

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

THOMAS E. PEREZ, SECRETARY OF	:	CIVIL ACTION
LABOR,	:	
Plaintiff,	:	
	:	
v.	:	
	:	NO. 14-5228
POLAR DRY ICE, INC., et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 3rd day of February 2015, upon consideration of Plaintiff Thomas E.

Perez’s Motion to Enter Default Judgment (Doc. No. 4), it is hereby ORDERED as follows:

1. The motion is GRANTED. A DEFAULT JUDGMENT is entered in favor of plaintiff Thomas E. Perez and against defendant Polar Dry Ice, Inc.
2. Defendant Polar Dry Ice, Inc. is removed from its position as a fiduciary with respect to the Polar Dry Ice, Inc. 401(k) Retirement Plan (“the Plan”). AMI Benefit Plan Administrators, Inc. (“AMI”)¹ is appointed as an independent fiduciary to administer the Plan in order to effect its termination, including the distribution of Plan assets to the remaining participants.
3. For services performed pursuant to this Order, the independent fiduciary shall receive compensation of no more than \$1,220.00, payable from the Plan assets, unless the independent fiduciary applies to this Court for approval of additional compensation.
4. Polar Dry Ice and its agents, employees, officers, shareholders, service providers, banks, accountants, and attorneys shall cooperate with the Secretary and AMI and provide all the books, documents, and records relating to the finances and administration of the Plan.
5. The Court retains jurisdiction of this action for purposes of enforcing compliance with the terms of this default judgment.
6. The Clerk of Court is directed to mark this case closed for statistical purposes.

¹ AMI is located at 100 Terra Bella Drive, Youngstown, Ohio, 44505, and its telephone number is (330) 406-9021.

I. Factual Background and Procedural History

Plaintiff, Secretary of Labor Thomas E. Perez, brought this action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., against Polar Dry Ice, Inc. and the Polar Dry Ice, Inc. 401(k) Retirement Plan (the Plan). Polar Dry Ice is the administrator and sponsor of the Plan, and is thus a fiduciary to the Plan under 29 U.S.C. § 1002(14)(A). (Compl. ¶ 8, Doc. No. 1.) The Secretary alleges that Polar Dry Ice established the Plan in 1997 and ceased doing business in 2003. (Compl. ¶¶ 10–11.) Since sometime in 2008, the Plan has allegedly been abandoned, with no officer or employee of Polar Dry Ice taking fiduciary responsibility for the Plan or its assets. (Compl. ¶ 12.) As of December 17, 2014, the Plan had four remaining participants with individual account balances totaling \$36,406.61. (Decl. of Erica Faust ¶ 3, Doc. No. 4-2.)

Plaintiff alleges that defendant Polar Dry Ice has failed to perform its fiduciary duties in compliance with ERISA. Specifically, Polar Dry Ice allegedly “failed to discharge its duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and its beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A),” and “failed to discharge its duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).” (Compl. ¶ 16.)

Joyce Weber, Secretary of Polar Dry Ice, Inc., signed a waiver of service on behalf of all defendants on September 28, 2014.² (Waiver of Service, Doc. No. 2.) Since that time, defendant has failed to defend or otherwise respond to this action. Plaintiff requested that the Clerk of Court enter default against defendant Polar Dry Ice on December 1, 2014, and the Clerk entered default the same day. (Doc. No. 3.) Plaintiff has moved this Court to enter a default judgment against defendant Polar Dry Ice, ordering defendant removed from its position as Plan fiduciary and appointing an independent fiduciary to liquidate Plan assets and distribute them to beneficiaries. (Mot. Default J., Doc. No. 4.)

II. Legal Standard

When a party fails to defend or otherwise litigate an action, Fed. R. Civ. P. 55 provides that, after requesting entry of default by the Clerk of Court, a party may apply to the Court for a default judgment against the nonresponsive party. Default judgments are generally disfavored, as courts prefer to adjudicate actions on their merits. See Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984) (collecting cases). Thus, when considering whether to enter default judgment, “district courts must make explicit factual findings as to: (1) whether the party subject to default has a meritorious defense, (2) the prejudice suffered by the party seeking default, and (3) the culpability of the party subject to default.” Malik v. Hannah, 661 F. Supp. 2d 485, 490 (D.N.J. 2009) (quoting Doug Brady, Inc. v. New Jersey Bldg. Laborers Statewide Funds, 250 F.R.D. 171, 177 (D.N.J. 2008)).

² Polar Dry Ice, Inc. served as the Plan’s sponsor and fiduciary. Under ERISA, service may be made upon a covered benefit plan by serving its fiduciary, or if no fiduciary exists, the plan sponsor. See Solis v. J.P. Maguire Co. Salary Sav. Plan, No. 11-2904, 2012 WL 4060569, at *1 n.3 (E.D.N.Y. July 24, 2012) (citing 29 U.S.C. § 1132(d)(1); 29 U.S.C. § 1002(16)(A)(ii)).

For purposes of proceeding on a default, “the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.” Id. (quoting Comdyne I, Inc. v. Corbin, 908 F.2d 1142, 1149 (3d Cir. 1990)). It is then left to the district court’s discretion, after considering the factors noted above, whether to impose the extraordinary sanction of default. Perez v. Railpower Hybrid Technologies Corp., No. 13-134, 2013 WL 6048984, at *1 (W.D. Pa. Nov. 15, 2013) (citing Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000)). Where a claim is not for a sum certain, the court must determine the amount of damages, generally by conducting a hearing. However, where, as here, the claim is solely for injunctive relief, the court need not hold an evidentiary hearing. Id. at *2.

III. Discussion

We conclude that default judgment should be entered in favor of the Secretary and against Polar Dry Ice, Inc. ERISA authorizes the Secretary of Labor to bring an action “to enjoin any act or practice which violates any provision of this subchapter.” 29 U.S.C. § 1132(a)(5). The allegations in the complaint, taken as true, establish that the Plan is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), that defendant Polar Dry Ice is a fiduciary of the Plan, and that defendant Polar Dry Ice abandoned its fiduciary duty to the Plan in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), and § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).³ By any standard, total abandonment is a breach of fiduciary duty.

³ ERISA § 404(a)(1) provides:

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then

(footnote continued)

The three factors discussed above weigh in favor of entering default judgment here. First, we see no potential for a meritorious defense against the Secretary's complaint. The complaint is conclusive as to defendant's breach of fiduciary duty. See Railpower Hybrid, 2013 WL 6048984, at *2 ("The Court is required to evaluate a potential meritorious defense on the Complaint alone, as no response has been offered by Defendant." (quoting G.P. Accoustics, Inc. v. Brandnamez, LLC, No. 10-539, 2010 WL 3271726, at *4 (D.N.J. Aug.17, 2010))). The Secretary would likely suffer significant prejudice in the absence of default, as this case could not proceed any further without some action by defendant, and therefore the breach of fiduciary duty would likely continue indefinitely. Finally, culpability is presumed when a party has utterly failed to plead or otherwise respond to an action. Id. (citing G.P. Accoustics, 2010 WL 3271726, at *4).

We also conclude that the Secretary's proposed relief, an injunction removing Polar Dry Ice as fiduciary to the Plan and appointing an independent fiduciary to liquidate plan assets (Mem. in Support of Mot. Default J. 1, Doc. No. 4-1), is proper under ERISA and warranted here. ERISA explicitly authorizes removal of a plan fiduciary for breach of fiduciary duty. 29 U.S.C. § 1009(a). While there is no explicit statutory authority for appointing a replacement trustee, courts have concluded that appointment of a replacement trustee is proper pursuant to the court's general equitable powers under ERISA and the common law of trusts. See Harris v. Windswept Environmental 401(k) Plan, No. 12-6179, 2013 WL 5537024, at *3-4 (E.D.N.Y. Oct. 7, 2013); Solis v. J.P. Maguire Co. Salary Sav. Plan, No. 11-2904, 2012 WL 4060569, at *3 (E.D.N.Y. July 24, 2012) ("ERISA grants plaintiff the power to seek—and the court the power to

prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. § 1004(a)(1).

award—appropriate equitable relief even when the specific relief sought is not expressly authorized in other provisions of ERISA.”).

The Secretary, after soliciting bids for independent fiduciary services, has proposed the appointment of AMI Benefit Plan Administrators as fiduciary, to be paid a fee of \$1,220.00 from plan assets. (Mem. in Support of Mot. for Default J. 7; AMI Proposal Letter, Doc. No. 4-3.) The Court concludes that the amount is reasonable.⁴ While it would be preferable to collect the fee from defendants rather than from fund assets, it is in the interest of the beneficiaries that liquidation commence as soon as practicable given defendants’ lack of response and the length of time that participants have been deprived of access to their funds. We will therefore remove Polar Dry Ice as fiduciary to the Plan and appoint AMI Benefit Plan Administrators as independent fiduciary to the Plan for the purposes of liquidating and distributing Plan assets.

IV. Conclusion

For the above-stated reasons, plaintiff’s motion for default judgment is granted.

BY THE COURT:

/s/ Legrome D. Davis

Legrome D. Davis, J.

⁴ There appears to be no precedent guiding decision on reasonableness of fees for fiduciary services, but the Court accepts the Secretary’s competitive bidding process as sufficient to ensure a reasonable fee.