

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SCOTT LEVY, and CHRISTOPHER	:	
KLUCSARITS, individually and on behalf of	:	
all other similarly situated individuals,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 3:08CV1289(PCD)
	:	
WORLD WRESTLING ENTERTAINMENT,	:	
INC. and WORLD WRESTLING	:	
ENTERTAINMENT INC., in its capacity as	:	
Plan Administrator of the WORLD WRESTLING	:	
ENTERTAINMENT, INC. 401(K) PLAN AND	:	
THE WORLD WRESTLING	:	
ENTERTAINMENT, INC. GROUP INSURANCE	:	
PLAN	:	
Defendant.	:	MARCH 10, 2009

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO
ALTER OR AMEND AND/OR FOR RELIEF FROM JUDGMENT**

Plaintiffs Scott Levy and Christopher Klucsarits respectfully move this Court, pursuant to Federal Rules 59(e) and 60(b), to alter or amend and/or for relief from the Judgment entered herein on February 24, 2009 dismissing all of plaintiffs' claims. Plaintiffs submit that reconsideration of the Court's prior ruling is appropriate because the Court dismissed plaintiffs' removed state court Complaint without affording plaintiffs the opportunity to replead, and without considering the viability of plaintiffs' proposed new claims, in derogation of the well-established rule that, on a dismissal pursuant to Rule 12(b)(6), justice requires leave to amend if plaintiff has at least colorable grounds for relief. Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001); Tarshis v. Riese Organization, 211 F.3d 30,39 (2d Cir. 2000); Cruz v.

Gomez, 202 F.3d 593, 598 (2d Cir. 2000); Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir.1991). see generally, Wright & Miller Federal Practice and Procedure: Civil 3d § 1357.

ARGUMENT

Requests to alter or amend judgment under Rule 59(e), or for relief from judgment pursuant to Rule 60(b), and motions for reconsideration under either rule, are “committed to the sound discretion of the district judge.” McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983) (Rule 59(e)); Lawrence v. Wink, 293 F.3d 615, 622-23 (2d Cir. 2002) (Rule 60(b)); Kregos v. Latest Line, Inc., 951 F. Supp. 24, 26 (D. Conn. 1996) (motion for reconsideration). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” Virgin Atlantic Airways, Ltd. v. Nat’l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.), cert. denied, 506 U.S. 820 (1992).

To obtain reconsideration, the moving party must “point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” Shrader v. CSX Transportation, Inc., 70 F.3d 255, 257 (2d Cir. 1995) (reconsideration granted where court failed to consider FELA legislative history and relevant case law from other circuits); see also Metropolitan Entertainment Co., Inc. v. Koplik, 25 F. Supp.2d 367, 368 (D. Conn. 1998) (reconsideration granted where court misapprehended that plaintiffs’ claims were based on two separate shareholders’ agreements rather than single agreement).

Plaintiffs' Complaint in this case was filed in Connecticut state court and asserted state law claims for breach of contract and unjust enrichment arising out of defendant's mischaracterization of plaintiffs as independent contractors notwithstanding defendant's exercise of complete dominion and control over plaintiffs' work performance. Defendant removed plaintiffs' state court Complaint on the basis of ERISA preemption and then moved to dismiss plaintiffs' claims, pursuant to Rule 12(b)(6), on the grounds that they were preempted by ERISA and/or otherwise insufficient and time-barred.

In their response to defendant's Motion, plaintiffs expressly requested permission to file an Amended Complaint to assert ERISA claims since the Complaint on its face did not purport to plead such a cause of action [see Pl. Mem. in Opposition to Def. Motion to Dismiss at 19], and further asserted that there were facts available which would defeat any statute of limitations defense to such claims [*id.* at 15]. The Court, however, dismissed plaintiffs' Complaint pursuant to Rule 12(b)(6) and entered judgment without allowing plaintiffs permission to replead their state court Complaint. In its decision, the Court did not address plaintiffs' request for an opportunity to file an Amended Complaint.

The law is well-established that a district court dismissing a claim under Rule 12(b)(6) should normally give plaintiff leave to file an amended complaint to see if plaintiff can state a cognizable cause of action, even if the court doubts plaintiff's ability to do so. See, Milanese, 244 F.3d at 110; Ricciuti, 941 F.2d at 123; see also Olsen v. Pratt & Whitney Aircraft, Div. of United Technologies Corp., 136 F.3d 273, 276 (2d Cir. 1998) (plaintiffs whose complaints are dismissed pursuant to Rule 9(b) are typically given an opportunity to amend their complaint).

As one treatise notes:

The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading. Thus, the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim. A wise judicial practice (and one that is commonly followed) would be to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the plaintiff actually can state a claim for relief.

Wright & Miller Federal Practice and Procedure: Civil 3d § 1357.

This general rule is particularly applicable where the Complaint under review has been removed from state court and only purported to plead state law claims. “Where the court finds that a state common law action removed to federal court is preempted by ERISA, it should permit the plaintiff to amend its complaint to restate its claims under ERISA.” Jomarie Bellavita v. Paul Revere Life Insurance Company, No. 3:96 CV 608 (AHN), 1997 WL 597115 (D. Conn. 1997) (Nevas, J.) at *3 (attached hereto); accord Lauria v. Donahue, 438 F.Supp.2d 131, 144 (E.D.N.Y. 2006) (where plaintiff’s claim for benefits pled under state law theory of implied contract was preempted by ERISA, plaintiff granted leave pursuant to Rule 15 to re-plead potential ERISA claims).

In this case, plaintiffs expressly advised the Court that they were prepared to amend their Complaint to assert claims under ERISA, [see Pl. Mem. in Opposition to Def. Motion to Dismiss at 19], but the Court did not allow plaintiffs the opportunity to do so, nor did the Court articulate any reason for denying such request.

Plaintiffs submit that, in light of the rule favoring permitting amended pleadings after the disposition of a Rule 12(b)(6) motion to dismiss, the Court erred in refusing to allow such an amendment. And that refusal has significant practical consequences. Although plaintiffs may attempt to assert their ERISA claims in a new cause of action, the law is unsettled as to the preclusive effect of the Court's dismissal. See Wright & Miller Federal Practice and Procedure: Civil 3d § 1357 at p. 746 (noting that federal law is unsettled concerning claim preclusion effect of a Rule 12(b)(6) dismissal). Moreover, any ERISA claims asserted in a new action will not relate back to the date of the filing of this Complaint and the named plaintiffs – or other putative class members – whose claims may have been timely as of July 16, 2008, the date of the filing of the state court complaint in this action, may be barred by operation of the statute of limitations in any new action brought on behalf of the class.

Plaintiffs also seek leave to replead their state law breach of contract claim. The Court dismissed plaintiffs' common law contract claim because plaintiffs' initial complaint did not specify the particular benefits and incidents of employment that they were denied as a result of defendant's mischaracterization of their status. [Ruling at 6]. Dismissal of that claim without leave to replead was error.

Plaintiffs were not required to plead the specific non-ERISA employment benefits subject to their contract claim under the pleading rules in Connecticut state court where the claim was first asserted. The allegations of plaintiffs' original Complaint, if proven in state court proceedings, were more than sufficient to sustain a finding that plaintiffs should properly have been characterized as "employees" not "independent contractors," and that defendant failed to

provide plaintiffs whatever non-ERISA contractual benefits arose from an employer-employee relationship implied at law.

To the extent this Court held that federal notice pleading required plaintiff to specify particular non-ERISA rights, benefits and incidents of employment that they were denied, plaintiff should have been given leave to attempt to do so in an amended complaint, especially since plaintiffs identified a number of such benefits in their Memorandum in opposition to the Motion to Dismiss. See Pl. Mem. in Opposition to Def. Motion to Dismiss at 17-18. See, e.g., Tarshis, 211 F.3d at 39 (on a motion to dismiss pursuant to Rule 12(b)(6) leave to replead should be granted unless it can be said that plaintiff is entitled to no relief under any view of facts that could be produced in support of the cause of action); Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991) (certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated).

Similarly, there was nothing on the face of the Complaint that allowed a finding as a matter of law that such state law contractual claims were time-barred – and, certainly, nothing that would allow the Court to determine as a matter of law either that plaintiffs’ rights to such benefits accrued more than six years prior to the filing of the Complaint, see e.g., Engelman v. Connecticut General Life Ins. Co., 240 Conn. 287, 294 & n.7 (1997), or that the doctrine of continuing conduct did not apply. Tolbert v. Connecticut General Life Ins. Co., 257 Conn. 118 (2001). To the extent that the Court dismissed plaintiffs’ contract claims because there was no express pleading in the initial Complaint from which the Court could determine that plaintiffs’ contract claims accrued within six years prior to the filing of the Complaint, the Court should

properly have allowed plaintiffs leave to amend their Complaint to assert facts sufficient to test the validity of a potential statute of limitations defense.

Plaintiffs are submitting with this Motion a proposed Amended Complaint which asserts an ERISA claim [Proposed Amended Complaint, First Claim for Relief], specifies the particular non-ERISA benefits of employment recoverable under a state law breach of contract claim [*id.*, Second Claim for Relief ¶¶ 23-24], and alleges facts establishing the timeliness of both of those claims. [*Id.*, ¶¶ 11-14]. Plaintiffs' proposed Amended Complaint clearly states cognizable causes of action under both ERISA and state law.¹ The proposed Amended Complaint specifically alleges that plaintiffs were not and could not reasonably have been aware within six years prior to the filing of the lawsuit that defendant WWE did not intend to treat them as independent contractors pursuant to the Booking Contract, but rather was exercising such indicia of control as to give rise to a common law employer-employee relationship. [Proposed Amended Complaint, ¶¶ 11-14, 16]. To the extent defendant may assert a statute of limitations defense as to those claims, plaintiffs are entitled to litigate that defense on the facts and, if necessary, to develop an appropriate factual record for appeal. See McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004)

¹ Plaintiffs have also repled their state law unjust enrichment claim as to non-ERISA benefits which they did not receive as a result of their mischaracterization as independent contractors. Since plaintiffs' Amended Complaint makes clear that their breach of contract claim is based on an implied at law employee-employer relationship with defendant WWE which arises notwithstanding the terms of the Booking Contract, plaintiffs believe that they may maintain a cognizable claim for unjust enrichment, likewise arising from the employment relationship implied at law. Plaintiffs recognize that the Court dismissed the unjust enrichment claim in plaintiffs' initial Complaint on the ground that the Booking Contract controlled the parties' relationship, but reassert the unjust enrichment claim in the Amended Complaint so that there is no question that plaintiffs have waived that cause of action. See In re Crysens/Montenay Energy Co., 226 F.3d 160, 162 (2d Cir. 2000) (recognizing circuit split on effect of a voluntary re-pleading that omits causes of action that have previously been alleged).

(where affirmative defense is asserted on Rule 12(b)(6) motion to dismiss, plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the affirmative defense).

CONCLUSION

For the foregoing reasons, plaintiffs' Motion to Alter or Amend and/or for Relief from Judgment should be granted, the Judgment entered herein should be opened and plaintiffs should be permitted to file the proposed Amended Complaint appended hereto.

PLAINTIFFS, individually, and on behalf of all other similarly situated individuals,

BY _____ /s/
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CERTIFICATION

I hereby certify that on March 10, 2009, a copy of foregoing Memorandum in Opposition to Defendant's Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
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