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IN THE CIRCUIT COURT OF MORGAN COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA, ex. rel.
JENNIFER BAKER, et. al.**

Plaintiffs/Relators,

v.

**Civil Action No.: 07-C-78
(Judge Yoder)**

**MORGAN COUNTY WAR MEMORIAL
HOSPITAL, BY AND THROUGH
MORGAN COUNTY WAR MEMORIAL
HOSPITAL BOARD OF DIRECTORS,**

Defendants/Respondents,

and

**JOHN H. BORG and VALLEY HEALTH
SYSTEM, INC.,**

Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO PLAINTIFFS

This matter comes on for decision on the 4th day of May, 2009 upon the Parties' Cross Motions for Partial Summary Judgment, upon the briefs of the parties and upon oral argument held before the Court on the 3rd day of March, 2009.

Plaintiffs filed a claim contending that the War Memorial Hospital Defined Benefit Pension Plan ("the Plan") was terminated on February 24, 2004, effective as of December 31, 2003, and that the funds held in trust under the Plan should be distributed to them. Defendants content that the plan has not been terminated. As set forth in the following Findings of Fact and Conclusions of Law, the Court agrees with the claim of Plaintiffs that the Plan was terminated, and GRANTS partial summary judgment for the Plaintiffs, and DENIES the motion for summary judgment of Defendants.

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Findings of Fact

1. Morgan County War Memorial Hospital ("MCH" is used hereafter to refer to all Defendants) as Employers, wrote the Plan in 1972. It is a defined benefit pension plan.

2. The Plan Assets consist of funds sufficient for the purchase of retirement annuities for each of the 15 Plaintiffs, estimated at about \$140,000.00 - \$150,000.00 in recent years (the fixed assets) and about \$650,000.00 in excess (or "residual") assets. MCH has been trying to obtain the residual assets for its own use since at least 2003.

3. The Plan, by its plain language, prohibits MCH from having any "right, title, or interest in any portion of the Plan assets, nor may any portion of the Plan assets be returned to the Employer [MCH], directly or indirectly..." (§ 10.3)

4. The Plan has never been amended to permit a reversion to MCH, for good reason: section 9.1 (c) permits Employer to amend the Plan from time to time, provided the amendment:

(c) does not provide for a reversion of Plan assets to the Employer on Plan termination or otherwise.

5. With knowledge of this clear prohibition of both reversions to the Employer and amendments permitting reversions to the Employer, MCH's Board passed a resolution February 24, 2004, which said, "...The plan is terminated as of [December 31, 2003]."

6. For an employee to be entitled to any benefits under the Plan, the Employee had to work a certain number of years for the Employer. All of the Plaintiffs' pension rights have vested under the Plan. They are entitled to retirement payments upon retirement.

7. The Plan is a benefit of Plaintiffs' employment. By following the rules in the Plan, these Plaintiffs accepted the offer of the Employer to work so many years in exchange for defined retirement payments from the Plan assets.

Conclusions of Law

1. Pursuant to Rule 56, WVRCP: “[Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” As this is a matter of applying the law to undisputed material facts, judgment is appropriate under Rule 56.
2. The applicable law of this case is the common law of West Virginia trusts, and West Virginia contract law.
3. As the Fourth Circuit has already held in this case, neither ERISA nor federal tax law are essential to the resolution of this case. Morgan County War Memorial Hospital v. Baker, et. al., (No. 07-1715, Nov. 19, 2008).
4. The cardinal rule in the construction of a trust is that a court should give effect to the intent of the creator of the trust. Wheeling Dollar General Savings and Trust Co. v. Hanes, 160 W.Va. 711, 237 S.E.2d 499 (1977).
5. MCH created this trust and drafted the Plan. The intention of MCH may be derived by reading the Plan.
6. The Plan is clear and unambiguous: “The Plan will terminate (a) by resolution of the Employer’s Board of Directors...” § 9.2.
7. MCH passed (and its Board signed) a resolution effectively dated December 31, 2003 which terminated the trust. On January 6, 2006, having tried and failed to seize the residual assets, the MCH Board attempted to “rescind” the termination. The Court finds that nothing in the Plan permits rescission of termination. Instead, the Plan is very clear regarding what happens upon termination. See, § 9.3, Termination Procedures. Section 9.3 defines the scope of Defendant’s duty.

8. The Court finds as a matter of law that the intent of the creator of the trust, as evidenced by Section 9.3, is that upon termination the Plan assets shall be completely distributed.

In § 9.3:

Any residual assets may be distributed to the Participants if all liabilities of the Plan to Participants and their Beneficiaries have been satisfied....

When this permissive language is compared with the mandatory language prohibiting reversion to the Employer, the creator's intent is clear.

9. MCH relies heavily upon Jensen v. Moore Wallace North American, Inc., 41 EBC 2406, No. 06-4388 (6th Cir. 2007). This unpublished opinion of the Sixth Circuit is instructive in its distinctions from the case at hand.

10. In Jensen, the Employer several times told its employees it *intended to terminate the Plan in the future*. Apparently there was no flat, present-tense resolution (such as we have here) that terminated the Plan. Second, ERISA sets forth certain requirements for termination which were not met in Jensen. As noted above, ERISA does not apply to this Plan. The standards for termination in Jensen do not apply here. The plain language of the Plan controls termination.

11. This Plan was terminated in accord with its requirements December 31, 2003. Moreover, examination of the Plan document reveals no basis for a later rescission of the termination. MCH's duties once it terminated the Plan were clear and obvious from the face of the Plan. Rescission of the termination was not among those duties; nor was it an option. Plaintiffs' Motion is GRANTED. The Plan was terminated effective December 31, 2003.

12. MCH, despite its claim to have made only a partial motion for summary judgment, also claims this Court should find that no fiduciary duties existed because there was no termination. This argument collapses where, as here, the Court finds the Plan was terminated.

Defendants' Motion for Summary Judgment on Plaintiffs' claim for breach of fiduciary duty claim is DENIED.

13. The Court makes no dispositive ruling at this time regarding Plaintiffs' breach of fiduciary claims, and those claims are yet to be litigated, whether by motion or at trial.

WHEREFORE, Defendants' Motion for Summary Judgment is DENIED. Plaintiffs' Motion for Partial Summary Judgment on the claim for Plan termination is GRANTED, and Defendants shall distribute the residual assets to the participants after ensuring that all liabilities of the Plan have been satisfied.

In addition, the Court expressly directs the entry of a final judgment as to the claim of Plan termination, for the purpose of allowing this Order to be appealed to the Supreme Court of Appeals. The Court makes the express determination that there is no just reason for delay with respect to the issue of Plan termination.

Further, defendants' motion for a ninety (90) day stay while they seek to appeal this decision is GRANTED. This case shall be stayed, and in the event the Defendants file a Petition for Appeal within the requested ninety (90) day period, the stay shall remain in effect until the Supreme Court of Appeals makes a decision on any appeal.

Plaintiffs' and Defendants' objections are preserved for the record.

The Clerk is hereby directed to forward an attested copy of this Order to all counsel of record.

Entered this 4th day of May, 2009.

CC: 5-5-09
Key
Jenkins
Baldwin
Schultz
Custodorf

John C. Yoder
John C. Yoder, Judge
TWENTY-THIRD JUDICIAL CIRCUIT

GUARDIAN MAG
DOM MH
CIVIL JUVENILE
CRIMINAL ADM
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DATE 5-4-09 Page 5 of 5

A TRUE COPY, ATTEST:

Kimberly J. Jackson
Clerk of the Circuit Court
of Morgan County, West Virginia
By: [Signature]