UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

William C. LYONS, Jr.	:	
	:	
v.	:	**No. 3:01cv1355 (JBA)**
	:	
FAIRFAX PROPERTIES, INC., et al.	:	

MEMORANDUM OF DECISION ON
DEFENDANT ZANGARI'S MOTION TO DISMISS [# 29]

After removal of this case by Fairfax Properties, Inc. ("Fairfax") on the grounds that plaintiff's contract claims against Fairfax and William C. Lyons, Sr. were preempted by ERISA, plaintiff amended his complaint to restate Counts One and Two as ERISA claims, with supplemental jurisdiction over Count Three, the malpractice claim against Zangari, under 28 U.S.C. § 1367.

This case arises out of the spin-off of Fairfax from the BILCO Company ("BILCO"), a closely-held corporation controlled by various members of plaintiff's family. Plaintiff William C. Lyons, Jr., formerly employed by Fairfax when it was a wholly-owned subsidiary of BILCO, claims that Fairfax, BILCO and William C. Lyons, Sr. failed to take the steps necessary to permit the transfer of plaintiff's BILCO pension funds to a qualified defined benefit plan, in violation of his employment and separation agreements, and therefore ERISA. Plaintiff also asserts in Count Three a common law claim of legal malpractice against Mario Zangari, his former attorney, who allegedly negligently advised him with regard to the transaction giving rise to this litigation.

Defendant Mario Zangari has moved to dismiss the claims against him, on the grounds that plaintiff’s legal malpractice claim is pre-empted by ERISA, and that as ERISA does not provide the relief plaintiff seeks, Count Three must be dismissed. For the reasons discussed below, Zangari’s motion is DENIED.

I. Factual background

The relevant factual allegations taken from plaintiff’s Amended Complaint are as follows. Prior to June 21, 1999, plaintiff was employed by Fairfax, BILCO’s wholly-owned subsidiary, and was a participant in BILCO’s group pension plan, the BILCO Company Defined Benefit Pension Plan (the “BILCO Plan”), under the terms of his executive agreement with Fairfax. Eventually, as a result of differences among the various owners of BILCO, all owners of BILCO common stock decided to divide the BILCO assets, which included Fairfax. Plaintiff had engaged Mario Zangari to represent him in connection with his disputes with the BILCO management in January 1997, and Zangari continued to represent plaintiff and certain other settling shareholders throughout the dissolution.

These shareholders reached a settlement agreement, and according to plaintiff, he made clear to the other shareholders and Zangari that a provision for transfer of his pension funds from the BILCO Plan to one established by Fairfax was a condition precedent to his execution of the settlement agreement. However, Zangari allegedly informed plaintiff that neither he nor any other member of his firm, Siegel, O'Connor, Schiff & Zangari, P.C., had time before the June 21, 1999 closing to draft or review the documents creating the pension plan to which plaintiff's funds could be transferred, but assured him that "there was no impediment to such being done promptly following the closing of June 21, 1999." Amended Compl. ¶ 24. Based upon these assurances, plaintiff executed the settlement agreement and Fairfax ceased to be a wholly-owned subsidiary of BILCO and became owned by the settling shareholders, including plaintiff.

Unfortunately for plaintiff, no qualified or defined benefit plan has been established by Fairfax since the dissolution, and plaintiff alleges that Lyons Sr., as trustee of the putative plan, has maliciously and vindictively failed to "press BILCO to transfer the assets of the pension plan held for [plaintiff] to Fairfax." Amended Compl. ¶¶ 19, 24. Thus, BILCO has never amended its Plan to allow for the funding of a like qualified defined benefit plan into which plaintiff's assets could be transferred. As a result, plaintiff has been unable to transfer his funds out of the BILCO Plan and deposit them into a Fairfax qualified defined benefit plan. Plaintiff also claims that BILCO has refused to amend its Plan to allow him to transfer his funds to a self-directed IRA or other qualified retirement vehicle.

These acts by BILCO, Fairfax and Lyons Sr. are alleged to have violated ERISA, § 29 U.S.C. § 1132 et seq.

Plaintiff claims that Zangari committed legal malpractice by: advising plaintiff that a qualified pension plan could be established by Fairfax to allow plaintiff "an unimpeded and IRS-qualified or sanctioned transfer of his pension funds from the BILCO [Plan] to the newly-established or created fund when he knew or . . . ought to have known that such was not the case"; approving the establishment of an IRS-qualified profit sharing plan when he knew or should have known that the BILCO Plan assets could be spun off only into another qualified defined benefit plan; neglecting to advise plaintiff that he could not withdraw funds from a Fairfax qualified defined benefit plan and deposit them into a 401-K without subjecting Fairfax to adverse tax consequences; failing to recognize that the "perceived alternative - inducing BILCO to amend its [Plan] to permit [plaintiff] to withdraw his funds directly from the BILCO [Plan] - would risk the imposition of adverse income or other tax consequences" on the BILCO Plan and plaintiff; failing to keep plaintiff advised of post-closing impediments to the portability of his pension funds; and failing to advise plaintiff and the other settling shareholders whom he represented that immediately after the June 1999 closing, he was engaged as counsel by Fairfax, thus creating a conflict of interest with respect to plaintiff.

II. Standard

When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. Discussion

Section 514(a) of ERISA, 29 U.S.C. s 1144(a), provides that the provisions of subchapter I, concerning protection of employee benefit rights, "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." Congress designed ERISA's preemption clause to be expansive to ensure that plans and plan sponsors are subject to a uniform body of benefits law free from state law actions not contemplated by ERISA. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990).

However, the Supreme Court has also observed "that if the 'relate to' language in § 514(a) were read literally, 'pre-emption would never run its course,' because '[r]eally, universally, relations stop nowhere.'" Plumbing Industry Bd., Plumbing Local Union No. 1 v. E.W. Howell Co., Inc., 126 F.3d 61, 66 (2d Cir. 1997) (quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)). Accordingly, analysis under ERISA's preemption clause now begins with the "starting presumption that Congress does not intend to supplant state law." Travelers, 514 U.S. at 654. In determining whether preemption applies, the Court must "look ... to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." Id. at 656. As the Second Circuit has characterized this standard, "to overcome the anti-preemption presumption, a party challenging a statute must convince a court that there is something in the practical operation of the challenged statute to indicate that it is the type of law that Congress specifically aimed to have ERISA supersede." Plumbing Industry Bd., 126 F.3d at 67 (citing De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 813-14 (1997)).

Preemption applies where a state law clearly "refers to" ERISA plans in the sense that the measure "acts immediately and exclusively upon ERISA plans" or where "the existence of ERISA plans is essential to the law's operation." Id. Where a state law does not expressly refer to ERISA plans, "an indirect reference will lead to that result only if it is clear that the state law, although not using the words 'ERISA plan,' applies only to ERISA plans or requires their existence in order to operate." Id. at 68 (citation omitted).

Zangari argues that the malpractice action "relates to" an ERISA defined benefit plan because the cause of action is premised on the existence of such a plan. In other words, defendant's logic goes, the action must relate to ERISA because were plaintiff not eligible to participate in a defined benefit plan, there could be no cause of action against Zangari. However, plaintiff's legal malpractice claim clearly does not "refer to" ERISA plans within the meaning of that phrase since it does not act upon the pension benefit plans in any way. See Custer v. Sweeney, 89 F.3d 1156, 1166 (4th Cir. 1996) (rejecting identical argument and noting that "Custer's claim affects neither the core functions performed by ERISA plans nor the central ERISA players, and, therefore, there is no threat that, by allowing this suit to go forward, conflicting regulations will emerge which will destroy the structural unity of the ERISA scheme") (citation and internal quotations omitted). While the facts giving rise to the malpractice claim are admittedly connected to plaintiff's claim for a particular form of pension plan benefits, in the sense that this entire litigation is connected to plaintiff's expectations about how his pension benefits would be structured, determining whether Zangari committed malpractice will not require reference to the terms of an ERISA plan. Cf., e.g., Smith v. Dunham-Bush, Inc., 959 F.2d 6, 10-11 (2d Cir. 1992) (negligent misrepresentation claim preempted where alleged misrepresentation was a promise to pay pension-related benefits). Nor is the existence of ERISA plans essential to the application of legal malpractice law generally. Cf. Plumbing Industry Bd., 126 F.3d at 68 (concluding that New York's lien law does not "refer to" ERISA plans because "although the lien law will undoubtedly apply primarily to ERISA plans, we are not persuaded that it can apply only to such plans") (emphasis in original).

Alternatively, a state law may be "preempted even though it does not refer to ERISA or ERISA plans if it has a clear connection with a plan in the sense that it mandates employee benefit structures or their administration or provides alternative enforcement mechanisms." Id. (internal citations and quotations omitted). In determining whether this standard is met, the Second Circuit has noted that the essential factor is the original Congressional objective "to eliminate alternative state law remedies for benefit plan participants and beneficiaries, relegating such persons to the six well-integrated remedies specifically provided in the statute's civil enforcement provisions . . . ." Id.

Although the Second Circuit has not addressed the issue, the Third, Fourth and Tenth Circuits, as well as many district courts, have concluded that third-party professional malpractice claims against attorneys or actuaries engaged to advise plaintiffs in connection with ERISA benefit plans are not generically preempted by ERISA. See Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1152-53 & n. 7 (3d Cir. 1989) (holding that ERISA "does not generally preempt state professional malpractice actions" and noting that "in the absence of an explicit corresponding provision in ERISA allowing a professional malpractice cause of action, Congress did not intend to preempt a whole panoply of state law in this area"); Custer, 89 F.3d at 1166 ("We now join this unanimous body of federal law and conclude that Custer's legal malpractice claim against Sweeney does not fall under ERISA's preemptive umbrella. We do so because we do not believe that Congress intended ERISA to preempt state law malpractice claims involving professional services to ERISA plans."); Airparts Co. v. Custom Ben. Services of Austin, 28 F.3d 1062, 1064 (10th Cir. 1994) (state law claims of professional negligence, implied-indemnity, and common law fraud against a firm hired by the plaintiffs to provide expert benefit plan consultation are not preempted by ERISA); see also, e.g., Isaacs v. Group Health Inc., 668 F. Supp. 306, 313 (S.D.N.Y. 1987) (malpractice claim against an actuary whose negligence caused the underfunding of an ERISA plan is not preempted).

Zangari contends that legal malpractice claims affect the structure, administration or type of benefits of an ERISA plan and "implicate the relations among the ERISA plan entities, the principals, the employer, the plan, the plan fiduciaries and the plan beneficiaries." Def. Br. at 10. However, he does not explain this conclusory allegation, and the Court cannot understand how permitting a state law claim of legal malpractice to go forward against Zangari as to what he represented he would or could do to establish a new pension plan for plaintiff, would implicate any of these relationships. See Airparts, 28 F.3d at 1065-66 ("[I]t is clear that the state law [malpractice] claims here do not relate to an ERISA plan. The state laws involved do not regulate the type of benefits or terms of the plan; they do not create reporting, disclosure, funding or vesting requirements for the plan; they do not affect the calculation of benefits; and they are not common law rules designed to rectify faulty plan administration . . . . State laws of negligence, indemnity, and fraud are laws of general application--not specifically targeting ERISA plans--that involve traditional areas of state regulation and do not affect relations among the principal ERISA entities.") (internal quotations and citations omitted).

As the Fourth Circuit noted in Custer:

> [W]e do not believe that permitting state law malpractice claims against attorneys representing ERISA plans would in any way compromise the policies that ERISA was designed to promote. In enacting ERISA, Congress sought "to protect ... the interests of participants in employee benefit plans and their beneficiaries, ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). A legal malpractice claim "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan." Rebaldo v. Cuomo, 749 F.2d 133, 139 (2d Cir. 1984); see also Airparts, 28 F.3d at 1066. Nor

> does such a claim implicate "the relations among the traditional [ERISA] plan entities[,] ... [the] principals, the employer, the plan, the plan fiduciaries, and the beneficiaries." Id. Thus, a legal malpractice claim such as that at issue here does not fall within any of the categories of laws that courts have generally held to be preempted by ERISA: "laws . . . that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee." Aetna Life Ins. Co., 869 F.2d at 146; see also Airparts, 28 F.3d at 1064-65.

89 F.3d at 1166. This Court finds the reasoning of these decisions persuasive, and joins every other court to have considered the issue in concluding that a state law malpractice claim against a third-party attorney is not preempted by ERISA simply because the representation had some connection to an ERISA plan.

IV. Conclusion

For the reasons set forth above, defendant Zangari's motion to dismiss [# 29] is DENIED.

IT IS SO ORDERED.

/s/

____

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 30th day of May, 2002.