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AO 450 (Rev. 5/85) Judgment in a Civil Case @

AUG 16 2001

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UNITED STATES DISTRICT COURT

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

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DISTRICT OF NEVADA

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DISTRICT OF

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JUDGMENT IN A CIVIL CASE

JANIS D. KESTER,

Plaintiff,

V.

CV-S-01-0431-PMP(PAL)

ROBERT GASTON, et al,

Defendants.


 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

 X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' motions to dismiss are GRANTED. Judgment is hereby entered in favor of the defendants, Robert Gaston, Marshal S. Willick, The Law Offices of Marshal S. Willick PC, and Judy Carmona and against the plaintiff Janis D. Kester.

August 16, 2001

LANCE S. WILSON
Clerk of the Court

Glenn Walters
(By) Deputy 

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CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
9111 DEPUTY

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LAYCE S. WILSON
CLERK

BY 9111 DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JANIS D. KESTER,

Plaintiff,

CV-S-01-0431- PMP (PAL)

v.

ORDER

ROBERT E. GASTON, a Nevada Resident, MARSHAL S. WILLICK, a Nevada Resident, THE LAW OFFICES OF MARSHAL S. WILLICK, P.C., a Nevada Professional Corporation, HILTON HOTELS RETIREMENT PLAN, a California entity doing business in Nevada, JUDY CARMONA, a Missouri Resident, the Representative in a Nevada Probate and Successor Representative in a Nevada divorce, and DOES I through XX, and ROES I through X,

Defendants.

Presently before this Court is Defendants Marshal'l S. Willick ("Willick"), the Law Offices of Marshall S. Willick, P.C. ("Law Offices") and Judy Carmona's Motion to Dismiss, for Attorney's Fees and Costs, and for Prohibition Against Future Filings (Doc. # 4, 5 and 6) filed on May 7, 2001. Also, before this Court is Defendant Robert E. Gaston's ("Judge Gaston") Motion to Dismiss (Doc. # 7) filed May 7, 2001. Plaintiff Janis D. Kester ("Kester") submitted an Opposition to Motions to Dismiss, for Attorney's Fees and Costs, and for Prohibition Against Future Filings (Doc. # 10, 11, 12 and 13) on May 21, 2001. Judge Gaston filed a Reply (Doc. # 25) on June 18, 2001. Defendants Willick, Law

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1 Offices and Judy Carmona filed a Reply (Doc. # 27, 28 and 29) on June 29, 2001. Finally,
2 on July 9, 2001, Defendants Willick, Law Offices, Judge Gaston and Judy Carmona filed
3 Defendant's [sic] Joint and Renew Their Motions to Dismiss Plaintiff's "First Amended
4 Civil Complaint to Recover and Enforce ERISA Survivor Benefits for Declaratory Relief
5 and Injunctive Relief under 29 U.S.C. 1132, and Civil Damages in Excess of \$75,000"
6 (Doc. # 31).

7 I. BACKGROUND

8 Lupe Carmona married Plaintiff Kester in March, 1988. (Defendants' Willick,
9 Law Offices and Judy Carmona's Motion to Dismiss, for Attorney's Fees and Costs, and for
10 Prohibition Against Future Filings [hereinafter Defendants' Motion] at 3.) Lupe Carmona
11 named Kester as the beneficiary of two of his pension plans in October, 1992. (Plaintiff
12 Kester's Complaint, ¶ 11.) In November, 1997, Lupe Carmona and Kester divorced. *Id.*, ¶
13 12. The Divorce Decree negotiated by Lupe Carmona and Kester awarded Lupe Carmona
14 the pension plan benefits as his sole and separate property. (Plaintiff Kester's Opposition,
15 Ex. 1, Decree of Divorce at 2.) At some time following the divorce decree, Lupe Carmona
16 married Defendant Judy Carmona. Then, Lupe Carmona named Judy Carmona as the
17 beneficiary of Lupe Carmona's pension plans. On April 15, 1999, Lupe Carmona died.
18 (Plaintiff Kester's Opposition, Ex. 16, Certificate of Death.)

19 Following Lupe Carmona's death, Judge Gaston ordered the creation of a
20 constructive trust for Lupe Carmona's pension plan benefits on June 22, 1999. (Plaintiff
21 Kester's Opposition, Ex. 19, Order Establishing Constructive Trust.) In March, 2000,
22 Kester appealed Judge Gaston's orders of June 22, 1999 and March 14, 2000 to the Nevada
23 Supreme Court. (Defendants' Motion, Ex. D, Supreme Court Pleadings Index Sheet.) On
24 July 18, 2000, Kester filed Chapter 13 bankruptcy in Federal Bankruptcy Court. (Plaintiff
25 Kester's Opposition, Ex. 34, Voluntary Petition.) The Nevada Supreme Court stayed
26

1 Kester's appeal based on a stay by the Federal Bankruptcy Court on October 5, 2000.
2 (Defendants' Motion, Ex. D, Supreme Court Pleadings Index Sheet.)

3 II. LEGAL STANDARD

4 In considering a motion to dismiss, "all well-pleaded allegations of material fact
5 are taken as true and construed in a light most favorable to the non-moving party." Wylor
6 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). However,
7 the Court does not necessarily assume the truth of legal conclusions merely because they
8 are cast in the form of factual allegations in Plaintiffs' Complaint. Clegg v. Cult
9 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). The issue is not whether
10 Plaintiff will ultimately prevail, but whether he may offer evidence in support of his claims.
11 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)(quoting Scheuer v.
12 Rhodes, 416 U.S. 232, 236 (1974)). Consequently, the Court may not grant a Motion to
13 Dismiss for failure to state a claim "unless it appears beyond doubt that the Plaintiff can
14 prove no set of facts in support of his claim which would entitle him to relief." Conley v.
15 Gibson, 355 U.S. 41, 45-46 (1957).

16 III. DISCUSSION

17 Plaintiff Kester brought her action against Defendants to recover benefits from
18 Lupe Carmona's pension plans under the Employee Retirement Income Security Act
19 ("ERISA"). 29 U.S.C. § 1132(a)(1)(B)(2001). ERISA allows that a suit may be brought
20 by a beneficiary of a plan "to recover benefits due to [her] under the terms of [the] plan,
21 [or] to enforce [her] rights under the terms of the plan." Id. For such actions under §
22 1132(a)(1)(B), ERISA permits concurrent jurisdiction for federal district courts and state
23 courts of competent jurisdiction. 29 U.S.C. § 1132(e)(1).

24 In Eighth District Court of Clark County, Judge Gaston rendered a final
25 judgment of the beneficiaries of the pension plans at issue in this case. (Plaintiff Kester's
26 Opposition, Ex. 1, Decree of Divorce at 2; Ex. 34, Voluntary Petition.) Kester appealed

1 Judge Gaston's decision to the Nevada Supreme Court in March, 2000. (Defendants'
2 Motion, Ex. D, Supreme Court Pleadings Index Sheet.) The same issues are before this
3 Court.

4 Essentially, Kester is asking the United States District Court of Nevada to allow
5 the relitigation of issues where Judge Gaston made a final determination and the Nevada
6 Supreme Court has the matter under review. ERISA allows concurrent jurisdiction
7 between federal district court and state courts. 29 U.S.C. § 1132(e)(1). Kester choose to
8 originally litigate in the Eighth Circuit Court of Clark County. This Court will not
9 relitigate issues where another court had jurisdiction and made a final determination.

10 Additionally, a United States District Court does not have the authority to review the final
11 judgement of state court proceedings. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923);
12 Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

13 Defendants Willick, Law Office and Judy Carmona also motioned this Court to
14 award attorney's fees against Kester under Fed. R. Civ. P. 11. Defendants argue that Kester
15 frivolously filed suit before this Court and should be sanctioned for such an action which
16 was without merit. Fed. R. Civ. P. 11 prohibits a party from filing papers with the Court
17 that are (1) "presented for any improper purpose, such as to harass or to cause unnecessary
18 delay or needless increase in the costs of litigation," or (2) not "warranted by existing law
19 or by a non-frivolous argument for the extension, modification or reversal of existing law."
20 Fed. R. Civ. P. 11 (b)(1)-(2). Defendants base their request for Fed. R. Civ. P. 11 sanctions
21 on the fact that Kester has brought the same issue before the Nevada Supreme Court and
22 has also tried to have the issue resolved before the Federal Bankruptcy Court. However,
23 Fed. R. Civ. P. 11 sanctions "are only available with regard to papers filed with the court,
24 not attorney misconduct." Trulis v. Barton, 107 F.3d 685 (9th Cir. 1995)(citing Fed. R.
25 Civ. P. 11). Kester has not filed much more than a Complaint and an Opposition before
26 this Court. Any actions taken by Kester and her attorney before the Eighth District Court

1 of Clark County, the Nevada Supreme Court and the Federal Bankruptcy Court cannot be
2 the basis for this Court to issue Fed. R. Civ. P. 11 sanctions. As a result, Defendants
3 motion for Fed. R. Civ. P. 11 sanctions should be denied.

4 Finally, Willick, Law Office and Judy Carmona ask this Court for an order
5 prohibiting future filings by Kester. While this Court understands Defendants' frustration
6 with the continuing litigation, Kester has not made the sort of voluminous filings in the
7 United State District Court of Nevada which would warrant such action. As a result,
8 Defendants' Motion for a Prohibition on Future Filings should be denied.

9 **IV. CONCLUSION**

10 IT IS THEREFORE ORDERED that Defendants Marshall S. Willick, the Law
11 Offices of Marshall S. Willick, P.C., Robert E. Gaston and Judy Carmona's Motion to
12 Renew their Motions to Dismiss against Plaintiff Janis D. Kester's First Amended
13 Complaint (Doc. # 31) is GRANTED.

14 IT IS FURTHER ORDERED that Defendants Marshall S. Willick, the Law
15 Offices of Marshall S. Willick, P.C., and Judy Carmona's Motion to Dismiss (Doc. # 4) is
16 GRANTED. All causes of action against Defendants Marshall S. Willick, the Law Offices
17 of Marshall S. Willick, P.C., and Judy Carmona are hereby DISMISSED.

18 IT IS FURTHER ORDERED that Defendant Robert E. Gaston's Motion to
19 Dismiss (Doc. # 7) is GRANTED. All causes of action against Defendant Gaston are
20 hereby DISMISSED.

21 IT IS FURTHER ORDERED that Defendants Marshall S. Willick, the Law
22 Offices of Marshall S. Willick, P.C., and Judy Carmona's Motion for Attorney's Fees (Doc.
23 # 5) is DENIED.

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IT IS FURTHER ORDERED that Defendants Marshall S. Willick, the Law Offices of Marshall S. Willick, P.C., and Judy Carmona's Motion for a Prohibition on Future Filings by Plaintiff Janis D. Kester (Doc. # 6) is hereby DENIED.

DATED: August 14, 2001



PHILIP M/PRO
United States District Judge