UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VANCE SMITH, M.D.,

Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Defendant.
_____/

CASE NO. 1:16-CV-1065

HON. ROBERT J. JONKER

OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Dismiss (ECF No. 13). The deadline for response has passed. Plaintiff has not responded to the motion, despite ample time in which to do so. The Court has thoroughly reviewed all matters of record and carefully considered the applicable law. The Court does not believe oral argument is needed to resolve this Motion. For the following reasons, the Court **GRANTS** the Motion to Dismiss.

BACKGROUND

Plaintiff Vance H. Smith ("Plaintiff") was a participant in a group long-term disability plan ("LTD") that was issued to Vance H. Smith, M.D. ("the Company"), Plaintiff's employer, by Defendant Northwestern Mutual Insurance Company ("Defendant") (ECF No. 1, PageID.2-3). Until January 2007, Plaintiff worked full-time for the Company as a vascular surgeon. *Id.* at PageID.3. At that time, Plaintiff became unable to work full-time due to a disability, but continued performing other duties for the company until December 2015. *Id.* The LTD provides disability benefits upon

a showing that one is "unable to perform with reasonable continuity the material duties of [one's] . . . own occupation." *Id.*

In 2008, Plaintiff filed a claim with Defendant requesting long-term disability benefits under the LTD based on his disability. *Id.* On September 29, 2008, Plaintiff's application was initially approved under the "own occupation" coverage. *Id.* On September 29, 2010, however, the applicable policy definition of "disability" and the eligibility criteria under the LTD changed to "any occupation." *Id.* at PageID.4. Defendant terminated Plaintiff's benefits effective October 12, 2010, because Plaintiff did not qualify under the "any occupation" definition of disability. In particular, he did not undergo a fifty percent reduction in income as a result of his disability. *Id.* at PageID.10. In making its determination, Defendant used December 2008 as the date of onset of disability. *Id.* at PageID.4.

Plaintiff appealed this determination on the basis that his date of onset of disability was January 2007. *Id.* On June 22, 2010, Defendant notified Plaintiff that the date of onset of his disability had been changed to July 1, 2008. *Id.* On July 20, 2010, Plaintiff requested a review of this determination. *Id.* at PageID.5. Defendant issued its denial of Plaintiff's appeal refusing to change the date of onset on September 30, 2010. *Id.* On December 9, 2010, Plaintiff again requested review of his claim for improper denial of benefits. *Id.* at PageID.7. Defendant denied this claim in February 2011. *Id.*

Plaintiff alleges that Defendant failed to provide the requisite disclosure in connection with this denial; that it "misdirected Plaintiff to the Michigan Department of Finance and Insurance to appeal Defendant's decision"; that Plaintiff continued to provide additional information, and that

Defendant continued to review Plaintiff's claims as late as February of 2014. *Id.* Plaintiff does not allege any formal denial from Defendant later than February of 2011.

On August 26, 2016, Plaintiff filed his complaint, alleging improper denial of benefits under the LTD (ECF No. 1). Specifically, Plaintiff claims Defendant: (1) failed to acknowledge the findings of his treating physician as to the date of onset of his disability; (2) improperly ignored Plaintiff's records which allegedly indicated that his disability caused over fifty percent reduction in income; (3) improperly calculated the date of onset of disability; and (4) improperly calculated Plaintiff's proof of loss amounts. *Id.* at PageID.11. Defendant moved for dismissal under FED. R. CIV. P. 12(b)(6), arguing that Plaintiff's claim for payment of benefits is time-barred and that Plaintiff fails to state a cognizable claim for *per diem* penalties under ERISA (ECF No. 14).

LEGAL STANDARDS AND ANALYSIS

To decide a motion to dismiss under Rule 12(b)(6), a district court must construe all well-pleaded allegations in the plaintiff's complaint as true, in light most favorable to plaintiff. *Gausmann v. City of Ashland*, 926 F. Supp. 635, 638 (N.D. Ohio 1996). Well-pleaded allegations are those that allege specific facts and are not merely conclusory statements. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). Documents attached to or incorporated in the pleadings may also be considered by the court. FED. R. CIV. P. 10(c) (documents attached to pleadings are considered part of pleadings). The court is required to dismiss a claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Gausmann*, 926 F. Supp. at 638 (citing *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

I. Plaintiff's Failure to File Response

Defendant's motion is unopposed. On this basis alone, Defendant's motion should be granted. The local rules of this Court provide that "[a]ny party opposing a dispositive motion shall, within twenty-eight (28) days after service of the motion, file a responsive brief and any supporting materials." W.D. MICH. L. CIV. R. 7.2(c). "[I]f a plaintiff fails to respond or to otherwise oppose a defendant's motion, then the district court may deem the plaintiff to have waived opposition to the motion." *Humphrey v. United States Attorney General's Office*, 279 F. App'x 328, 331 (6th Cir. 2008) (quoting *Scott v. State of Tennessee,* No. 88-6095, 1989 WL 72470, at *2 (6th Cir. July 3, 1989)) (granting defendants' unopposed motion to dismiss); *see also Woods v. Demmer Corp.*, No. 1:09-CV-625, 2010 WL 5147364, at *4 (W.D. Mich. Nov. 18, 2010) ("Plaintiff's failure to file a response is a violation of the local court rules and tantamount to a waiver of opposition to defendant's motion.").

Here, Plaintiff was served with Defendant's motion on October 19, 2016 (ECF No. 15). Plaintiff has yet to respond to Defendant's motion. Accordingly, Plaintiff's failure to file a response amounts to a waiver under the local court rules and establishes sufficient grounds for this Court to grant Defendant's motion. In addition, this Court finds that this action should be dismissed on the merits for the reasons set forth below.[1]

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[1]The Court notes that Plaintiff previously litigated another case against this Defendant for disability insurance coverage under a series of individual policies. The disability issues appear to be similar, if not identical. The critical policy language may or may not vary, and the source of law to decide the case differed–ERISA in this case under a group policy, and state contract law for the individual policies at issue in the previous case. But the factual underpinnings of both cases and the litigating parties appear to be identical. The parties settled the prior case, and the Court dismissed the case with prejudice. *Smith v. Northwestern Mutual Ins. Co.*, Case No. 1:14-CV-760 (W.D. Mich. Feb. 2, 2016) (ECF No. 97). This at least raises the possibility of a claim preclusion defense in this litigation, which the Court would have the parties brief if the case continued beyond the pending

II. Statute of Limitations

Defendants move to dismiss Plaintiff's claim for improper denial of benefits in Count I as time-barred. ERISA does not contain a statute of limitations period for claims seeking benefits under an ERISA benefits plan. Accordingly, courts have held that the appropriate statute of limitations period for benefits claims in the ERISA context is the limitations period for breach of contract claims in the state where the claim is brought. *See Meade v. Pension Appeals & Rev. Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992). However, the Sixth Circuit has recognized that parties may contractually agree to a shorter limitations period so long as that period is not unreasonably short. *See Clark v. NBD Bank, N.A.*, 3 F. App'x 500, 503-04 (6th Cir. 2001) (per curiam). The Sixth Circuit has consistently found three-year statute of limitations periods to be reasonable. *Williams v. Metro Life Ins. Co.*, 541 F. App'x 545, 548 (6th Cir. 2013) ("We have previously deemed three-year statutes of limitations periods to have been reasonable, and we see no reason to find otherwise.") (citing *Rice v. Jefferson Pilot Fin. Ins. Co.*, 578 F.3d 450, 454 (6th Cir. 2009); *Med. Mut. of Ohio v. K. Amalia Enters. Inc.*, 548 F.3d 383, 390 (6th Cir. 2008)). Additionally, the Sixth Circuit has held that parties may contract for the date on which an ERISA claim accrues, provided it is reasonable. *Rice*, 578 F.3d at 455-56. Subject to exceptions not applicable here,[2] a plaintiff who fails file suit within the applicable limitations period is time-barred from pursuing its claims. *See Mazur v. Unum Ins. Co.*, 590 F. App'x 518, 522 (6th Cir. 2014).

Rule 12(b)(6) motion. *Cf. Newell Window Furnishings, Inc. v. UAW*, No. 1:11-CV-1080, 2014 WL 2780019 (W.D. Mich. June 19, 2014).

[2]The Court finds no evidence in the record to suggest that the statute of limitations is inapplicable, *see Moyer v. Metropolitan Life Ins. Co.*, 762 F.3d 503, 506 (6th Cir. 2014), or that equitable tolling is appropriate in this case. *See Engleson v. Unum Life Ins. Co. of America*, 723 F.3d 611 (6th Cir. 2013).

Here, the LTD provided for a three-year limitations period for bringing claims based on the plan (ECF No. 14-1, PageID.77) ("No such action may be brought more than three years after the end of the period within which Proof of Loss is required to be given."). This three-year period began to run at the end of the period within which Plaintiff was required to submit Proof of Loss. The LTD defines "Proof of Loss" as "written proof that you are [d]isabled and entitled to benefits." *Id.* at PageID.76. Here, Defendant determined that Plaintiff failed to provide Proof of Loss beyond October 12, 2010 (ECF No. 1, PageID.6).

The Court finds that the limitations period and accrual time set forth in the LTD are reasonable. *See Metro Life Ins. Co.*, 541 F. App'x at 548; *Rice*, 578 F.3d at 455-56. Accordingly, Plaintiff was required to file his claim by October 12, 2013. Defendant informed Plaintiff about the Proof of Loss date and the limitations period through a written communication on July 28, 2011, (ECF No. 14-2, PageID.82-84), which Plaintiff himself admits that he received (ECF No. 1, PageID.8). Plaintiff, however, failed to file this action until August 26, 2016, almost three years after the limitations period had run. Accordingly, Plaintiff's claim for payment of benefits under the LTD is time-barred and must be dismissed. *See Unum*, 590 F. App'x at 522.

III. *Per Diem* Penalties

Plaintiff's claim in Count II is based on § 502(c)(1) of ERISA, which provides, in relevant part:

> (1) Any administrator . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount up to $100 a day from the date of such

> failure or refusal, and the court may in its discretion order such other relief as it deems proper . . . .

29 U.S.C. § 1132(c)(1). The maximum *per diem* penalty has been increased to $110 by regulation. 29 C.F.R. § 2575.502c-1.

Section 1002(16)(A) defines the term "administrator" as follows:

> (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
> (ii) if an administrator is not so designated, the plan sponsor; or
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may be regulation proscribe.

29 U.S.C. § 1002(16)(A). The Sixth Circuit has repeatedly held "that only plan administrators are liable for statutory penalties under § 1132(c)." *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 584 (6th Cir. 2002) (citing *Hiney Printing Co. v. Brantner*, 243 F.3d 956, 960 (6th Cir. 2001) ("The law in this Circuit is clear that '[o]nly a plan administrator can be held liable under section 1132(c).'") (quoting *VanderKlok v. Provident Life & Accident Ins. Co.*, 956 F.2d 610, 618 (6th Cir. 1992)).

Here, the LTD does not designate the plan administrator. Accordingly, under § 1002(16)(A)(ii), the plan administrator is the plan sponsor. ERISA defines the term "plan sponsor" as "the employer in the case of an employee benefit plan established or maintained by a single employer[.]" § 1002(16)(B). Consequently, ERISA's default statutory provision dictates that Plaintiff's employer, not Defendant, is the plan administrator. Accordingly, even if Plaintiff could show that Defendant failed to respond to its requests for plan documents, Defendant would not be liable for *per diem* penalties under § 1132(c).

Moreover, Plaintiff's assertion that Defendant should still be held liable under § 1132(c) as the "de facto" administrator is unavailing. Even assuming that Plaintiff could somehow establish that

Defendant was acting as the "de facto" administrator, this theory of liability is foreclosed in this circuit. *See Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833, 843 (6th Cir. 2007); *Hiney Printing Co.*, 243 F.3d at 960-61; *VanderKlok*, 956 F.2d at 617.

ACCORDINGLY, Plaintiff's Motion to Dismiss (ECF No. 13) is **GRANTED** and this case is **DISMISSED**.

Dated: December 1, 2016

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE