Act by terminating her disability benefits. I noted that three issues still had to be resolved: (1) whether plaintiff is entitled to prejudgment interest and, if so, the amount to which she is entitled; (2) whether plaintiff is entitled to attorney fees and, if so, the amount to which she is entitled; and (3) whether defendant Buchholz Planning Corporation (the plan) should be dismissed from the case.

With respect to the first two issues, the parties have agreed that plaintiff should receive $55,611.17 in attorney fees and $189.93 in prejudgment interest. Accordingly, I will award those amounts.

With respect to the third issue, plaintiff does not ask for any relief against defendant Buchholz and she says that "judgment should only be awarded against Unum." Dkt. #57

at 3. However, she cites Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan, 378 F.3d 669 (7th Cir. 2004), as support for a view that the plan is a proper party.

Blickenstaff does not stand for the proposition that the plan may be named as a defendant even when the plaintiff is not seeking any relief from the plan. Rather, the court in that case stated that a claim for benefits under ERISA "generally is limited to a suit against the Plan." Id. at 674. See also Feinberg v. RM Acquisition, LLC, 629 F.3d 671, 673-74 (7th Cir. 2011) ("The proper defendant in a suit for benefits under an ERISA plan is, in any event, normally the plan itself rather than the plan administrator, because the plan is the obligor.") (citations omitted). In other words, Blickenstaff supports a view that plaintiff should have sued Buchholz *instead of* Unum, not that the plan should be included alongside the insurer as a kind of nominal party.

The Court of Appeals for the Seventh Circuit recently questioned its general rule that insurers are not proper parties in a claim for benefits. Schultz v. Aviall, Inc. Long Term Disability Plan, 670 F.3d 834, 836 n.1 (7th Cir. 2012). However, even if I assume that Blickenstaff reflects the current rule, defendant Unum waived any argument that it should not have been included in the lawsuit by failing to raise it in response to plaintiff's motion for summary judgment. In any event, plaintiff cites no authority for the view that a party can be excluded from the judgment but still remain a party to the case. Accordingly, I am dismissing the complaint as to defendant Buchholz.

ORDER

IT IS ORDERED that

1. Plaintiff Patricia Garrity is AWARDED $55,611.17 in attorney fees and $189.93 in prejudgment interest against defendant Unum Insurance Company of America.

2. The complaint is DISMISSED as to defendant Buchholz Planning Corporation.

3. The clerk of court is directed to enter judgment in favor of plaintiff and close this case.

Entered this 10th day of June, 2013.

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