

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MCGRAW-HILL COMPANIES, INC.,	:	CIVIL ACTION
	:	NO. 97-3777
Plaintiff,	:	
	:	
v.	:	
	:	
THE ESTATE OF JOHN D. DAILEY	:	
and JANICE LOCKIE DAILEY	:	
ROSENBERGER,	:	
	:	
Defendants.	:	

ORDER-MEMORANDUM

AND NOW, this **12th** day of **May, 1998**, upon consideration of motion by counterclaim-defendants McGraw-Hill Companies, Inc., the Management Compensation Committee of the Board of Directors of the McGraw-Hill Companies, Inc. and Barbara Maddock (collectively referred to as "McGraw-Hill") for dismissal of the counterclaims asserted by Estate of John D. Dailey and for discharge from interpleader action (doc. no. 24), response thereto by Estate of John D. Dailey (doc. no. 26), motion by McGraw-Hill for leave to file a reply brief (doc. no. 27), and response thereto by Estate of John D. Dailey (doc. no. 28), it is hereby **ORDERED** that:

1. McGraw Hill's motion for leave to file a reply brief (doc. no. 27) is **GRANTED**; and
2. McGraw-Hill's motion to dismiss and for discharge from the interpleader action (doc. no. 24) is **DENIED**.

The Court's reasoning is as follows:

This is an interpleader action brought by McGraw-Hill

against competing claimants to the proceeds of a Management Supplemental Death and Disability Benefits Plan ("the plan") in which John D. Dailey, a now deceased employee of McGraw-Hill, participated. The first claimant to the proceeds is Janice Lockie Dailey Rosenberger ("Mrs. Rosenberger"), Mr. Dailey's ex-wife, who claims the proceeds as the named beneficiary on the plan. The second claimant is Mr. Dailey's estate ("the estate"). McGraw-Hill acknowledges that it is liable for the payment of the employee death benefits and has deposited \$336,000 into the Registry of the Clerk of Court.

After McGraw-Hill filed the interpleader complaint, the estate filed two counterclaims against McGraw-Hill alleging: (1) that McGraw-Hill breached its fiduciary duties to Mr. Dailey by either failing to inform him as to the proper procedure for changing the designation of beneficiary under the plan, or in the alternative, by misplacing a change of beneficiary form submitted to McGraw-Hill by Mr. Dailey; and (2) that the estate is entitled to recover the attorney fees and costs incurred in defending itself in the interpleader action, and in prosecuting its crossclaims and counterclaims. McGraw-Hill responded by filing a motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the estate's counterclaim for breach of fiduciary duty for failure to state a claim upon which relief can be granted. By way of the same motion, McGraw-Hill requests that it be dismissed from this interpleader action as a disinterested stakeholder.

A complaint or counterclaim may be dismissed for failure to state a claim upon which relief can be granted if the facts plead, and reasonable inferences drawn therefrom, are legally insufficient to support the relief requested. Commonwealth ex. Rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988). In reviewing a motion to dismiss a complaint or counterclaim pursuant to Rule 12(b)(6), the Court must "accept as true the facts alleged in the complaint [or counterclaim] and reasonable inferences drawn from them. Dismissal . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). This standard will be applied to McGraw-Hill's motion.

The Third Circuit has recognized that "ERISA provides plan participants an equitable cause of action for an administrator's breach of fiduciary duty." Jordan v. Federal Express Corp., 116 F.3d 1005, 1012 (3rd Cir. 1997). Among the duties owed by an administrator is the duty to inform, which entails not only a negative duty not to misinform, but also an affirmative duty to inform when it is known that silence will be harmful. Jordan v. Federal Express Corp., 116 F.3d 1005, 1015 (3rd Cir. 1997)(citing Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993)); Estate of Jeanne Gore v. Crozer Chester Medical Center, 1997 WL 570906 *4 (E.D. Pa. 1997). Thus, as a general principle, "[an administrator] has an obligation to convey complete and accurate

information material to [a participant's] circumstances." Estate of Jeanne Gore, 1997 WL 570906 at *4 (citing In re Unisys Corp. Retiree Medical Benefit ERISA Litigation, 57 F.3d 1255, 1264 (3d Cir. 1995)).

McGraw-Hill's contention that the facts as alleged by the estate do not state a cause of action for breach of fiduciary duty is without merit. The estate sets forth facts which, if proven, could support a claim for breach of fiduciary duties. First, the estate alleges that, when Mr. Dailey removed his ex-wife as the beneficiary of a different benefits plan also administered by McGraw-Hill, McGraw-Hill should have known that Mr. Dailey also desired to remove his wife as the beneficiary of the plan at issue in this case. Thus, by failing to inform him of how to accomplish the change of beneficiary properly under the terms of the plan, McGraw-Hill breached its fiduciary duties. In the alternative, the estate argues that McGraw-Hill breached its fiduciary duties by misleading Mr. Dailey into believing that by executing the change of beneficiary form, he was removing his ex-wife from both of the benefits plans in which he participated as an employee of McGraw-Hill rather than just one of the two plans. Under Third Circuit precedent and given the allegations concerning McGraw-Hill's conduct, the Court cannot conclude that it is certain that relief can not be granted under any set of facts that could be proved. Therefore, dismissal of the counterclaim is not appropriate.

McGraw-Hill also argues that the estate's breach of fiduciary duty claim is not cognizable because the fiduciary duty requirements of ERISA do not apply to Mr. Dailey's plan. McGraw-Hill's argument rests on its contention that the plan is a "top hat plan," which is an unfunded deferred compensation plan maintained by an employer to benefit a select group of management or highly compensated employees. (Def. Reply Mem. Ex. A at 5-6; doc. no. 27). Based on the pleadings, the Court cannot determine whether the plan is indeed a "top hat plan." Rather, this is a factual issue which can only be resolved after discovery on the matter has been concluded. Therefore, dismissal of the estate's counterclaim cannot be granted on that basis.

With respect to McGraw-Hill's request that it be dismissed from the lawsuit in its capacity as stakeholder, that request must also be denied. McGraw-Hill is correct that, as a general rule, after a stakeholder deposits disputed funds with the Court, its obligations as stakeholder in an interpleader action are complete, and thus the stakeholder is entitled to be discharged from the litigation. However, where a counterclaim has been asserted against the stakeholder, as in this case, the stakeholder should not be discharged from the litigation because of the stakeholder's potential liability to the claimant. See Moore's Federal Practice 3d, ¶ 22.03[2][a] at 22-40 (1997); Charles Alan Wright, et al., 7 Federal Practice & Procedure, § 1714 n. 10, § 1715 (2d ed. 1986).

With respect to claims by the estate and McGraw-Hill that, pursuant to 29 U.S.C. § 502(g)(1), each is entitled to attorney fees and costs, these claims are not ripe for disposition and should be resubmitted to the Court at the appropriate time, such as in conjunction with motions for summary judgment or at trial. Any motion for sanctions should also be submitted at the same time.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.