COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1365

Cir. Ct. Nos. 97CV007129
01CV004050

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

DANKWART ESSBAUM,

PLAINTIFF-APPELLANT,

V.

NATIONAL INSURANCE COMPANY OF WISCONSIN,

DEFENDANT-RESPONDENT.

DANKWART ESSBAUM,

PLAINTIFF,

V.

NATIONAL INSURANCE COMPANY OF WISCONSIN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Hoover, JJ.

¶1 PER CURIAM. Dankwart Essbaum appeals from the circuit court judgment dismissing all but one of his claims against National Insurance Company of Wisconsin.[1] He argues that the court erred in denying his motion to file a second amended complaint, and in concluding that his pleadings established no material factual issues. We affirm.

I. BACKGROUND

¶2 On March 9, 1994, Essbaum injured his back while employed by the Fox Point/Bayside School District. Through his employer, he had disability coverage with National. The National policy included a section, "**MONTHLY BENEFIT PROVISION DIRECT OFFSET**," which provided that an insured's monthly benefit would equal his or her "Plan Monthly Benefit minus Other Specified Income, if any," derived from other sources, including worker's compensation, social security, and "[a]ny disability or retirement benefits the Insured Employee, his or her dependents or other person receives or is eligible to receive because of Employee's disability or retirement from any government plan not otherwise specified[.]"

¶3 On November 11, 1994, National received notice of Essbaum's claim for disability benefits. On December 14, 1994, Dennis M. Boyle, Chief Investigator for National, wrote Essbaum advising him that National was "approving [his] claim for total disability benefits." The letter also advised:

[1] The judgment also granted Essbaum some relief on one of his claims, awarding interest on certain late payments of benefits; that portion of the judgment, however, is not at issue in this appeal.

> We also understand that you are continuing to pursue your claim for Worker's Compensation benefits. If your Worker's Compensation benefits are reinstated, we understand that your sick leave benefits will also be reinstated and this would create an overpayment in your Long Term Disability benefits. If that occurs, you will be required to remit the amount of the overpayment to us. Please be sure to keep us informed concerning your Worker's Compensation claim.
>
> This plan also requires you to apply for Social Security and Wisconsin Retirement System Disability benefits. If you have not done this, we would suggest that you apply for those benefits in the near future and advise us in writing of the dates that your applications for Social Security and Wisconsin Retirement System disability benefits were submitted to the appropriate agencies. As your Long Term Disability benefits would be calculated in conjunction with those benefits, please also keep us informed of your eligibility for Social Security and Wisconsin Retirement System Benefits by providing us with copies of any written determinations that you should receive concerning your eligibility for those benefits.
>
> In addition to the Worker's Compensation benefits, if Social Security and/or Wisconsin Retirement System benefits are awarded, your benefits with us may become overpaid. If you wish us to provide full benefits to you pending favorable determination on your Worker's Compensation, Social Security and Wisconsin Retirement System claims, please complete the enclosed Promise to Repay Agreement and return the completed and notarized agreement to us as soon as possible.

¶4 Despite these policy provisions and Boyle's directions, Essbaum initially did not seek compensation from at least some of the potential sources. Ultimately, however, he received $25,000 in worker's compensation and, after appealing an initial denial, he also received social security benefits. Accordingly, while making substantial payments to Essbaum, National also adjusted its payments by offsetting them by the amounts he received, or was eligible to receive, from the other sources.

¶5 Essbaum disputed National's authority to require him to pursue and obtain benefits from some of the other sources, and he disputed some of the offset amounts. He sued National, filing the first of several actions on July 3, 1995. On July 15, 1996, Judge John DiMotto granted National's motion for summary judgment. On September 2, 1997, Essbaum filed his First Amended Complaint, again challenging the offsets. Mediation followed and, after it failed to resolve the case, Judge Stanley Miller dismissed the action on the grounds that Essbaum had failed to mediate in good faith. We reversed, concluding that the circuit court could not require Essbaum to accept a mediated agreement. *See* ***Essbaum v. National Ins. Co. of Wis.***, No. 99-2519, unpublished slip op. (WI App Nov. 21, 2000). The case then returned to circuit court before Judge Elsa Lamelas and, later, Judge Kitty Brennan.

¶6 Following remand, on March 5, 2001, Judge Lamelas asked the parties whether they needed time to amend the pleadings or name additional parties. Counsel for Essbaum answered that he needed no additional time; he said nothing about any intention to amend the pleadings. Accordingly, the court entered a scheduling order, which did not allow the parties to amend their pleadings; it provided the parties a few months to complete discovery and file dispositive motions.

¶7 Nevertheless, on March 25, 2001, Essbaum filed a motion requesting leave to file a twenty-seven page Second Amended Complaint setting forth six claims, four of which had not been included in the First Amended Complaint. Judge Lamelas denied his motion. She noted that she had asked the parties "whether any amendment to the pleadings was desired," and that "the parties both were clear that all of the proper parties had been joined and that no amendment to the pleadings was in order." She then commented:

> It doesn't need to be said … that a case from 1997 is an aging case. This case has had a complicated history, which is obvious from the fact that it went to the Court of Appeals and came back. There is no criticism of anyone here in the making of that statement. [Counsel for Essbaum] prevailed before the higher court, so he certainly had every right to take this case higher, and the Court of Appeals has stated that there was no obligation … for his client to go along with mediation that had been worked out.
>
> But the age of the case is something which I think is pertinent here.
>
> I have reviewed the second amended complaint which was filed. It is very long. I don't know that it clarifies the issues any further. Some of the claims, of course, are claims that have already been incorporated. Other claims[,] it's a little less clear just what they are.
>
> However, I do believe it is fair to conclude that [counsel for Essbaum] has had ample time to think about the appropriate pleading of this case since it was first filed in 1997. He had one opportunity to amend the complaint, and … availed himself of the opportunity to amend the complaint and seeks to amend the complaint now a second time.
>
> Clearly if I were to permit an amendment of the complaint, we would have to revisit the scheduling order here and make an allowance for additional discovery…. If there are additional causes of action, that will precipitate further litigation.
>
> ….
>
> I have heard no reason advanced … as to the merits as to why this new amendment should be allowed…. I don't think it does anything to clarify the issues. It will age the litigation further, this is already a very old case; and I am denying leave to amend.

¶8 The day after Judge Lamelas denied his motion to amend the pleadings, Essbaum filed another action against National, before Judge Michael P. Sullivan, bringing essentially the claims he had sought to pursue in the Second Amended Complaint. Judge Sullivan granted National's motion to consolidate the case with that before Judge Lamelas; Judge Lamelas then granted National's

motion to strike and/or dismiss the action that had been filed before Judge Sullivan. In 2002, the case was transferred to Judge Kitty Brennan.

¶9 In 2002-03, Judge Brennan presided over extensive hearings and considered whether any material factual issues required further proceedings or trial on Essbaum's breach of contract and bad faith claims. Judge Brennan concluded that the policy was clear and unambiguous, that it provided for the offsets National took into account in computing its payments to Essbaum, and that National had shown no bad faith in denying the additional amounts Essbaum sought.

II. DISCUSSION

¶10 Unfortunately, many of Essbaum's arguments are unclear or undeveloped. Essentially, however, he challenges Judge Lamelas' denial of his motion to file the Second Amended Complaint, and from Judge Brennan's dismissal of his breach of contract and bad faith claims.

A. Second Amended Complaint

¶11 Essbaum argues that we should independently review the decision denying his motion to file a second amended complaint, giving no deference to the circuit court's conclusion. He is incorrect.

¶12 A few years ago, we reiterated:

> "A trial court's decision to grant leave to amend a complaint is discretionary." We will not reverse a court's discretionary decision unless the record discloses that the court failed to exercise its discretion, that the facts do not support the trial court's decision, or that the court applied the wrong legal standard. The circuit court "in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment."

Grothe v. Valley Coatings, Inc., 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463 (citations omitted). WISCONSIN STAT. § 802.09(1) (2001-02)[2] provides, in relevant part:

> AMENDMENTS. A party may amend the party's pleadings once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

In this case, Essbaum had amended his complaint once. When he sought to do so again, he needed "leave of court" or written consent from National to do so. *See **id.*** He did not have National's consent, and he offered nothing to establish that justice required the court to grant his request. Clearly, as its comments show, the circuit court exercised discretion and properly denied Essbaum's request, consistent with § 802.09(1) and the standards summarized in ***Grothe***.

B. Dismissal of Claims

¶13 Essbaum next argues that the circuit court incorrectly concluded that the pleadings failed to establish any material factual issue for further proceedings or trial.[3] Again, he is incorrect.

¶14 WISCONSIN STAT. § 802.10(5) provides, in part:

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[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[3] He also attempts to present various arguments related to claims contained in the Second Amended Complaint. Having concluded, however, that the circuit court properly denied his motion to file that amended pleading, we need not address any argument related to its claims.

> PRETRIAL CONFERENCE. At a pretrial conference, the court may consider any matter that facilitates the just, speedy and inexpensive disposition of the action …. At a pretrial conference, the court may consider and take appropriate action with respect to …:
>
> (a) The formulation and simplification of the issues.
>
> (b) The elimination of frivolous claims or defenses.
>
> ….
>
> (h) The disposition of pending motions.

When a circuit court concludes that no material factual issues exist and dismisses claims as a matter of law, our review, essentially the same as that in considering a grant of summary judgment, is *de novo*. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751.

¶15 Essbaum takes issue with National's delay in determining the worker's compensation offsets, contending that National somehow waived or was estopped from making the offsets, or should only have computed them prospectively. He takes issue with the manner in which National timed and computed the social security offsets. And he contends that National showed bad faith in requiring him to appeal the denial of Wisconsin Retirement benefits. We are not convinced.

¶16 Essbaum fails to identify any factual dispute or any error in the circuit court's analysis. As the circuit court determined, the clear terms of the policy, together with the undisputed facts, establish that National was entitled to offset its payments to Essbaum by the amounts he received, or was eligible to receive, from the other sources to which the policy referred. That is exactly what National did. Essbaum has offered nothing to suggest otherwise or to establish bad faith. *See* ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶¶3, 29, 249 Wis. 2d 623,

638 N.W.2d 575 (bad faith established only where insurance company "'has intentionally denied (or failed to process or pay) a claim without a reasonable basis'") (quoting ***Anderson v. Cont'l Ins. Co.***, 85 Wis. 2d 675, 693-94, 271 N.W.2d 368 (1978)). Thus, we conclude, Essbaum has offered nothing to establish any factual dispute about the policy's provisions, their meaning, or their application in computing his disability payments. Accordingly, the circuit court correctly dismissed his breach of contract and bad faith claims.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.