STATE OF NORTH CAROLINA COUNTY OF ALAMANCE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 06 CVS 2620
BRIAN S. COPE, M.D., Plaintiff, v. MICHAEL P. DANIEL, M.D. and DANIEL UROLOGICAL CENTER, INC., Defendants.	MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER

NOW COME Defendants Michael P. Daniel, M.D. and Daniel Urological Center, Inc., by and through their undersigned counsel and submit this Memorandum of Law in Support of Defendants' Motion for Leave to Amend Answer pursuant to Rule 15(a) of the Rules of Civil Procedure to add an additional counterclaim for stock redemption and to plead the defenses of statute of limitations and ERISA preemption with respect to several of Plaintiff's claims.

STATEMENT OF THE CASE

This action was originally commenced by the filing of the Plaintiff's Complaint on November 1, 2006. (Complaint). The Defendants obtained an extension and timely filed their Answer and Counterclaims on January 3, 2007. (Answer). The parties thereafter engaged in written discovery. A dispute arose over discovery, culminating in entry of an order providing for sanctions against Defendant Michael Daniel. (Order on Motion for Sanctions). Following entry of that order, the parties by consent submitted a new case management order which was approved by the Court. (Order Amending Case Management Order). Pursuant to that new case management order, discovery is scheduled to end on June 30, 2008, expert reports are due from the Plaintiff and Defendant by April 30, 2008 and May 30, 2008, respectively, and mediation is

to occur by June 15, 2008. Id. Defendants have filed the instant motion to amend their answer to assert a statute of limitations and ERISA preemption defense as to certain claims, as well as to add an additional counterclaim for stock redemption.

STATEMENT OF FACTS

The Plaintiff, Dr. Brian Cope, is a former employee and shareholder of Defendant Daniel Urological Center. (Answer ¶7). The other shareholder and president of Daniel Urological is Defendant Dr. Michael Daniel. (Answer ¶7). Sometime prior to 1998, Dr. Cope became a shareholder pursuant to an Employment Agreement. (Answer ¶¶11-12). Dr. Cope and Dr. Daniel also entered into a Stock Redemption Agreement dated effective January 1, 1998. (See Exhibit B to Motion). Pursuant to the Stock Redemption Agreement, Defendant Daniel Urological is entitled to redeem the Plaintiff's stock upon termination of his employment. (Id.)

Dr. Cope resigned from the Daniel Urological practice on October 31, 2006. (Answer, Ninth Affirmative Defense ¶18). Shortly thereafter, Dr. Cope initiated the instant action against Dr. Daniel and Daniel Urological Center alleging Breach of Fiduciary Duty and Usurpation of Corporate Opportunity, Breach of Contract, Conversion, Unfair and Deceptive Trade Practices and Fraud.

As his basis for some of these claims, Dr. Cope alleged that under the Employment Agreement, Dr. Daniel and Dr. Cope "were to receive equal annual salaries, bonuses profits and benefits from the practice." (Complaint ¶23). Dr. Cope further alleged that Dr. Daniel paid wrongfully paid himself "capital distributions" and or "bonuses" that gave him a salary that was greater than Copes," and that "As a result of the discrepancies in salaries, Daniel was paid excess retirement benefits." (Complaint, ¶¶24-25). Although a number of the allegations fail to specify

the timeframe, several of the claims alleged in the complaint rely on acts alleged to have occurred as far back as 1999 or 2000. (Complaint ¶¶16; 24).

ARGUMENT

I. Standard For Amendment Under Rule 15(a)

Rule 15(a) of the North Carolina Rules of Civil Procedure provides that after the filing of a responsive pleading, a party "may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C.G.S. §1A-1, Rule 15(a). "The grant or denial of an opportunity to amend pleadings is within the discretion of the trial court, and that court's decision will not be disturbed on appeal absent a showing of an abuse of discretion. [However, it is] an abuse of discretion to deny leave to amend if the denial is not based on a valid ground." Madry v. Madry, 106 N.C.App. 34, 36-37, 415 S.E.2d 74, 76 (1992).

Thus, a motion to amend should ordinarily be granted unless there is some justification for denial such as undue prejudice, futility of amendment, bad faith, undue delay or repeated failure to cure defects by previous amendments. See Walker v. Sloan, 137 N.C.App. 387, 402, 529 S.E.2d 236, 247 (2000). "The objecting party has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend." Watson v. Watson, 49 N.C.App. 58, 60, 270 S.E.2d 542, 544 (1980).

"There is no time limit under G.S. 1A-1, Rule 15 within which a party must move to amend." Gladstein v. South Square Associates, 39 N.C.App. 171, 177, 249 S.E.2d 827, 830 (1978). The Court can allow amendments, including additional claims and affirmative defenses at any time, before or even after judgment. See Williams v. Nationwide Mut. Ins. Co.,

12 N.C.App. 131, 182 S.E.2d 653 (1971); See also *Shuford North Carolina Civil Practice and Procedure*, §15:4, p. 334 (6th Ed. 2003).

II. Amendment is For a Proper Purpose and No Prejudice Will Result to Plaintiff

In this case Plaintiff would not be prejudiced by the assertion of these affirmative defenses in that the Plaintiff was aware or should have been aware that these issues were present and inherent in the underlying action. See Hummer v. Pulley, Watson, King & Lischer, P.A., 157 N.C.App. 60, 577 S.E.2d 918 (2003) (Court allowed amendment to add an additional defense where there was no evidence that motion to amend answer was filed in bad faith or to cause delay or prejudice, where plaintiff was aware that damages was a disputed issue in case.) Plaintiff was aware that he was asserting claims relating to a retirement plan, and therefore should have been aware of the potential impact of ERISA. (Complaint, ¶¶24-27). The issues relating to stock redemption have already been raised in the case, as they have been raised by the Plaintiff. (Complaint, ¶71).

The Defendants do not anticipate any delays in the existing discovery deadlines or in the trial date as a result of the proposed amendments. Also, the parties have not yet mediated this matter, and the Defendants do not anticipate that the proposed amendments will impact the scheduled mediation or the trial date. Indeed, the proposed amendments would serve to limit the scope of the issues to be addressed at trial by removing issues and amounts for which the statutes of limitation has expired.

III. Amendment Should Be Allowed Where Employment Claims are Clearly Preempted By ERISA

In this case, Dr. Cope has alleged a number of claims based on the allegation that Dr. Daniel wrongfully enhanced his own salary, and thus allegedly received an inflated amount of retirement benefits, and allegedly causing Dr. Cope's retirement benefits to be wrongfully

decreased. (Complaint, ¶¶24-27). Plaintiff further alleged that "Daniel is a fiduciary under the practice's benefit plan." (Complaint, ¶26). To the extent that the state law claims alleged by Plaintiff relate to alleged retirement benefits due to Plaintiff, they are clearly preempted by ERISA.

As recently explained by the 4th Circuit Court of Appeals:

> ERISA's preemption clause states that "the provisions of [ERISA] shall supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a). The scope of ERISA's preemption is deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern. A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. The Supreme Court has repeatedly emphasized that ERISA's preemptive scope is not limited to state laws specifically designed to affect employee benefit plans. *Pilot Life,* 481 U.S. at 47-48, 107 S.Ct. 1549 (internal quotation marks omitted); *see also Aetna Health Inc. v. Davila,* 542 U.S. 200, 209, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) ("Any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy ... is pre-empted.")... Nor may parties avoid ERISA's preemptive reach by recasting otherwise preempted claims as state-law contract and tort claims."

Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 341 (4th Cir. N.C.,2007) (internal citations and quotations omitted) (holding that ERISA preempted plan participant's state-law claims against plan fiduciary for unfair and deceptive trade practices, breach of contract, negligent misrepresentation, and constructive fraud; each of those claims incorporated the allegations from participant's ERISA breach of fiduciary duty claim, and thus related to an ERISA-covered plan.)

Cases involving similar state law claims have consistently been held to be pre-empted by ERISA. See Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 378 (N.C.,2001) (Court held that "ERISA preempts state common law claims of fraudulent or negligent misrepresentation when the false representations concern the existence or extent of benefits

under an employee benefit plan. In fact, ERISA preemption is commonly understood to apply to state common law claims that an ERISA fiduciary misrepresented the nature or availability of retirement benefits, or failed to provide enough information to permit the retiring beneficiary to make an intelligent retirement decision.") (internal citations and quotations omitted); See also Elmore v. Cone Mills Corp., 23 F.3d 855, 863 (4th Cir. 1994) (Holding that employee's state law claims for breach of contract, fraud, unjust enrichment, breach of fiduciary duty, negligence, accounting, and conspiracy in an attempt to enforce representations made in connection with an employee stock ownership plan (ESOP), clearly "relate to" an ERISA-covered plan, and were preempted by ERISA.)

Accordingly, based on the foregoing authority, to the extent that the Plaintiff's claims for recovery are based on or relate to retirement benefits, said claims are preempted by ERISA and must be dismissed.

Therefore, in the interests of justice, these Defendants respectfully request that the court grant this motion to amend.

This the 14th day of March, 2008.

/s/ Pamela S. Duffy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the enclosed BRIEF was served on this date via U.S. Mail and via electronic filing on the parties listed below:

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This the 14th day of March, 2008.

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CERTIFICATE OF COMPLAINT WITH RNCBC 15.8

The Defendants hereby certify that this brief complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Pamela S. Duffy
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