

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLAND DIVISION

BENJAMIN T. BROWN,
Plaintiff,

CASE NO.

v.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY;
A foreign corporation.

Defendant.

PLAINTIFF'S MOTION TO REMAND

COMES NOW, Plaintiff, Benjamin T. Brown, M.D., by and through undersigned counsel, hereby files this Motion to Remand pursuant to 28 U.S.C. §§ 1331, 1332, and 1447 for transfer of this action back to the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida, and as grounds states:

I. BACKGROUND

Plaintiff, Benjamin T. Brown (hereinafter "Dr. Brown") is employed by Atlantic Urological Associates as a full-time Genitourinary Surgeon. He has been diagnosed with a herniated cervical disc for which he underwent surgery on September 19, 2004. Dr. Brown's medical condition causes a number of disabling symptoms including, but not limited to, a loss of tactile sensation in his index finger of his dominant right hand. Due to the effects of these conditions, Dr. Brown has been unable to perform open surgical procedures, and therefore, cannot be on-call. As a result, Dr. Brown has been unable to perform the material and substantial duties of a Genitourinary Surgeon at all times material to this action and, is therefore, totally disabled under the terms of the policies.

In accordance with the procedures set forth by the policies, Dr. Brown notified the Defendant that he was disabled. The Defendant only evaluated and reviewed Dr. Brown's claim for proportionate disability benefits and deemed Dr. Brown to be partially disabled. The Defendant has breached the terms of the policies at issue by failing to approve Dr. Brown's claim for total disability benefits.

Dr. Brown filed a Complaint against Defendant, Northwestern Mutual Life Insurance Company (hereinafter "Northwestern"), the insurer and administrator of the policies at issue, on the grounds of common law breach of contract claim due to Northwestern's failure to approve his claim for total disability benefits.

II. THIS COURT LACKS JURISDICTION

A. There is no Diversity Jurisdiction

Northwestern incorrectly argues it is entitled to removal of this state court action to the U.S. District Court for the Middle District of Florida because this court has original jurisdiction pursuant to 28 U.S.C. § 1332. (Notice of Removal I.1.A.) This Court has original jurisdiction only if this action involves an amount in controversy that exceeds \$75,000, exclusive of interest and costs, and the parties involved are diverse. 28 U.S.C. § 1332(a).

Here, though the parties concededly are of diverse citizenship, the amount in controversy does not exceed \$75,000. It is well-settled Florida case law that, in the context of a disability benefits suit, the amount in controversy is limited to the date of the filing of the action. In fact, this District Court considered the very same issue in a disability benefit action similar to the matter at hand. See *Kneebusch v. Mut. of Omaha Ins. Co.*, 2007 U.S. Dist. LEXIS 28654 (D. Fla. 2007) (in granting Plaintiff's motion to remand the court

explained binding case law limits Plaintiff's claim for benefits to the date of filing of the action and the time preceding the filing). Additionally, a plaintiff cannot recover disability benefits that accrue between the filing of a legal action and the date of the verdict. Mutual Life Ins. Co. v. Knight, 178 So. 898, 900 (Fla. 1938). Accordingly, Plaintiff's Complaint makes clear he seeks damages commencing on or around August 1, 2004, the date he is first eligible under the policies to receive a monthly total disability payment of \$1,000 per month, through November 21st, 2007, the date the complaint was appropriately filed in circuit court. Therefore, the amount in controversy represent approximately 39 months of total disability payments at \$1,000 per month, less the amount Northwestern has already paid Plaintiff. Assuming arguendo that Northwestern's claim that it had already paid Plaintiff \$18, 638.38 is indeed accurate, then damages total approximately \$20,361.62. Clearly, this does not meet the minimum amount in controversy requirement.

Defendant Northwestern misreads Plaintiff's Complaint as requesting damages in the amount of \$1,000 per month from August 1, 2004 to the first policy anniversary after Plaintiff reaches age 65. (Notice of Removal ¶ 5). However, Plaintiff's Complaint makes clear he seeks damages for Defendant's failure to pay benefits up to the date of filing and "to pay him benefits, as they come due, up to the first policy anniversary after age 65". (Comp. ¶ 24). Consequently, Defendant incorrectly calculates the amount in controversy.

Accordingly, this Court must remand this action to the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, because the amount in controversy jurisdictional requirement is less than \$75,000. See Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994) (A federal district court must remand to state court any case that was removed improperly or without necessary jurisdiction).

B. There is no Federal Question Jurisdiction

Northwestern also wrongly argues this action should be removed to this Court on the basis of original jurisdiction pursuant to 28 U.S.C. § 1331, which provides jurisdiction over all civil actions arising under the Constitution, law or treaties of the United States. (Notice of Removal I.1.B.). Specifically, Northwestern argues the disability benefits policies at issue constitute an employee benefit welfare plan as defined by the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et. seq. because the premiums were paid by Plaintiff's employer.

ERISA governs "employee welfare benefit plans," which the statute defines in the following terms:

any plan, fund, or program which was . . . *established or maintained by an employer* . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . disability.

29 U.S.C. § 1002 (1).

"By definition, then, a welfare plan requires (1) a plan, fund, or program (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing . . . benefits . . . (5) to participants or their beneficiaries." Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982) (internal quotation marks omitted). Applying the Donovan Dillingham test, the policies at issue clearly were not established or maintained by Dr. Brown's former or current employer. Dr. Brown's application for the disability policies, attached as Exhibit A and B to Plaintiff's Complaint, indicates Dr. Brown applied for the policies in 1975 and 1977 respectively, on his own

accord, and was listed as the owner of the policies as well as the person responsible for the payment of the premiums annually.

Consequently, this civil action is not governed by ERISA and, therefore, this Court lacks subject-matter jurisdiction. Accordingly, this action must be remanded to the court of proper jurisdiction; the Circuit Court, Seventh Judicial Circuit, in and for Volusia County.

III. CONCLUSION

For the foregoing reasons, Plaintiff, Dr. Brown, requests this Court to enter an order remanding the above-referenced action to the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, and to award Plaintiff reasonable attorney's fees and costs pursuant to 28 U.S.C. § 1447(c).