

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

GENE R. ROMERO, et al.	:	
Plaintiffs	:	No. 01-3894
	:	
v.	:	
	:	
ALLSTATE INSURANCE COMPANY, et. al.	:	
Defendants.	:	

**REPLY TO PLAINTIFFS’ OPPOSITION TO
MOTION TO DISMISS OF DEFENDANT EDWARD M. LIDDY
PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)**

Plaintiffs seek to assert claims against Edward M. Liddy (“Liddy”) arising out of alleged violations of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 et seq. (2010). Plaintiffs, however, cannot distinguish the Third Circuit’s clear holding in Solomon v. Klein, that under ERISA, “**the term ‘person,’ as defined does not include corporate officers,**” and thus precludes Liddy from personal liability. 770 F.2d 352, 353 (3d Cir. 1985) (emphasis added). Because Solomon is controlling on the Court, the claims against Liddy fail as a matter of law and should be dismissed. Plaintiffs also cannot invoke the “law of the case doctrine” in order to escape dismissal of their claims against Liddy, as the doctrine does not apply to denials of motions to dismiss and the previous decision on which plaintiffs rely never addressed the legal issue presented by Liddy’s current motion. Nonetheless, even if the district court had in fact reached the current issues in a previous decision, the “law of the case” doctrine would not prohibit the Court from reversing a clearly wrong decision given the controlling precedent of the Third Circuit. Accordingly, the Court should grant Liddy’s motion to dismiss.

I. THIRD CIRCUIT PRECEDENT PRECLUDES PLAINTIFFS' CLAIMS AGAINST LIDDY.

Contrary to the assertions of plaintiffs in their Opposition Brief, in Solomon, the Third Circuit Court of Appeals interpreted the meaning of “person” under the definitional section of ERISA when it made its authoritative ruling determining that corporate officers are not persons under ERISA. See 770 F.2d at 353-54. More specifically, the Solomon decision rests on the fact that Section 1002(9) section of the statute defines terms as they are used throughout ERISA’s other sections, including Section 510, the provision under which Liddy is sued. See id.; see also 29 U.S.C. § 1002(9) (defining “person” under ERISA); Adams v. Koppers Co., 684 F. Supp. 399, 400-01 (W.D. Pa. 1988) (looking to 29 U.S.C. § 1002 in order to interpret Section 510 of ERISA). Thus, regardless of whether an action is brought under Section 510 or 515 of ERISA, Solomon governs, as the definitions set forth in Section 1002(9) apply to the entire statute.¹ Accordingly, Solomon is controlling in the current matter.

Similarly unpersuasive are plaintiffs’ other arguments. For example, plaintiffs assert that the plain language and congressional intent of ERISA dictate their desired result. Opposition at 5-8. The Solomon court, however, in precluding suits such as this one, explicitly looked to congressional intent and “found nothing in the legislative history to indicate that Congress intended to impose personal liability on a shareholder or high-ranking officer of a corporation for ERISA contributions owed by the corporation.” Solomon, 770 F.2d at 354.

¹ In the years since Solomon, the Third Circuit and its district courts have reaffirmed the case’s authoritative holding that corporate officers are not included within the definition of “person” under ERISA. See, e.g., Tr. of the Nat’l Elevator Indus. Pension v. Lutyk, 332 F.3d 188,192 n.4 (3d Cir. 2003); Cent. Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc., 85 F.3d 1098, 1109 (3d Cir. 1996); Laborers Combined Funds of W. Pa. v. Ruscito, 848 F. Supp. 598, 600 n.1 (W.D. Pa. 1994); Connors v. Martinage, 41 Pa. D. & C. 3d 302, 306 (1986) (applying Solomon decision regarding meaning of “person”
(continued...)

Further, plaintiffs' suggestion that Tobin v. General Elec. Co., 1995 WL 603155 (E.D. Pa. Oct. 6, 1995) implies that corporate officers may be liable under Section 510 is likewise unavailing. The issue of whether a corporate officer is a "person" was wholly absent from Tobin, which instead dealt with whether allegations related to a plant closing could constitute a claim under Section 510. Tobin, 1995 WL 603155 *3. Thus, neither Tobin nor plaintiffs' assertions regarding the congressional intent of ERISA salvages plaintiffs' deficient claims against Liddy as determined by Solomon.

Plaintiffs' references to Boesl v. Suburban Trust & Sav. Bank, 642 F. Supp. 1503, 1513-14 (N.D. Ill. 1986) and Simons v. Midwest Tel. Sales & Serv. Inc., 433 F. Supp. 2d 1007, 1013 (D. Minn. 2006) are similarly unpersuasive. Indeed, in Simons, the District Court for the District of Minnesota rejected, with little analysis, the precedent of its own circuit court on the question of officer liability under ERISA. See 433 F. Supp. 2d at 1012-13 (rejecting holding of Rockney, 877 F.2d at 642-43). Regardless, the scant analysis and limited holdings offered by the district courts in Boesl and Simons cannot serve to overrule the authoritative holding of Solomon.

As Solomon foreclosed plaintiffs' claims against Liddy, plaintiffs turn to exceptions to the general rule that are wholly inapplicable to their claim. Opposition at 9 n.6, 10-11. Admittedly, in the Third Circuit and elsewhere, plaintiffs may hold officers liable for the actions of their corporate employers when the plaintiffs can justify "piercing the corporate veil." See Solomon, 770 F.2d at 353-54; see also Sasso v. Cervoni, 985 F.2d 49 (2d Cir. 1993) (finding individual not liable for corporate ERISA obligations in absence of "special circumstances" akin

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under 29 U.S.C. § 1002 (9) in action brought under Section 4201 of ERISA, 29 U.S.C. §1381).

to those that would warrant piercing of corporate veil); Scarborough v. Perez, 870 F.2d 1079, 1082-85 (D.C. Cir.1989); Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297, 1299-1300 (7th Cir. 1989); Rockney v. Blohorn, 877 F.2d 637, 641-42 (8th Cir. 1988); Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 24-26 (1st Cir.1988) (finding that ERISA does not impose liability on corporation's president and sole shareholder for corporation's delinquent pension contributions unless plaintiffs establish that defendant officer was acting other than as a company officer in violating statute).

However, plaintiffs who seek to pierce the corporate veil in order to maintain an ERISA claim against a corporate officer must demonstrate several factors, including the defendant's failure to observe corporate formalities, non-payment of dividends, siphoning of funds of the corporation and absence of corporate records. See Solomon, 770 F.2d at 354 (citing United States v. Pisani, 646 F.2d 83, 88 (3d Cir. 1981); DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976)); see also Laborers Combined Funds of Western Pa., 848 F.Supp. at 600 (finding plaintiff who had alleged that defendant officer had failed to observe corporate formalities, kept inadequate records, siphoned funds from an insolvent corporation to avoid creditors, created an undercapitalized corporation as a façade and used a corporate legal entity in furtherance of wrongdoing could maintain claim under ERISA). Absent here is any allegation, let alone an allegation that would satisfy the pleading requirements of Aschroft v. Iqbal, 556 U.S. ___ (May 18, 2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), that Liddy's relationship with Allstate was marked by any factors that would justify a piercing of the corporate veil. Accordingly, plaintiffs cannot maintain a claim against Liddy under Section 510 of ERISA.

Plaintiffs also rely on cases regarding issues distinct from the one presented in Liddy's 12(b)(6) motion. See Custer v. Pan American Life Insurance Co., 12 F.3d 410, 421 (4th Cir. 1993) (stating in case against corporate defendants under Section 510, that proper inquiry is "whether scope of 29 U.S.C. § 1140 includes claims against persons other than the [plaintiff's] employer"); Maguire v. Level Sights, Inc., No. 03-CV-2294, 2004 WL 1621187, at *2 (S.D.N.Y. July 19, 2004) ("Liability under this section . . . is not limited to employers."); Place v. Abbott Labs., Inc., 938 F. Supp. 1373, 1377 (E.D. Ill. 1996) (inquiring into "whether a non-employer can be held liable under Section 510" in case concerning corporate defendants); Swanson v. U.A. Local 13 Pension Plan, 779 F. Supp. 690, 701 (W.D.N.Y. 1991) ("There is some dispute among the courts over whether § 1140 liability is limited to employers"). As these cases interpret the meaning of the term "employer," and not "person," as was in dispute in Solomon and is in dispute here, these authorities are not applicable to the question at hand.

Plaintiffs further cite to authority in support of the proposition that "a corporate officer can be a 'fiduciary' subject to personal liability under ERISA when they fail to act 'solely in the interest of the plan participants and beneficiaries.'" Opposition at 10 n. 7 (quoting Carpenters Combined Funds, Inc. v. Lyons Contr., Inc., 2009 No. 09-0842, 2009 WL 3874344 *4 (W.D. Pa. Nov. 18, 2009)). Plaintiffs, however, do not allege that Liddy owed or violated such a duty to plaintiffs. As plaintiffs' Second Amended Complaint makes clear, plaintiffs seek only to hold Liddy liable for actions taken by Liddy as an officer of Allstate under the theory that such actions interfered with plaintiffs' protected rights. See 29 U.S.C. § 1140; Second Amended Complaint, Doc. No. 223 ¶¶ 164, 172 (describing plaintiffs' claims against Liddy under § 1140).

Similarly unavailing are plaintiffs' assertions that the Court should look to the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (2010) ("FLSA") in order to resolve the

current dispute. Indeed, the Third Circuit explicitly rejected such an analogy in Solomon. See 770 F.2d at 354 (rejecting analogy of ERISA to FLSA and related reasoning of Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., Civ. No. 83-2872 (D. Mass. Oct. 12, 1984)); see also Scarborough, 870 F.2d at 1083 (finding that FLSA case law does not apply in interpretations of ERISA). In sum, the cases and statutory authority cited by plaintiffs regarding corporate officers' are not relevant to their claims against Liddy.

Most simply stated, as Liddy does not fall within the definition of "person" under ERISA, plaintiffs cannot bring an action against him under Section 510. Plaintiffs' suggestions to the contrary do not take into account the controlling precedent of the Third Circuit, which must be followed by the Court. Plaintiffs' claims against Liddy, therefore, should be dismissed.

II. THE "LAW OF THE CASE" DOCTRINE DOES NOT PRECLUDE THE DISMISSAL OF LIDDY AS A DEFENDANT.

Plaintiffs contend that the "law of the case" doctrine permits them to maintain their claims against Liddy. Opposition at 4-5. This doctrine, however, does not apply to interlocutory orders such as a denial of a motion to dismiss. See In re Res. Am. Sec. Litig., 2000 U.S. Dist. LEXIS 10640, *6 (E.D. Pa. 2000) (citing Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40, 42 (1st Cir. 1994) (refusing to apply law of the case doctrine to order to denial of motion to dismiss because "[i]nterlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration . . .")); see also Lovett v. General Motors Corp., 975 F.2d 518, 522 (8th Cir. 1992) (holding that law of the case doctrine does not apply to denials of motions to dismiss). Liddy's previous motion to which plaintiffs refer sought dismissal of Liddy as a defendant pursuant to Federal Rule of Civil Procedure 12(b)(2). See Liddy Memorandum of Law in Support of Motion to Dismiss, Doc. No. 12; Liddy Reply Br., Doc. No. 31. The law of

the case doctrine, therefore, does not restrict the Court's ability to decide the issues currently presented.

Further, the law of the case doctrine does not prohibit the Court from now reversing a "clearly wrong" decision. See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance."). As the Court of Appeals for the Third Circuit has stated, "[t]he [law of the case] doctrine does not restrict a court's power but rather governs its exercise of discretion." In re Pharmacy Benefit Managers Antitrust Litigation, 582 F.3d 432, 439 (3d Cir. 2009) (quoting Pub. Interest Research Group of NJ, Inc. v. Magnesium Elektron, 123 F.3d 111, 116 (3d Cir. 1997)). The rule "does not deprive the district court of the ability to reconsider earlier rulings' to avoid reversal." Mosley v. City of Northwoods, 415 F.3d 908, 911 (8th Cir. 2005) (quoting Conrad v. Davis, 120 F.3d 92, 95 (8th Cir. 1997)). In fact, the Third Circuit has specifically stated that, "a trial judge has the discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling, even if unambiguous, might lead to an unjust result." Pharmacy Benefit Managers, 582 F.3d at 439 (citing Messenger v. Anderson, 225 U.S. 436 (1912), Sweitlewich v. County of Bucks, 610 F.2d 1157, 1164 (3d Cir. 1979)).

Plaintiffs, therefore, are mistaken in suggesting that the law of the case doctrine is an absolute bar rather than a guideline for the exercise of discretion. See Opposition at 4 n.3. Here, as explained above, a holding that plaintiffs are able to maintain a claim against Liddy in his capacity as an officer of the Allstate Insurance Company under Section 510 of ERISA is clearly wrong under the law of the Third Circuit. Solomon, 770 F.2d at 354. Even had the Court reached such a decision in earlier proceedings, therefore, the law of the case doctrine would not bar the Court's reversal of that decision.

III. CONCLUSION

Plaintiffs seek to assert claims against Liddy arising out of alleged violations of ERISA. Plaintiffs seek to assert these claims in the face of clear Third Circuit precedent which the Court is required to follow. Furthermore, plaintiffs themselves state in their Second Amended Complaint that these claims against Liddy seek to hold him liable “in his capacity as the former President, Chief Executive Office and Chairman of Allstate.” Second Amended Complaint, Doc. No. 223 ¶ 51. Finally, in their attempt to avoid the controlling precedent set by the Third Circuit in Solomon, plaintiffs cite to exceptions which are not applicable to their case against Liddy. Accordingly, the Court should grant the motion to dismiss.

Respectfully submitted,

Dated: October 4, 2010

/s/ John B. Langel
John B. Langel
Christopher T. Cognato
Attorney I.D. Nos. 20714, 306506
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 864-8227
langel@ballardspahr.com

*Attorney for Defendant
Edward M. Liddy*

CERTIFICATE OF SERVICE

I, John B. Langel, hereby certify that I caused a true and correct copy of the foregoing Reply to Plaintiffs' Opposition to Motion to Dismiss of Defendant Edward M. Liddy Pursuant to Federal Rules of Civil Procedure 12(B)(6) to be served via electronic service on the following counsel for plaintiffs:

Coleen M. Meehan
John V. Gorman
Brian M. Ercole
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, PA 19103

Michael Lieder
SPRENGER & LANG, PLLC
1400 Eye Street, N.W.
Washington, D.C. 20009

Michael J. Wilson
Paul Anton Zevnik
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Ave, N.W.
Washington, D.C. 20004

C. Felix Miller, Senior Trial Attorney
U.S. Equal Employment Opportunity Commission
St. Louis District Office
Robert A. Young Federal Building
1222 Spruce Street, Room 8.100
St. Louis, MO 63103

Thomas W. Osborne
Mary Ellen Signorille
AARP FOUNDATION LITIGATION
601 E. Street, N.W.
Washington, D.C. 20049

Attorneys for Plaintiffs

Dated: October 4, 2010

/s/ John B. Langel
John B. Langel
Christopher T. Cognato