

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In Re)	
)	In Bankruptcy
THE RUST CO., INC.)	
)	No. 93-30220
Debtor.)	
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)	
CENTRAL LABORERS' PENSION,)	
WELFARE & ANNUITY FUNDS,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 94-3008
)	
UNITED STATES FIDELITY &)	
GUARANTY COMPANY,)	
)	
Defendant.)	

O P I N I O N

Two issues are presented in this adversary proceeding: (1) Whether 29 U.S.C. § 1144(A) of ERISA preempts a laborers' pension fund's claim for fringe benefit contributions against an employer's surety; and (2) Whether a surety of an employer's obligations qualifies as an employer under 29 U.S.C. § 1002(5) of ERISA.

The material facts are not in dispute and both parties have filed motions for summary judgment. The Plaintiff, Central Laborers' Pension, Welfare and Annuity Funds, is comprised of fiduciary trust funds administered pursuant to a Declaration of Trust. It is required to be maintained and administered in accordance with the Labor/Management Relations Act of 1947. In 1988 and again in 1991, the Debtor, The Rust Co., Inc., entered into a collective bargaining agreement with the Southern Illinois Laborers' District Council, which required the Debtor to make contributions to Central Laborers' representing fringe benefits

for labor used by the Debtor within the District Council's jurisdiction. The County of St. Clair falls within the jurisdiction of the Collective Bargaining Agreement.

On February 18, 1992, the Debtor entered into two construction contracts with the City of Belleville, St. Clair County, 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 the Defendant, United States Fidelity & Guaranty, Co.

The Debtor employed various laborers from Laborers' Local #459 to perform labor under the two contracts with the City. When the Debtor did not make the required contributions for labor performed on the City projects, the Central Laborers' caused a Verified Notice of Bond Claim to be served on various City officials and the Debtor. The Notice was served on July 12, 1993, in compliance with 30 ILCS 550/2. Central Laborers' Notice sought a total recovery of \$49,695.43, representing the following claimed delinquent contributions: Pension - \$10,676.40; SI Welfare - \$17,197.86; Training - \$1,198.30; SW Annuity - \$16,105.10; Liquidated Damages - \$4,517.77. USF&G denied liability on the claim. After the Debtor filed bankruptcy, Central Laborers' filed this adversary complaint.

USF&G argues that Central Laborers' claim is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA's preemption clause provides that

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(b) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). The Supreme Court has recognized that ERISA preemption is "conspicuous for its breadth" and that its "deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 St.Ct. 478, 482 (1990). "ERISA § 514(a) pre-empts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by the statute." Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829, 108 S.Ct. 2182, 2185 (1988)(quoting 29 U.S.C. § 1144(a)).

Central Laborers' argues that ERISA preemption is not applicable in this case because the instant action is not based on an Illinois statute. Rather, Central Laborers' argues that its claim is based on a contract voluntarily given by USF&G after receiving consideration from the Debtor. Central Laborers' maintains that ERISA does not preempt voluntary consensual contracts. Thus, the question in this case is whether an Illinois statute is involved which would invoke ERISA preemption.

The contract in this case is the bond issued by USF&G to cover work performed by the Debtor on two constructions contracts with the City of Belleville. The bond was required by 30 ILCS 550/1, which requires a bond for public work projects for the State or one of its political subdivisions. The purpose of the statute is remedial; it is designed to protect those who furnish labor or material on public works because no right of mechanic's liens exists against a public body. Housing Authority of Franklin County for Use and Benefit of Smith-Alsop Paint & Varnish Co. v. Holtzman, 120 Ill. App.2d 226, 256 N.E.2d 873 (1970); Chicago Housing Authority for Use of General Bronze Corp. v. U.S. Fidelity & Guaranty Co., 49 Ill. App. 407, 199 N.E.2d 217 (1964).

Central Laborers' was not a signatory to the bond issued by USF&G for the Debtor's work on the Belleville projects. However, 30 ILCS 550/2 authorizes every person furnishing material or performing labor on a public work project to sue on the bond in the name of the political subdivision which entered into the public works contract. Thus, this is more than the simple contract action described by Central Laborers'. An Illinois statute specifically authorizes entities such as Central Laborers' to seek recovery on the bond. The Court believes that these statutes bring the instant action within the broad ambit of ERISA preemption. Williams v. Ashland Engineering Co., Inc., 863 F.Supp. 46 (D. Mass. 1994).

Since ERISA preempts Central Laborers' claim against USF&G, the Court must determine whether USF&G is an "employer" under ERISA. ERISA imposes an obligation upon employers to contribute to employee benefit plans:

Every employer who is obligated to make contributions to an multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement, shall to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145.

ERISA defines "employer" as follows:

The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer in relation to an employee benefit plan.

29 U.S.C. § 1002(5).

29 U.S.C. § 1132 creates a federal claim to enforce the obligations of employers imposed by section 1145.

The cases are split on the question of whether a surety is an "employer" within the meaning of ERISA. USF&G relies on Xaros v. USF&G,

820 F.2d 1176 (11th Cir. 1987); Carpenters Southern California Administrative Corp. v. D & L Camp Construction Corp., 738 F.2d 999 (9th Cir. 1984), and Carpenters Southern California Administrative Corp. v. Majestic Housing, 743 F.2d 1341 (9th Cir. 1984). These cases hold that a surety cannot be an employer under ERISA of unionized workers because it is not a signatory to the collective bargaining agreement. Central Laborers' relies on Greenblath v. Delta Plumbing & Heating Corp., 818 F.Supp. 623 (S.D. N.Y. 1993), which held a surety of an employer's obligations under a multiemployer plan qualified as an employer under ERISA, and therefore was obligated to make contributions to the plan. After a thorough review of these and other cases, the Court finds Greenblatt to be the most persuasive, and the Court hereby adopts the Greenblatt rationale.

Courts holding that sureties are not employers under ERISA note that there is no indication in the legislative history of ERISA that Congress intended to expand the jurisdiction of ERISA to include sureties. See, Xaros, supra, 820 F.2d at 1179. Greenblatt correctly notes that nothing in the legislative history excludes sureties. Citing Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 100 S.Ct. 1723 (1980) and the applicable legislative history, Greenblatt concludes that "the better interpretation of the law would support Congress' intention of allowing prompt and effective collection of unpaid benefits." 818 F.Supp. at 627. This Congressional intent is furthered by finding sureties to be employers under ERISA.

Moreover, nothing in ERISA requires that an employer be a signatory to the collective bargaining agreement. Sections 1145 and 1002(5) simply state that anyone acting directly or indirectly in the interest of an employer who is required to contribute under the terms of

the collective bargaining agreement must make such contributions. Neither section requires or even mentions a signature, and the cases which read a signature requirement into these sections are misguided. The dispositive issue is whether a party is "acting in the interest of" an employer. Here, USF&G agreed to pay the obligations of the Debtor if the Debtor did not pay. Thus, USF&G obligated itself to make contributions according to the terms of the collective bargaining agreement. USF&G was therefore acting in the interest of the Debtor

ERISA was enacted to protect the interests of participants and beneficiaries in financially distressed multiemployer plans and to encourage the growth and maintenance of multiemployer plans. House Report No. 96-869, Part II, at 12, reprinted in 1980 U.S. Code Cong. & Admin. News 2918, 3002. ERISA was not enacted to shield sureties like USF&G from paying their bonding obligations. Construing ERISA to include sureties as employers is consistent with the plain meaning of the statutes, the legislative history of ERISA, and the goals and purposes of ERISA.

For the foregoing reasons, the Motion of the Plaintiff, Central Laborers' Pension, Welfare & Annuity Funds, for Summary Judgment is allowed, and the Motion for Summary Judgment of the Defendant, United States Fidelity & Guaranty Company, is denied. Judgment will be entered in favor of the Plaintiff and against the Defendant in the amount of \$49,695.43.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: December 14, 1994

/s/ LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE