[Cite as *Bennett v. Bank of Am., N.A.*, 2003-Ohio-654.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81490

WILLIAM R. BENNETT, ET AL.	:	
	:	JOURNAL ENTRY
Plaintiffs-Appellants	:	
	:	AND
vs.	:	
	:	OPINION
BANK OF AMERICA, N.A., ET AL.	:	
	:	
Defendants-Appellees	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 13, 2003
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-437143
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellant: William R. Bennett	JAMES A. DEROCHE, ESQ. Garson & Associates Co., L.P.A. 1600 Rockefeller Building 614 West Superior Avenue Cleveland, Ohio 44113
For defendant-appellee: Bank of America, N.A.	DAVID A. WALLACE, ESQ. Zeiger & Carpenter 1600 Huntington Center 41 South High Street Columbus, Ohio 43215
For defendant-appellee: Key Trust Co. of Ohio, N.A.	MITCHELL G. BLAIR, ESQ. COLLEEN MORAN O'NEIL, ESQ. KIMBERLY M. OREH, ESQ.

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FRANK D. CELEBREZZE, JR., J.:

{¶1} The appellant[1], William R. Bennett, appeals the judgment of the Cuyahoga County Court of Common Pleas, Civil Division, which dismissed the instant action holding that his state law claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA). For the following reasons, the judgment of the lower court is hereby affirmed.

{¶2} In the mid-1960's, Bennett founded Vision Service Plan ("Ohio VSP") and served as its President. Thereafter, in 1992, Ohio VSP and Vision Service Plan of California ("VSP") entered into an affiliation agreement and the two entities merged. After the merger, Bennett remained an employee/consultant of VSP until January 2, 2001.

{¶3} While employed at VSP, Bennett agreed to defer a substantial portion of his income pursuant to a deferred compensation agreement with VSP. The deferred compensation agreement provided that Bennett was the sole beneficiary of two

[1]VSP is an involuntary plaintiff, pursuant to Rule 19 of the Ohio Rules of Civil Procedure, as the titled owner of the funds, investments and assets subject of this action. William R. Bennett is the sole appellant herein.

unfunded, deferred compensation plans. The plans were intended to defer taxation and later provide retirement income for Bennett. The plan's funds and assets were held in custodial accounts, first with Bank of America ("BOA"), then with Bank of New York ("BNY"), and eventually with Key Bank ("KEY").

{¶4} In January of 1994, VSP appointed Cashel Management ("Cashel"), an investment advisory firm, to serve as manager of the assets and investments that VSP chose to accumulate in order to fund its future payment obligations under the deferred compensation agreement with Bennett. Thereafter, it is alleged that Cashel began to perpetrate a financial scam that depleted the assets of the compensation plan which was intended to fund Bennett's retirement.

{¶5} It is alleged that Cashel depleted the assets of said compensation accounts by repeatedly making wire transfers from said accounts to a failed dot-com start-up known as Rx Remedy. It is further alleged that both BOA and KEY ignored the limits of authority granted to Cashel under each bank's respective account agreements in relation to the plan's funds. Bennett contends that both banks gave Cashel possession of property and assets held in the respective accounts and allowed Cashel to cash in and out of the accounts at will. Bennett asserts that the acts of Cashel and the banks circumvented both the account agreements and each bank's respective internal policies.

{¶6} In discovering that the plans, which were intended to fund his retirement, had been depleted, Bennett filed the instant action asserting claims for breach of contract, bad faith, and violation of Ohio's Corrupt Activity Act, pursuant to R.C. 2923.32. Thereafter, Key answered and filed motions to dismiss arguing that all of the claims asserted by Bennett were preempted by ERISA, and the lower court granted the dismissal.

{¶7} Following the lower court's decision on the preemption issue, BOA filed a motion for judgment on the pleadings asserting the same preemption argument as Key and that, too, was granted by the lower court.[2]

{¶8} It is from this judgment of the lower court, that Bennett now appeals. For the following reasons, the judgment of the lower court is hereby affirmed.

{¶9} The appellant presents one assignment of error for this court's review:

{¶10} "I. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-APPELLEE KEY TRUST COMPANY OF OHIO AND DEFENDANT-APPELLEE BANK OF AMERICA N.A. ARE PRE-EMPTED BY THE EMPLOYEE RETIREMENT SECURITY ACT OF 1974 (ERISA)."

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[2]BOA initially answered and filed a third-party complaint. Due to the lower court's grant of BOA's judgment on the pleadings, BOA dismissed its third-party claims.

{¶11} In order to prevail on a motion to dismiss, pursuant to Civ.R. 12(B)(6), it must appear "* * * beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545. It is well settled that "when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd* at 60, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶12} While the factual allegations of the complaint are taken as true, "[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324. In light of these guidelines, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 245. See, also, *Spalding v. Coulson* (1993), 104 Ohio App.3d 62.

{¶13} Since factual allegations in the complaint are presumed true, only the legal issues are presented, and an entry of dismissal on the pleadings will be reviewed de novo. *Hunt v. Marksman Prod., Div. of S/R Indus., Inc.* (1995), 101 Ohio App.3d 760, 762.

{¶14} In this instant action, the appellant asserts claims for breach of contract, negligence, and violations of R.C. 2923.32, Ohio's Corrupt Activity Act, each directly related to the mismanagement of the appellant's employee benefits plan/accounts by Cashel. Accordingly, under 29 U.S.C. 1144(a), ERISA preempts state law and state law claims that "relate to" any employee benefit plan as that term is defined therein. *Pilot Life Insurance Co. v. Dedeaux* (1987), 481 U.S. 41, 95 L.Ed.2d 39, 107 S.Ct. 1549. The phrase "relate to" is given broad meaning such that a state law cause of action is preempted if "it has connection with or reference to that plan." *Metropolitan Life Ins. Co. v. Mass*. (1985), 471 U.S. 724, 730, 105 S.Ct. 2380, 85 L.Ed.2d 728. Such claims are preempted if they "relate to" an ERISA plan whether or not they were so designed or intended. *Daniel v. Eaton Corp*. (6th Cir., 1988) 839 F.2d 263, cert. denied, 488 U.S. 826, 102 L.Ed. 52, 109 S.Ct. 76. It is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit. *Scott v. Gulf Oil Corp*. (6th Cir. 1985), 754 F.2d 1499. Nor is it relevant to an analysis of the scope of

federal preemption that appellants may be left without remedy. *Caterpillar Inc. v. Williams* (1987), 482 U.S. 386, 96 L.Ed.2d 318, 107 S.Ct. 2425.[3]

{¶15} In reviewing the record, it is abundantly clear that all of the appellant's state law claims relate to an employee benefit plan. Moreover, all of the issues in this matter relate to an employee benefit plan and involve allegations of failure to pay benefits under said employee benefit plan. The appellant was to benefit from two separate employee benefit plans, the assets of which were to be utilized to fund his retirement. However, when he attempted to collect funds from these plans, it was discovered that, due to the "alleged" mismanagement by Cashel, the funds/ accounts were virtually depleted. Thereafter, the appellant filed the instant action asserting the aforementioned state claims. As stated in *Scott*, supra, it is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit.

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[3]The United States Supreme Court has held that Congress' intent in enacting ERISA was to completely preempt that area of employee benefit plans and to make regulation of benefit plans solely a federal concern. *Pilot Life*, 481 U.S. at 41. Moreover, the 6th Circuit, has repeatedly recognized that virtually all state law claims relating to an employee benefit plan are preempted by ERISA. *See, e.g., Ruble v. UNUM Life Ins. Co.* (6th Cir., 1990), 913 F.2d. 295; *Davis v. Kentucky Finance Cos. Retirement Plan* (6th Cir., 1989), 887 F.2d 689, cert. denied, 495 U.S. 905, 109 L.Ed.2d 288, 110 S.Ct. 1924 (1990); *McMahan v. New England Mut. Life Ins. Co.* (6th Cir., 1989), 888 F.2d 426.

{¶16} In the instant matter, each and every cause of action goes directly to the ability to recover from an ERISA plan benefit; therefore, as specifically delineated by Congress under 29 U.S.C. 1144(a), ERISA preempts state law and state law claims that "relate to" any employee benefit plan as that term is defined therein. *Pilot Life,* 481 U.S. 41. As such, we can find no reason to disturb the judgment of the lower court. The claims asserted are intimately related to the appellant's ability to collect under a covered employee benefit plan and are summarily preempted by ERISA.

Judgment affirmed.

COLLEEN CONWAY COONEY, J., CONCURS.

JAMES J. SWEENEY, J., DISSENTS WITH SEPARATE DISSENTING OPINION.

FRANK D. CELEBREZZE, JR.
JUDGE

JAMES J. SWEENEY, J., DISSENTING:

{¶17} I respectfully dissent from the majority's conclusion that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. ("ERISA") preempts Bennett's state law claims in this action. The gravamen of Bennett's case is that the Banks breached the terms and duties assumed under certain custodial agreements causing him to suffer damage. After reviewing the record and applicable law, I simply cannot agree that ERISA preempts Bennett's claims due to the fortuitous fact

that the custodial accounts in this case just happened to hold funds of certain ERISA plans.

{¶18} The Banks allege[4] that 29 U.S.C. 1144(A) preempts Bennett's claims through the following language: "the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)] ***." A cursory review of the breadth of federal and state law dealing with this issue reveals that courts have and continue to struggle with applying the phrase "relate to" in defining the scope of this preemption. Indeed, the United States Supreme Court has felt compelled to go beyond the "unhelpful text and difficulty of defining its key terms, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."). *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 656.

{¶19} Following that lead, I begin by noting "that in passing §514(a), Congress intended 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between

[4]Bank of America joined in the brief and arguments submitted by Key Trust Company of Ohio, N.A.

States and the Federal Government *** [and to prevent] the potential for conflict in substantive law *** requiring the tailoring of plans and employer conduct to the pecularities of the law of each jurisdiction.'" Id. quoting, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142.[5] Allowing Bennett's state law claims to proceed will not endanger the goal of a uniform body of benefits law since his claims have nothing whatsoever to do with the administration of a benefits plan.

{¶20} The imprecise nature and seemingly infinite scope of the "relate to" phrase underscores the importance of mooring ERISA preemption to its legislative objectives. Without some point of reference, "for all practical purposes preemption would never run its course, for 'really, universally, relations stop nowhere.'" *Travelers*, 514 U.S. at 656 [other citations omitted].

{¶21} It is undisputed that the Banks are not ERISA fiduciaries.[6] It is not contended that the Banks administered the ERISA plans or exercised any discretion within the meaning of ERISA in any way. Quite simply, the Banks assumed certain

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[5]The United States Supreme Court recognizes three areas that Congress intended for ERISA preemption: (1) state laws that mandate employee benefit structures or their administration; (2) state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself; (3) state laws providing alternate enforcement mechanisms for employees to obtain ERISA plan benefits. *Arizona State Carpenters*, 125 F.3d at 723.

[6]"A person or entity who performs only ministerial services or administrative functions within a framework of policies, rules and procedures established by others is not an ERISA fiduciary." *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 U.S. 715, 721-722.

contractual obligations as custodian of the funds in the accounts. Yet, the Banks seize upon the tangential fact that the particular custody agreements under our examination in this case apparently relate to accounts holding funds of certain ERISA plans for which Bennett is the sole beneficiary.

{¶22} The custody agreements, however, do not, in and of themselves, relate to ERISA plans and, in fact, the agreements make no reference to ERISA at all. Rather, the custody agreements appear to be standard fill-in-the-blank forms available for the Banks' use whenever it is to act as a custodian of funds, regardless of the nature of those funds. From that, it is logical to infer that any individual or entity depositing personal funds into a custodial account and entering a like agreement with the Banks would be afforded the opportunity to pursue state law claims against the Banks for breach of contract without thought or threat of ERISA preemption. To find that ERISA preempts the very same claims advanced by Bennett here seems to accept the expansive meaning of "relate to" without placing it in the context of legislative objectives as counseled by the United States Supreme Court. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 656.

{¶23} I am further persuaded by the reasoning employed by the Ninth Circuit Court of Appeals in *Geweke Ford v. St. Joseph's Omni Preferred Care Inc.* (C.A.9, 1997), 130 F.3d 1355 and *Arizona State Carpenters Pension Trust Fund v. Citibank* (C.A.9, 1997), 125

F.3d 715. I find both *Geweke* and *Arizona State Carpenters* factually analogous to the circumstances we are addressing here. In *Arizona State Carpenters*, the Ninth Circuit cogently reasoned that "the key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain *relationships*: for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee ***

{¶24} "But a plan doesn't purport to regulate those relationships where a plan operates just like any other commercial entity -- for instance, the relationship between the plan and its own employees, or the plan and its insurers or creditors, or the plan and the landlords from who it leases office space." *Arizona State Carpenters*, 125 F.2d at 724 [other citations omitted]. Consequently, the court in *Arizona State Carpenters* concluded that ERISA did not preempt claims against Citibank for breach of contract involving a custodial agreement and related state law claims since Citibank's relationship to the ERISA plan in that instance was no different than with any of its customers. The court succinctly found that the connection or relation between the state law claims and ERISA's regulation of employee benefit claims was "too 'tenuous, remote, or peripheral' to trigger preemption." Id. citing *Shaw*, 463 U.S. at 100 n.21.

{¶25} In this case, it is quite obvious that Bennett seeks damages for the Banks' alleged breach of duty under the contract[7] and which is apparently a claim no different than the type available to any of the Banks' other customers who enter similar custody agreements. Bennett is not making a claim against the Banks for deferred compensation benefits under the terms of any ERISA plan. The total loss of funds no doubt contributed to the plan's inability to pay Bennett his benefits, but the focus here is on the Banks' alleged responsibility for how the funds were lost, not on the plan's decision not to pay benefits. Applying the law as stated above to the facts of this case, I would sustain Bennett's assignment of error and reverse and remand this matter for further proceedings.

[7]It is worth noting that the Banks' briefs on appeal dispute any contractual breach citing excerpts from the custody agreements to support their position that the agreements "contractually bound" them to follow the direction of the Cashel defendants. And that is the point of this case: whether the Banks' breached contractual obligations. While the Banks argue that the breach of contract is intricately tied to a determination of whether the Cashel defendant's engaged in breaches of fiduciary duty under ERISA, I do not see this. In other words, whether or not the Cashel defendants independently breached fiduciary obligations under ERISA really has no bearing on whether the Banks breached any duties they assumed under the custody agreements.