IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MATT MILLER and DAVID H. SWISHER, Trustees of the ANTHRACITE HEALTH AND WELFARE FUND,	:	**No. 3:03cv1269**
Plaintiffs	:	**(Judge Munley)**
v.	:	
LEHIGH COAL AND NAVIGATION COMPANY,	:	
Defendants	:	

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MEMORANDUM

Before the court for disposition is the plaintiffs' motion for preliminary injunction. The plaintiffs are Matt Miller and David H. Swisher, Trustees of the Anthracite Health and Welfare Fund (hereinafter "Fund") and the defendant is Lehigh Coal and Navigation Company (hereinafter "Lehigh"). A hearing on this matter was held on December 30, 2003. At the hearing, the Court, with the parties' agreement, indicated that the preliminary injunction hearing would be consolidated with the trial on the merits pursuant to FED. R. CIV. P. 65(a)(2). The matter is thus ripe for disposition. The issue in the case is whether the defendant coal company must tender interim withdrawal liability payments to the plaintiffs pending the arbitration of withdrawal liability issues.

Background

Lehigh was in the anthracite coal business located in Pottsville, Pennsylvania. It ceased doing business in January 2001. The company was a contributing employer to the Fund, a multiemployer plan providing retirement benefits to employees of the anthracite coal industry under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), as amended 28 U.S.C. §§ 1001, *et seq*. The contributions to the Fund were in the form of royalties for each ton of anthracite coal produced for use or sale.

The United States Supreme Court has described the system as follows:

> Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension benefit insurance. This comprehensive and reticulated statute was designed to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement- - and if he has fulfilled whatever conditions are required to obtain a vested benefit- - he will actually receive it.
>
> To achieve this goal of protecting anticipated retirement benefits, Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, to administer an insurance program for participants in both single-employer and multiemployer pension plans. ...
>
> During the period between the enactment of ERISA and 1978, when mandatory multiemployer guarantees were due to go into effect, the PBGC extended coverage to numerous plans. Congress became concerned that a significant number of plans were experiencing extreme financial hardship and that implementation of mandatory guarantees for multiemployer plans might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. As a result, Congress delayed the effective date for mandatory guarantees...and directed the PBGC to prepare a report analyzing the problems of multiemployer plans and recommended possible

solutions.

The PBGC's Report found, *inter alia*, that ERISA did not adequately protect plans from adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans. The basic problem, the Report found, was the threat to the solvency and stability of multiemployer plans caused by employer withdrawals, which existing law actually encouraged.

"A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage - - or force - - further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue." Pension Plan Termination Insurance Issues: Hearings before Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind)

To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation. ... Congress agreed with the analysis put forward in the PBGC Report, and drafted legislation which implemented the Report's recommendations. As enacted, the [Multiemployer Pension Plan Amendments Act of 1980] requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's unfunded vested benefits, calculated as the difference between the present value of the vested benefits and the current value of the plan's assets.(internal quotations, citations and footnote omitted).

Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211, 214-17 (1986).

In the instant case, subsequent to Lehigh ceasing its business operation in January

2001, the Fund assigned it a withdrawal liability in the amount of $1,875,264, which was due in monthly installments for approximately 38 months. Lehigh has challenged this assignment of withdrawal liability through arbitration. Plaintiffs now seek to have the court order the defendant to make payments on the withdrawal liability until arbitration is completed.[1]

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) directs employers to begin payments upon notification of withdrawal liability, whether or not they choose to dispute the determination. 29 U.S.C. § 1399(c)(2). Therefore, the general rule set forth by the MPPAA is to pay now, dispute later. In the instant case, the defendants seeks to have the court recognize an equitable exception to general rule regarding making interim payments and argue that the plaintiffs' claim is without merit and that the defendant will suffer irreparable harm from making such payments. Plaintiffs contend that no equitable exception exists and even if it does, the defendants have not shown the necessary elements.

Jurisdiction

As this case arises out of the MPPAA, we have jurisdiction pursuant to 29 U.S.C. § 1451(c) (providing that the district courts of the United States shall have exclusive jurisdiction of an action under this section [the MPPAA] without regard to the amount in controversy.)

Discussion

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[1]The arbitration is currently scheduled for March 2004.

With regard to a preliminary injunction seeking interim withdrawal liability payments, the traditional four-prong preliminary injunction test does not apply. The Third Circuit Court of Appeals has explained as follows:

> The traditional four-prong test for garden-variety preliminary injunctions is not applicable in this context. In enacting the interim withdrawal liability provisions of MPPAA, 29 U.S.C. §§ 1399(c)(2), 1401(d), and the judicial mechanism for their enforcement, 29 U.S.C. § 1451(b) & (c), Congress has effectively determined that pension funds will be irreparably harmed unless employers are enjoined to make interim payments while litigation proceeds. By enacting the withdrawal liability provisions, Congress has concluded that the uninterrupted flow of payments is important in itself,[Pantry Pride, Inc. v. Retail Clerks Tri-State Pension, 747 F.2d 169, 171 (3d Cir. 1984)] and that the ultimate recovery of payments will not suffice to make the Fund whole. Congress has likewise determined that neither party's probability of success in litigation is relevant: interim payments must be made regardless.

Galgay v. Beaverbrook Coal Co., 105 F.3d 137, 140 (3d Cir. 1997).

The following are the requirements for a preliminary injunction in these situations: 1) The Fund assessed withdrawal liability against the employer; 2) the employer was notified; and 3) payments were not made. Id. at 141. The parties are in agreement that these requirements have been met. However, as stated above, defendant seeks to have us recognize an "equitable exception" to the interim payments.

The Third Circuit Court of Appeals has never held that there are any equitable exceptions to the statutory provisions on interim payments. Id. The Galgay court noted that the language in the statute indicates that "[w]ithdrawal liability *shall* be payable in accordance with the schedule set forth by the plan sponsor . . .beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the account of such liability or of the schedule." Id. (quoting 29 U.S.C. § 1399(c)(2)). In addition, section 4221(d) of the MPPAA, 29 U.S.C. § 1401(d) provides that payments are to be made during arbitration and if the arbitrator decides in favor of the employer, the employer is reimbursed. Id.

Two Circuit Courts of Appeals, the Fifth and Seventh, have held that an equitable exception can apply in this situation. Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Mar-Len, Inc., 30 F.3d 621 (5th Cir. 1994); Trustees of the Chicago Truck Drivers Pension Fund v. Rentar Insustries, Inc., 951 F.2d 152 (7th Cir. 1991). The exception applies where the defendants can demonstrate: A) that plaintiff's claim is frivolous or non-colorable and B) the defendant will suffer irreparable harm from the payments. Mar-Len, 30 F.3d at 626; Rentar, 951 F.2d at 155. Merely demonstrating irreparable harm to the company is insufficient because "[i]t is inappropriate to refuse a preliminary injunction ordering interim withdrawal liability payments on the grounds that the payments might pose a financial risk to the employer." Galgay, 105 F.3d at 141. The purpose of the exception is to ensure that courts are not utilized by unscrupulous pension fund lacking a legitimate claim to squeeze money from an employer and send it into bankruptcy. Id. at 140.

The Third Circuit in Galgay noted, however, that that case did not provide them opportunity to consider adopting an equitable exception because the parties had not established the two elements that other courts have held are vital to an equitable exception, those being, that the Fund's claim is frivolous or non-colorable and irreparable harm to the employer. Galgay, Id. at 141.

We are faced with a similar situation in the instant case. We find that even if there were an equitable exception, the defendant has not met its burden of establishing the necessary elements. The defendant did not establish that the Fund's claim is frivolous or non-colorable. In the circuits where the equitable exception is recognized, the standard for establishing a frivolous or non-colorable claim is as follows:

> The employer must make an affirmative showing that the plan's claim has no merit, i.e., no arguable basis in law or fact. The court may only excuse interim payments if the arbitrator is almost certain to rule for the employer.

Central States, Southeast and Southwest Areas Pension Fund v. Mars Leasing Co., 2003 WL 21995192 (N.D. Ill. Aug. 18, 2003) (internal quotation marks and citations omitted).

In the instant case, the defendant has not met its burden. The record reveals that the Fund assessed withdrawal liability against Lehigh based upon the assertion that it permanently ceased operations on January 19, 2001. The parties do not dispute that the company did not operate or make contributions to the Fund for eighteen months following January 2001. Lehigh's position is that it did not permanently cease operations and actually resumed business in September 2002.

The Fund, however, has determined that the resumed operations are merely a fraction of what they previously were with many fewer workers and a much lower level of output. These facts coupled with what the Fund perceives to be the company's persistent refusal to provide information concerning the nature of its resumed operations[2] led the Fund to conclude that the resumed operation may be merely a transaction to evade or avoid withdrawal liability under Section 4212(c) of the MPPAA, 29 U.S.C. § 1392(c). The defendant, although it presented evidence at the hearing regarding its resumed operations, did not meet its burden that this position of the plaintiff is frivolous and that the arbitrator is almost certain to rule against the plaintiff. Accordingly, even if we were to hold that the equitable exception applies, we would have to rule in favor of the plaintiff and grant the preliminary injunction.

Because we find that the defendant has not established that the plaintiff's claim is frivolous or non-colorable we need not decide whether an equitable exception exists or whether the defendant has established irreparable harm to itself.

For the foregoing reasons, the preliminary injunction will be granted. In the plaintiffs' complaint, they also seek to have their attorney's fees paid by the defendant. The attorney fee shifting provision of the MPPAA is found at 29 U.S.C. § 1451(e). A prevailing plaintiff should be awarded an attorney's fee unless special circumstances would render such an award unjust. Dorn's Transp., Inc. v. Teamsters Pension Trust Fund, 799 F.2d 45, 48 (3d

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[2]The Affidavit of Plaintiff Matt Miller provides: "By letter dated January 30, 2003, . . .counsel for the Fund requested [Lehigh] to provide certain financial and operational information so that the Fund trustees could evaluate the company's success in refinancing its working capital requirements and its prospects for resuming operations.

In its response of February 12, 2003, . . . [Lehigh] declined to provide the requested information other than that necessary to confirm the accuracy of its reported production." Affidavit of Matt Miller at ¶ 13, 14. See also Plaintiff's Ex. D, and E, copies of the referred to letters.

Cir. 1986). Thus, we shall grant the plaintiff's request for attorney's fees and costs. We shall order the plaintiff to submit a petition for attorney's fees and costs setting forth the amounts they seek within ten (10) days from the date of this order. The defendant shall then have ten (10) days to respond to the plaintiffs' fee petition. An appropriate order follows.

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Plaintiffs	:	**(Judge Munley)**
v.	:	
LEHIGH COAL AND NAVIGATION COMPANY,	:	
Defendant	:	

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ORDER

AND NOW, to wit, this 16th day of January 2004, it is hereby ORDERED as follows:

1) Plaintiffs' request for injunctive relief is hereby **GRANTED**;

2) The defendants are **ORDERED** to pay to the Anthracite Health and Welfare Fund its assessment of withdrawal liability of $1,875,264 in 38 equal monthly installments of $52,816.35, retroactive to May 1, 2003, and a final installment of $11,423.53 on July 1, 2006, this portion of the order is **STAYED** for thirty days to provide the defendant an opportunity to appeal and it is also stayed during the pendency of any such appeal pursuant to FED. R. CIV. P. 62(c); and

3) Plaintiffs are directed to file an Attorney's Fee Petition by January 30, 2004 so the court can determine the amount of the attorney's fee award. The defendant may respond to the plaintiffs' petition within ten (10) days of its filing.

BY THE COURT:

Filed: 1/16/04

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court