

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ELAINE L. CHAO, Secretary of Labor, United States Department of Labor)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 01-007 GMS
)	
JAY F. PINDER, P.I.P. DELIVERY & COURIER SERVICE, INC. and WILMINGTON BROKERAGE SERVICES COMPANY)	
)	
Defendants.)	
)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

P.I.P Delivery & Courier Service (“PIP”) is a Delaware corporation formerly located in Newark, DE, with an employee benefit plan (“Plan”) within the meaning of Section 3(3) of the Employment Retirement Income Security Act, (“ERISA”), 29 U.S.C. § 1002(3). It is therefore subject to the coverage of the Act pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). Jay Pinder (“Pinder”) is the owner and president of PIP. PIP has been insolvent since 1998 and has since made no contributions to nor distributions pursuant to the Plan. The Secretary of Labor, pursuant to Sections 502(a)(2) and (5) of the Act, 29 U.S.C. § 1132(a)(2) and (5) has the authority to enforce the provisions of Title I of ERISA by filing and prosecuting claims against fiduciaries and others who commit violations of ERISA. On January 4, 2001, the Secretary filed an action against Pinder

and PIP. Pinder failed to move or respond, and on June 5, 2001, the Secretary filed a Request to Enter Default and a Motion for Default Judgment. On June 21, 2001, default was entered against the fiduciaries of the Plan (Jay Pinder, and P.I.P. Delivery & Courier Service).

Presently before the court is the Secretary's Motion for Default Judgment. In her motion, the Secretary seeks the entry of a default judgment removing PIP and Pinder from their positions as fiduciaries with respect to the plan and appointing an independent fiduciary to administer the Plan. This will enable the Secretary to effectuate its termination, including the distribution of Plan assets to the participants and beneficiaries. The Secretary also requests the court direct Wilmington Brokerage Services Company ("WBSC") to turn the assets of the Plan over to the independent fiduciary appointed by the court to administer the Plan and award the Secretary the costs of this action. Under the terms of the proposed Default Judgment, the present Plan fiduciaries would be removed and the plaintiff would supply the name of a proposed independent fiduciary within thirty (30) days of entry of the Default Judgment. The court agrees with the Secretary and will enter the requested relief for the reasons stated below.

II. BACKGROUND

On or about January 1, 1997, PIP established an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002 (3) to provide supplemental retirement benefits to eligible participants. During the first half of 1998, PIP became insolvent and ceased operations. After February 1998, PIP stopped making contributions to the Plan. Additionally, since 1998, PIP has failed to file the annual statements required by 29 U.S.C. § 1024. As of Plan year 1999, there were thirty-seven (37) participants and \$33,865.14 in Plan assets. Since PIP ceased operations, participants and beneficiaries

of the Plan have not been able to obtain distributions from the Plan of their individual account balances. Under the terms of the Plan, it would be terminated when PIP discontinued contributions. Once the Plan is terminated, its terms require the trustee to distribute the Plan assets to the participants and beneficiaries. WBSC is the custodian for the assets held in the Plan.

III. STANDARD OF REVIEW

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default. *See* Fed. R. Civ. P. 55(a). If the plaintiff's claim against defendant is for other than a certain sum, however, the plaintiff must apply to the court for a judgment by default. *See* Fed. R. Civ. P. 55(b)(2). Once the default has been entered, the well-pleaded facts of the complaint must be accepted as true. *See Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). In determining whether to enter a judgment of default, the court must set forth the factors it considered in reaching its decision. *See Emasco Ins. Co. v. Sambrick*, 834 F.2d 71, 74 (3d Cir. 1987).

As noted in the court's introduction, it is clear that the relief sought is for other than a sum certain. Thus, it is appropriate for the court, rather than the clerk, to enter the default. Accepting the well pleaded facts as true, the court concludes that the Secretary's request is reasonable under the circumstances. The court will now set forth the reasons for its decision to grant the judgment.

IV. DISCUSSION

A. Removal of Pinder and PIP as fiduciaries

A fiduciary shall be removed if he breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by ERISA. *See* 29 § U.S.C. 1109. Section 404(a)(1) of ERISA outlines several fiduciary duties. *See* 29 U.S.C. § 1104(a)(1). The Secretary asserts that defendants violated their duties under section 404(a)(1) because they failed to provide benefits to recipients, act prudently under the circumstances, or operate the plan in accordance with the applicable documents. The well pleaded facts clearly establish that PIP and Pinder did not act to provide benefits to recipients. PIP became insolvent in 1998 and ceased making contributions to the fund in 1998. Since PIP ceased operations, participants and beneficiaries of the plan have not been able to obtain distributions. The court, therefore, finds that PIP and Pinder violated their fiduciary duty under ERISA to provide benefits.

Moreover, the above conduct could be considered violative of ERISA's mandate to act with the care and diligence of a prudent person. *See* 29 U.S.C. § 1104(a)(1)(B). It is clearly unreasonable for a Plan administrator to refuse to disburse plan funds. PIP and Pinder also acted unreasonably in other ways. For instance, the failure to appoint an administrator after operations ceased can be considered unreasonable because it further delayed the disbursement of benefits. Additionally, PIP's failure to file any of the annual statements required by 29 U.S.C. § 1024 after 1997 can be construed as unreasonable because a reasonable plan administrator would comply with the governing statute. Finally, PIP and Pinder did not govern the plan according to its terms. *See* 29 U.S.C. § 1104(a)(1)(D). The terms of the Plan dictated that if the plan were terminated, the assets were to be disbursed to the beneficiaries. Although the Plan was terminated in 1998, no disbursement occurred.

Thus, the court finds that Pinder and PIP violated several duties under ERISA by failing to disburse benefits. When, as here, the plan assets are not properly distributed in accordance with the agreement, a trustee may be deemed to have failed to perform his fiduciary responsibilities. Under these circumstances, removal of the trustee is proper as appropriate equitable relief pursuant to 29 U.S.C. § 1132(a)(1)(B)(8)(B). The court, therefore, finds that the relief requested by plaintiff is appropriate and will remove PIP and Pinder as fiduciaries.

B. Directing WBSC to deliver the assets to the Independent Fiduciary

The Secretary also requests the court to direct WBSC to turn the assets of the Plan over to the independent fiduciary appointed by the court to administer the Plan. WBSC is the custodian for the assets held in the Plan and is properly joined so that complete relief can be granted. *See* Fed. R. Civ. P. 19(a).¹ The Secretary does not allege that WBSC has violated any duties.² WBSC's only involvement in this case, therefore, is as a holder of the funds. Although WBSC has not engaged in wrongdoing, it is entirely appropriate for the court to order WBSC to disburse the funds to the new fiduciary once appointed. This will ensure minimal interference with the equitable relief that will be ordered by the court.

¹ A custodian is an institution that has charge or custody of property, papers, or other valuables. *See* BLACK'S LAW DICTIONARY 384 (7th ed. 1999). The custodian is not personally interested in the matter except to see that the assets are properly distributed in accordance with the plan. (*See Bank of Commerce v. Hartford Accident & Indemn. Co.*, 164 F.2d 149 (5th Cir. 1947), stating "under ordinary circumstances a Custodian merely has the care or possession of a res.").

² Indeed, the complaint states that WBSC is joined "solely so that complete relief can be granted." D.I. at ¶ 9.

C. Costs

The court finds that the Secretary's request for costs is reasonable. First, ERISA authorizes costs to be awarded against the defendant in any action on behalf of a plan to enforce a delinquent employee benefit plan payment. *See* 29 U.S.C. § 1132 (g)(2)(D). Since Pinder and PIP have been delinquent in their required contributions to the fund, the award of costs of the action to the Secretary is proper. Moreover, the Secretary would be entitled to costs even without leave of court under Federal Rule of Civil Procedure 55 (b)(1). *See* FED. R. CIV. P. 55(b)(1) (noting that clerk alone can grant costs to party on motion for default).

V. CONCLUSION

Since the Secretary of Labor has filed a well-pleaded complaint with reasonable requests for relief and neither PIP nor Pinder have countered the Secretary of Labor's allegations with any statements of their own, the court shall enter the judgment requested by the plaintiff. The court will, therefore, grant plaintiff's Motion for Default Judgment.

Therefore, IT IS HEREBY ORDERED that:

1. The Plaintiff's Motion for Default Judgment (D. I. 8) is GRANTED;
2. Judgment BE AND IS HEREBY ENTERED in favor of the Plaintiff in the manner described in the Plaintiff's attached order (D.I. 10), also executed by the court on this date.

Dated: January 31, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE