

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
THE RUST CO., INC.,)
)
Debtor,)
)
CENTRAL LABORERS' PENSION,)
WELFARE AND ANNUITY FUNDS\$ NO. 95 57 WLB)
)
Plaintiff,)
)
vs.) (BK 93-30220)
)
UNITED STATES FIDELITY &)
GUARANTY COMPANY and)
DON SAMSON, Trustee,)
)
Defendant.)

ORDER

This matter is before the court on the appeal of United States Fidelity and Guarantee Company's (USF&G) of the Bankruptcy Court's decision that it, as surety, was obligated to pay to Appellee, Central Laborers' Pension Welfare & Annuity Funds (the Funds) contributions for employee benefits on behalf of the Rust Company.

BACKGROUND

In 1988 and 1991, the Rust Company, (Debtor) entered into collective bargaining agreements with the Southern Illinois Laborers' District Council. Pursuant to those agreements, the debtor was required to make contributions to the Funds, representing fringe benefits for labor used by the debtor within the District Council's jurisdiction.

On February 18, 1992, the debtor entered into two construction contracts with the City of Belleville, Illinois. Pursuant to 30

ILCS 550/1, the debtor was required to provide the city with surety bonds to cover labor and materials used in the project. The debtor obtained two surety bonds from USF&G.

The debtor employed various laborers from Laborers' Local 459 to perform labor under the two construction contracts. When the debtor did not make the required contributions to the Funds for fringe benefits on the labor performed on the Belleville projects, the Funds served a verified notice of bond claim on the debtor and various city officials, pursuant to 30 ILCS 550/1. The Funds sought \$49,695.43. USF&G denied liability on the claims. After the debtor filed bankruptcy, on March 14, 1994, the Funds filed an adversary complaint for declaratory judgment in the bankruptcy court.

Both parties filed motions for summary judgment on (1) whether 29 U.S.C. §§1001-1461, ERISA, preempts the Funds' state cause of action and; (2) whether a surety of an employer's obligations qualifies as an "employer" under 29 U.S.C. 51002(5). The Bankruptcy Court denied USF&G's motion, granted the Funds' motion, and ordered USF&G to pay the amounts owed to the Funds. USF&G appealed. This court will review the decision of the Bankruptcy Court de novo. Matter of Excaliber Auto. Corp, 859 F.2d 454 (7th Cir. 1989).

DISCUSSION

In the bankruptcy court, USF&G contended that the Fund's claim was preempted by ERISA. The Funds argued that the instant action was not preempted by ERISA because it is not based on an Illinois statute. Rather, according to the Funds, it is a claim based on a consensual contract between USF&G and the debtor. The Bankruptcy Court held that

this was a claim which is preempted, but that USF&G qualified as an "employer" under ERISA. For the reasons set forth below, both holdings of the Bankruptcy Court are reversed.

Section 1144(a) of Title 29, "preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefits plan' covered by the statute." Macey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 83 (1988)(quoting §1144(a)).

A rule of law "relates to" an ERISA plan "if it is specifically designed to affect employee benefits plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan." United Wire, Metal and Machine Health and Welfare Fund v. Morristown Memorial Hospital, 995 F.2d 117, 112 (3d Cir.), cert. denied, ___ U.S. 114 S.Ct. 382 (1993) (footnotes omitted).

In addition, state causes of action which conflict with ERISA's civil enforcement mechanism, i.e., §1132(a), are also preempted. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987; see also, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)).

The state law action brought by the Funds is

neither "specifically designed to affect employee benefits plans" nor "singles out" such plans for special treatment. United Wire, 995 F.2d at 1192. Rather, such [state] law causes of action are "generally applicable" laws that "make[] no reference to [and] indeed function[] irrespective of, the existence of an ERISA plan." Ingersoll-Rand, 498 U.S. at 139.

Nor is the cause of action "predicated on

the existence of" an ERISA plan. United Wire,
995 F.2d at 1192.

Ragan v. Tri-County Excavating, Inc., 1995 U.S. App. LEXIS 21414, *28-
29 (3d Cir. August 7, 1995).

The action brought by the Funds requires the court to determine only USF&G's obligations under the bonds. This inquiry is not predicated upon the existence of an ERISA plan, nor is the court required to examine the validity or status of the Funds. "The fact that the claimant under the bond happens to be an ERISA fund is not the kind of 'critical factor in establishing liability'", that prompts preemption. Id., at *29. (Emphasis added); see also, Haberern v. Kaupp Vascular Surgeons Pension Plan, 24 F.3d 1491, 1497 (3d Cir. 1994).

While State law causes of action are preempted by ERISA if they conflict directly with ERISA causes of action, Ingersoll-Rand Co., 498 U.S. 142, this cause of action does not fall within the "conflict preemption" aspect of ERISA. Section 1145 of ERISA imposes an obligation upon employers to contribute to employee benefit plans. Section 1132 provides a cause of action for an employer's failure to fulfill that obligation. Under Section 1002 (5) of title 29, an "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan."

The majority of courts which have construed this term have held that sureties are not "employers" under ERISA. The Eleventh Circuit, in Xaros v. U.S. Fidelity and Guar. Co., 820 F.2d 1176 (11th Cir.

1987), held that nonsignatory sureties were not "employers" under ERISA.

Courts presented with the issue have generally refused to expand the definition of employer under ERISA to include entities which were not a party [sic] to the collective bargaining agreement under which suit is brought. In Carpenters Southern Cal. Admin. Corp. v. D & L Camp Constr. Co., 738 P.2d 999 (9th Cir. 1984), the court held that nonsignator sureties do not fall within the statutory meaning of employer.

* * * * *

We agree. We hold that nonsignator subcontractors and sureties are not employers as defined in section 1002(5) of ERISA and as incorporated into section 1145 of the Act, thereby precluding federal subject matter jurisdiction over claims against these nonsignatories for a signatory's failure to make contributions to employee benefit plans. To hold otherwise would constitute an unwarranted departure from the language of, and intent underlying, sections 1002(5) and 1145.

Xaros, 820 F.2d at 1179-80, see also Carpenters Southern Cal. Admin. Corp. v. Majestic Housing, 743 F.2d 1341 (9th Cir. 1984); Giardiello v. Balboa Ins. Co., 837 F.2d 1566 (11th Cir. 1988); Carpenters Health & Welfare Tr. F. v. Tri Capital, 25 F.3d 849, 855-56 (9th Cir. 1994); Ragan v. Tri-County Excavating, Inc., 1995 U.S. App. LEXIS 21414, at * 33. (But see, Greenblatt v. Delta Plumbing & Heating Corp., 818 F.Supp. 623, 629 (S.D.N.Y.) (holding that a surety on a private bond qualified as an employer under ERISA)).

The court agrees with the Third, Ninth and Eleventh Circuits that a surety does not act "in the interest of an employer."

Although it is true that the surety's services are often purchased by the employer in order that it may proceed with its business, the ultimate

beneficiaries of that contract are the claimants on the bond. The surety does not stand in an employer relationship to the claimants, nor is it the agent of the employer.

Ragan v. Tri-County Excavating, Inc., 1995 U.S.App - LEXIS 21414, at 34. Thus, USF&G, which is neither the employer of the Funds' beneficiaries nor acting "in the interests of" their employer, Rust, cannot claim ERISA "conflict" preemption.

Because the underlying cause of action brought to recover fringe benefits neither "relates to an employee benefits plan, nor conflicts directly with the provisions of ERISA, the cause of action is not preempted. USF&G's Motion for Summary Judgment on the issue of preemption, is denied, and the Motion for Summary Judgment filed by the Funds on the issue of preemption, is granted.

In its Motion for Summary Judgment, USF&G also argued that the Funds lack standing to pursue this claim. Because the Bankruptcy Court did not address this issue, the question was not raised in the appeal, and therefore is not before this court.

CONCLUSION

For the reasons set forth above, the Funds' Motion for Summary Judgment is allowed, in part. This matter is not preempted by ERISA, but it appears that other issues remain which preclude the entry of a money judgment at this time. This matter, therefore, is remanded to the Bankruptcy court for further proceedings not inconsistent with this order.

IT IS SO ORDERED.

DATED: This 18 day of September, 1995.

/s/ WILLIAM, L. BEATTY
UNITED STATES DISTRICT JUDGE