

FILED

2013 OCT 21 PM 2:50

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

**THE WEST VIRGINIA INVESTMENT
MANAGEMENT BOARD, a public body
corporate, and THE WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a public agency,**

Plaintiffs,

v.

Civil Action No. 09-C-2104
Honorable James C. Stucky

**THE VARIABLE ANNUITY LIFE
INSURANCE COMPANY, a Texas corporation,**
Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AGAINST PLAINTIFF THE WEST VIRGINIA INVESTMENT MANAGEMENT
BOARD**

Pending before the Court is a Motion for Summary Judgment filed by Defendant The Variable Annuity Life Insurance Company ("VALIC") against Plaintiff The West Virginia Investment Management Board ("IMB").¹

Upon review of the memoranda and oral argument of counsel, the Court GRANTS VALIC's Motion for Summary Judgment against IMB and issues the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

The Court finds no genuine issues as to the following material facts:

1. West Virginia's teachers' pension plan—the TRS—was created in 1941 to provide retirement benefits for the State's public school teachers and other school service personnel.²

¹ VALIC has concurrently filed a separate motion for summary judgment as to the claims asserted by Plaintiff The West Virginia Consolidated Public Retirement Board ("CPRB").

2. IMB, as trustee for the investment of funds in the TRS and the other state pension plans, is responsible for selecting and managing the investments used to fund the plans.³

3. CPRB, as administrator of the TRS and the other state retirement plans, is responsible for collecting the contributions invested in the retirement plans and overseeing the payment of benefits to plan participants.⁴

4. In 1990, as a result of funding problems with the TRS, the West Virginia legislature created a defined contribution plan for public teachers and other school service personnel—the DCP—which allows participating teachers to allocate their retirement funds to various investment options.⁵

5. Under the legislation, as of July 1, 1991, the TRS was closed to new participants, new teachers were automatically enrolled in the DCP, and participants in the TRS could elect to transfer from the TRS into the DCP.⁶

6. CPRB, as both the administrator of and the trustee for the investment of funds held in the DCP, is responsible for overseeing the collection of contributions and payout of benefits under the DCP, as well as selecting and managing the investment options available to DCP participants.⁷

² Pls.' First Am. Compl. ("FAC") ¶ 9; Ex. 1 (TRS Plan Description). All references to « Ex. » herein refer to the exhibits filed in support of VALIC's Motions for Summary Judgment.

³ FAC ¶ 5; W. Va. Code §§ 12-6-3(a), 12-6-9a(a); VALIC MSJ Ex. 2 (Dep. Ex. 45); VALIC MSJ Ex. 3 (Lambright Dep.) at 26:17-27:23; Ex. 5 (Jones Dep.) at 26:7-14.

⁴ FAC ¶ 3; W. Va. Code §§ 5-10D-1(a), (f)(1), (g), 18-7B-5; VALIC MSJ Ex. 3 (Lambright Dep.) at 26:17-27:23; VALIC MSJ Ex. 4 (Slaughter Dep. (Vol. 1)) at 23:11-24:15; VALIC MSJ Ex. 5 (Jones Dep.) at 26:2-19.

⁵ FAC ¶ 10; W. Va. Code § 18-7B-3; Ex. 9 at ¶¶ 8, 13 (Affidavit of Terasa Miller).

⁶ FAC ¶ 10; W. Va. Code §§ 18-7B-7(a), 18-7B-8; Ex. 9 at ¶ 9 (Affidavit of Terasa Miller).

⁷ FAC at ¶ 3, 14; W. Va. Code §§ 5-10D-1(a), (f)(1), (g); Ex. 9 at ¶ 14 (Affidavit of Terasa Miller).

7. On October 8, 1991, VALIC issued a fixed annuity contract to the DCP (the “1991 Contract”).⁸

8. From 1991 to present, VALIC, through the 1991 Contract, has provided a fixed annuity investment option for DCP participants.⁹

9. The 1991 Contract includes an endorsement that deletes the contract’s surrender charge provision and adds a provision that restricts participants’ rights “in the case of withdrawal for transfer to another funding entity.”¹⁰

10. The 1991 Contract provides that the contract will “terminate when performance by VALIC of its duties and obligations hereunder have been completed.” Ex. 11 (1991 Contract) § 6.07. The contract also permits the DCP, as the contract owner, to suspend the contract, and “[e]ffective with such suspension no new Participants will be accepted” *Id.*

11. On March 16, 2008, the West Virginia legislature passed House Bill 101x, which permitted DCP members to voluntarily transfer their retirement accounts to the TRS effective July 1, 2008, so long as at least 65 percent of actively-contributing DCP members elected to transfer.¹¹

12. As of June 3, 2008, 78.3 percent of DCP participants had elected to transfer from the DCP to the TRS. As a result, CPRB began the process of transferring the electing members’ accounts to the TRS for investment by the IMB.¹²

⁸ Ex. 11 (1991 Contract).

⁹ Ex. 3 (Lambright Dep.) at 24:8-19, 34:4-7; Ex. 10 at CPRB 002624 (August 29, 1991 CPRB Meeting Minutes); Ex. 12 (Dep. Ex. 113 (VALIC’s Annuity Proposal)); Ex. 13 (Oct. 15, 1991 Letter of Understanding); Ex. 17 (Miller Dep.) at 36:18-22, 50:3-11.

¹⁰ Ex. 11 (1991 Contract) at CPRB 004169.

¹¹ W. Va. Code §§ 18-7D-3, 18-7D-5(a).

¹² Ex. 14 at CPRB 003334 (Dep. Ex. 12 (June 3, 2008 CPRB Meeting Minutes)); Ex. 3 (Lambright Dep.) at 115:12-116:7.

13. To effectuate the transfer of the DCP participants' funds invested with VALIC under the 1991 Contract from the DCP to the TRS, VALIC agreed to transfer the electing-teachers' assets in the 1991 Contract to a new annuity contract that VALIC would issue to IMB.¹³

14. On November 6, 2008, VALIC issued a new fixed annuity contract to IMB (the "2008 Contract").¹⁴

15. The 2008 Contract includes terms and conditions nearly identical to those contained in the 1991 Contract, including a withdrawal restriction that is identical to the restriction included in the 1991 Contract.¹⁵

16. The withdrawal restriction is found in the West Virginia Optional Retirement Program Endorsement (the "Endorsement"), which provides, in relevant part:

Section 2.03 (Surrender Value) is amended by adding the following:

A) Except as provided in (B) below, in the case of withdrawal for transfer to another funding entity only 20% of the Surrender Value may be withdrawn once a year.

A Participant may choose to have the Surrender Value withdrawn for transfer in one of the following ways:

(1) Five Year Equal Annual Installment Method. The interest rate during the five year payout period will be declared in advance by VALIC. No other withdrawals may be made once payments begin.

(2) Decreasing Balance Method. 1/5 of the account balance the first year. 1/4 of the remaining balance the second year. 1/3 of the remaining balance the third year. 1/2 of the remaining balance the fourth year. The entire remaining balance the fifth year. Interest under this method will be

¹³ Ex. 3 (Lambright Dep.) at 75:10-76:13, 190:12-191:20; Ex. 4 (Slaughter Dep. (Vol. 1)) at 99:3-11, 205:1-207:5; Ex. 18 (Dep. Ex. 65 (July 2, 2008 emails between VALIC and CPRB discussing bond fund transfer)).

¹⁴ Ex. 28 (2008 Contract).

¹⁵ Ex. 4 (Slaughter Dep.) at 55:4-19; Ex. 25 (Dep. Ex. 46); Ex. 40 (Coppedge Dep.) at 133:4-18; compare Ex. 11 (1991 Contract) with Ex. 28 (2008 Contract).

credited at a rate determined by VALIC. Withdrawals may be made under this method.

B) The 20% a year restriction does not apply if:

- (1) The Surrender Value remaining would be less than \$500, or;
- (2) The withdrawal is for transfer to the funding entity for the West Virginia ORP Common Stock Fund or the West Virginia ORP Bond Fund.

Section 3.02 is deleted. There will be no surrender charges under this Contract. The account Surrender Value is equal to the Annuity Value.¹⁶

17. VALIC would not have entered into the 2008 Contract had it not included the withdrawal restriction contained in the Endorsement.¹⁷

18. On December 10, 2008, VALIC and IMB executed a Letter of Understanding related to the 2008 Contract.¹⁸

19. The Letter of Understanding provided that the 2008 Contract operated “as an investment and funding vehicle for the TRS Plan, rather than as an annuity in which individual participants have specific rights . . .” and that “[r]eferences to participant rights in the Annuity Contract shall be deemed to mean rights vested in WVIMB”¹⁹

20. On December 10, 2008, Plaintiffs submitted a request to VALIC to transfer \$248,345,458.77 from the 1991 Contract to the 2008 Contract, and VALIC executed the transfer.²⁰

21. On December 18, 2008, IMB requested withdrawal of all funds held under the 2008 Contract on or before December 31, 2008.²¹

¹⁶ Ex. 28 (2008 Contract) at WVIMB001616.

¹⁷ Affidavit of Jim Coppedge at ¶4; Ex. 40 (Coppedge Dep.) at 133:4-18.

¹⁸ Ex. 27 (Dep. Ex. 73 (Dec. 10, 2008 Letter of Understanding)).

¹⁹ Ex. 27 (Dep. Ex. 73); see also Ex. 49 (Slaughter Dep. (Vol. 2)) at 115:14-118:18.

²⁰ Ex. 29 (WVIMB 001599 (Dec. 10, 2008 Instruction to Confirm Transfer Annuity Values)).

²¹ Ex. 30 (Dep. Ex. 74).

22. On April 23, 2009, IMB elected to withdraw funds from the 2008 Contract pursuant to the contract's equal installment method.²²

23. In accordance with IMB's instructions, VALIC transferred the first distribution of \$55,058,102.037 to IMB's Short Term Fixed Income Pool, a pool that is structured as a money market fund and that funds the TRS, on May 5, 2009. For each of the four years thereafter, VALIC transferred the requisite funds to IMB's Short Term Fixed Income Pool. The fifth and final transfer occurred in May 2013.²³

II. CONCLUSIONS OF LAW

The Court issues the following conclusions of law:

Standard Of Review

1. Summary judgment is proper when the record demonstrates ““that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”” *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W. Va. 257, 261 (2010) (quoting W. Va. R. Civ. P. 56(c)).

2. “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, *such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.* Thus, if one element fails, there is no possibility for recovery[.]” *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 719 (2002) (citation omitted) (emphasis in

²² Ex. 33 (Dep. Ex. 87 (April 23, 2009 letter attaching executed Transition Information Form)).

²³ Ex. 5 (Jones Dep.) at 40:9-43:19; Ex. 6 (Watson Dep. (Vol. 1)) at 202:23-203:10; Ex. 7 (Watson Dep. (Vol. 2)) at 7:17-23; Ex. 34 (Dep. Ex. 75); Ex. 42 (IMB 2008 Annual Report) at 15 (describing the Short Term Fixed Income Pool as a fund “structured as a money market fund, where the goal is a stable dollar value per share, thus preserving principal.”); Ex. 53 (Daily Cash Management Reported dated May 5, 2010); Ex. 54 (Daily Cash Management Reported dated May 6, 2011); Ex. 55 (Daily Cash Management Reported dated May 7, 2012).

original); *see also Chafin v. Gibson*, 213 W. Va. 167, 174 (2003) (affirming summary judgment where plaintiff failed to establish essential element).

3. Where, as here, “the record could not lead a rational trier of fact to find for the non-moving party,” a court should grant summary judgment in favor of the moving party.

Armor v. Lantz, 207 W. Va. 672, 677 (2000).

The Withdrawal Restriction Unambiguously Restricted IMB’s December 2008 Request To Withdraw From The 2008 Contract

4. Whether a contract is ambiguous is a question of law that is properly adjudicated on summary judgment. *Harrison v. Town of Eleanor*, 191 W. Va. 611, 615-616 (1994); *Benson v. AJR, Inc.*, 226 W. Va. 165, 175 (2010).

5. The contract between VALIC and IMB includes the 2008 Contract and the 2008 Letter of Understanding.²⁴ Accordingly, the Court construes both writings as a whole. *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 469 (1976) (“It is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent.”).

6. The Endorsement is unambiguous.

7. The Endorsement was the only provision of the 2008 Contract that governed withdrawal and transfer of funds from 2008 Contract.

8. The Letter of Understanding clarified that the 2008 Contract’s references to “participants” applied to IMB. Because the Endorsement defined “participants” rights to withdraw from the contract, references to “participants” in the Endorsement refer to IMB.

²⁴ Ex. 27 (Dep. Ex. 73 (“This letter of understanding contains the entire understandings and agreements between VALIC and WVIMB concerning its subject matter, other than the terms set forth in the above-referenced Annuity Contract itself. . . .”)).

9. IMB transferred funds from the 2008 Contract to the Short Term Fixed Income Pool, an investment pool that is structured as a money market fund and funds the TRS—that is, “another funding entity” for purposes of the Endorsement.

10. Construed together, the 2008 Contract and the Letter of Understanding therefore unambiguously applied to restrict IMB’s requested withdrawal from the 2008 Contract on December 18, 2008.²⁵

11. The Endorsement permitted IMB to withdraw 20 percent of the Annuity Value over four years, unless one of the two exceptions in section (B) of the Endorsement applied.

12. Neither of the two exceptions to the Endorsement applied to IMB’s December 18, 2008 request to withdraw funds from the VALIC annuity.

13. IMB concedes that its withdrawal does not fall within the exception for transfers to the West Virginia ORP Common Stock Fund or Bond Fund.

14. The second exception to the Endorsement permitting withdrawals where the “Surrender Value remaining would be less than \$500” did not apply because the Surrender Value was more than \$248 million.

IMB Cannot Establish That It Is Entitled To Declaratory Relief Or Damages Related To The 1991 Contract Because It Has Not Suffered Any Damages Under The 1991 Contract

15. To establish a claim for damages under the 1991 Contract, CPRB must prove the “existence of a valid, enforceable contract, that the plaintiff has performed under the contract,

²⁵ Ex. 4 (Slaughter Dep. (Vol. 1)) at 25:20-24, 219:4-220:4, 221:13-222:3 (acknowledging that the TRS investment pools fund the TRS); Ex. 33 (Dep. Ex. 87 (April 23, 2009 letter attaching executed Transition Information Form)); Ex. 32 (Dep. Ex. 98 (Jan 12, 2009 Letter from Coppedge to Slaughter)); Ex. 34 (Dep. Ex. 75 (BNY Mellon Daily Cash Management Report for IMB Short Term Fixed Income Pool dated May 5, 2009 reflecting a wire transfer from VALIC of \$55,058,102.037)); Ex. 5 (Jones Dep.) at 42:1-43:19, 103:15-104:4 (confirming that first four transfers were made to the Short Term Fixed Income Pool); Ex. 6 (Watson Dep. (Vol. 2)) at 7:17-23 (confirming final transfer in May 2013 was transferred to the Short Term Fixed Income Pool); Ex. 4 (Slaughter Dep. (Vol. 1)) at 219:4-220:4 (acknowledging that the funds were transferred to a pool that funds the TRS);

that the defendant has breached or violated its duties or obligations under the contract, *and that the plaintiff has been injured as a result.*” *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 688, 693 (N.D. W. Va. 2010) (citation omitted) (emphasis in original).

16. “It is a rather well settled principle of the law that more is necessary to maintain a civil action than a simple breach of the duty. There must also be an injury. A breach of duty, without an injury . . . is not actionable.” *Absure, Inc. v. Huffman*, 213 W. Va. 651, 655 (2003).

17. Plaintiffs’ claimed lost investment income resulting from alleged breaches of the 1991 Contract and the 2008 Contract are not the same.

18. IMB cannot establish that it has suffered any harm related to the 1991 Contract because VALIC agreed to issue a new contract to IMB to permit CPRB to transfer assets from the electing-teachers’ accounts in the 1991 Contract *without restriction*.²⁶

19. IMB also cannot establish that it has suffered any harm related to the 1991 Contract because Plaintiffs’ expert has not calculated damages related to the 1991 Contract, and IMB has not otherwise claimed harm resulting from the 1991 Contract.²⁷

IMB Cannot Establish That It Is Entitled To Declaratory Relief Or Damages Related To The 1991 Contract Because It Does Not Have Standing To Enforce The 1991 Contract

20. Summary judgment is required where a party lacks standing to seek a declaration of rights under or to enforce a contract. *See, e.g., Raines Imports, Inc. v. Am. Honda Motor Co.*,

²⁶ Ex. 3 (Lambright Dep.) at 75:10-76:13; Ex. 4 (Slaughter Dep. (Vol. 1)) at 99:3-15, 205:1-207:5; Ex. 25 (Dep. Ex. 46 (Sept. 25, 2008 email from Coppedge to Lambright and Slaughter indicating that VALIC can accommodate the State’s request to issue a new annuity contract to IMB)); Ex. 28 (2008 Annuity Contract).

²⁷ Ex. 35 (Coffman Dep.) at 93:23-94:7; Ex. 43 (IMB’s Answers to VALIC’s First Set of Interrogatories and Requests for Production) at 6 (identifying the expert report of Chad Coffman as containing all facts supporting IMB’s claim that VALIC’s refusal to release the funds has caused IMB to lose the opportunity to invest the funds and earn higher returns), 12 (identifying the expert report of Chad Coffman as describing “all income and/or losses recognized by the WVIMB as a result of the investment options in the DCP.”), 22 (identifying expert report of Chad Coffman as “all documents supporting WVIMB’s claim for damages in this civil action.”); Ex. 38 (Report of Chad Coffman).

223 W. Va. 303, 311 (2009) (affirming trial court's grant of summary judgment where plaintiff lacked standing to bring declaratory judgment action).

21. The Declaratory Relief Act authorizes "interested" persons to seek a determination of a "question of construction or validity arising under" a contract. W. Va. Code § 55-13-4.

22. An interested person has standing to sue for declaratory relief only when he can demonstrate that his interests are "significant" or "substantial." *Shobe v. Latimer*, 162 W. Va. 779, 784, 790-91 (1979).

23. IMB is not an "interested" person under the 1991 Contract because IMB, as trustee for the TRS, does not have a significant or substantial interest in the 1991 Contract offered as an investment option in the DCP.²⁸

24. IMB, therefore, does not have standing to enforce the 1991 Contract.

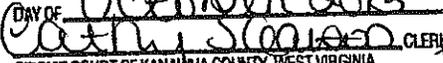
Based on all of the foregoing, the Court hereby GRANTS VALIC's Motion for Summary Judgment against IMB.

The Clerk is ORDERED to mail certified copies of this Order to counsel of record upon its entry with the Court.

IT IS SO ORDERED.

ENTERED this 21st day of October, 2013.


Honorable James C. Stucky, Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21st and
DAY OF October 2013

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

²⁸ FAC ¶ 5; W. Va. Code §§ 12-6-3(a), 12-6-9a(a); Ex. 2 (Dep. Ex. 45); Ex. 5 (Jones Dep.) at 26:7-14.