UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES B. MULLIGAN, Plaintiff, v. AMERICAN INST. OF CERTIFIED PUBLIC ACCOUNTANTS INSURANCE TRUST, AON INSURANCE SERVICES, BANKERS TRUST CO., and THE PRUDENTIAL INSURANCE CO. OF AMERICA, Defendants.	:	Civil No. 3:99CV01407(AWT)

MEMORANDUM OF DECISION

The plaintiff, James B. Mulligan ("Mulligan"), brought this action seeking payment of long-term disability benefits, and alleging that the defendants had improperly reduced his benefits and had failed to provide him with full, complete, and proper information regarding the benefits available to him. The complaint alleges that this court has federal question subject matter jurisdiction because the benefits are payable pursuant to an "employee benefit plan" as defined by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3). The defendants have moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) on the grounds that because the benefits at issue are

not paid as part of an ERISA plan, the court lacks jurisdiction. For the reasons set forth below, the defendants' motion is being granted.

"It is axiomatic that a lack of subject matter jurisdiction may be raised at any time", and by any interested party. Wight v. BankAmerica Corp., 219 F.3d 79, 90 (2d Cir. 2000). Although a motion to dismiss for lack of subject matter jurisdiction is normally raised pursuant to Rule 12(b)(1), see Ryan v. Volpone Stamp Co., Inc., 107 F.Supp. 2d 369, 375 (S.D.N.Y. 2000), such a motion may also be raised pursuant to Rule 12(c) "[a]fter the pleadings are closed but within such time as not to delay the trial". Fed. R. Civ. P. 12(c) (2000). See, e.g., United States v. New Silvar Palace Restaurant, Inc., 810 F. Supp. 440, 441 (E.D.N.Y. 1992) ("A motion to dismiss for lack of subject matter jurisdiction can certainly be raised via a Rule 12(c) motion."); 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1367 (1990) ("[I]f a party raises an issue of subject matter jurisdiction on his motion for a judgment on the pleadings, the court will treat the motion as if it had been brought under Rule 12(b)(1).").

Although the court must draw all inferences in favor of the non-moving party on a motion to dismiss, the "[p]laintiff, who is seeking to invoke the subject matter jurisdiction of the district court, bears the burden of showing that he [is]

properly before that court." Scelsa v. City Univ. of New York, 76 F.3d 37, 40 (2d Cir. 1996). The Second Circuit has recently stated:

> When considering a motion to dismiss for lack of subject matter jurisdiction . . . the court must accept as true all material factual allegations in the complaint. But, when the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.

Shipping Financial Servs. Corp. v. Drako, 140 F.3d 129, 131 (2d Cir. 1998) (internal citations omitted).

The defendants argue that the court lacks subject matter jurisdiction because the plan pursuant to which the plaintiff seeks payment of benefits is not an ERISA plan, because it was not "established or maintained by an employer or by an employee organization", as required by 29 U.S.C. § 1002(1).

The plan under which Mulligan's benefits are provided is the American Institute of Certified Public Accountants ("AICPA") Trust Long Term Disability Income Plan (the "Plan"). In the early 1990s, Mulligan was employed as a certified public accountant ("CPA") with a private accounting firm. As a CPA, Mulligan was able to join, and did join, the AICPA, which is a professional association of accountants. As a member of the AICPA, Mulligan was permitted to enroll in the Plan provided by the AICPA for "eligible individual members" of the AICPA. According to its terms, "[t]he purpose of the

Long Term Disability Income Plan is to provide for insurance of eligible individual members of the [AICPA]." Plan at 1. The Plan is administered by the Prudential Insurance Company, which insures the Plan participants.

The parties agree that the AICPA is not an employer under ERISA. However, the plaintiff alleges that the AICPA is an "employee organization" as defined by ERISA; the defendants disagree. ERISA defines an "employee organization" as follows:

> any labor union or any organization of any kind, or any agency or employee representation committee, association group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan.

29 U.S.C. § 1002(4) (2000). The defendants argue that the AICPA is not an "employee organization" because it does not exist "for the purpose . . . of dealing with employers concerning" the Plan. The plaintiff does not address this contention; his opposition simply restates the allegations of the complaint and cites the relevant statutory language. The court finds the defendants' analysis persuasive.

The defendants argue, in addition, that ERISA excludes the Plan from coverage under that act. "Pursuant to its authority under 29 U.S.C. § 1135, the Department of Labor has promulgated regulations designed to clarify the definitions of

the terms 'employee welfare benefit plan' and 'welfare plan' in ERISA by identifying certain practices which do not constitute employee welfare benefit plans." Grimo v. Blue Cross/Blue Shield of Vermont, 34 F.3d 148, 152 (2d Cir. 1994) (internal quotation marks omitted).[1] The defendants contend that the Plan comes within the exception to ERISA coverage set forth in these regulations at 29 C.F.R. § 2510.3-1(j). That section reads as follows:

> For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which (1) No contributions are made by an employer or employee organization; (2) Participation in the program is completely voluntary for employees or members; (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or due checkoffs.

29 C.F.R. § 2510.3-1(j) (2000). "[P]rograms that meet each of the regulation's four criteria are excluded from ERISA coverage." Grimo, 34 F.3d at 152.

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[1] "The regulations of the Secretary of Labor . . . are entitled to deference as the reasonable interpretations of the official specifically authorized to define ERISA's terms". Massachusetts v. Morash, 490 U.S. 107, 108 (1989).

The defendants attach to their motion an affidavit signed by John T. Flynn, the Account Manager for the AICPA Trust for the past fourteen years. "[On] a challenge to the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." Reiss v. Societe Generale du Groupe des Assurances Nationales, 235 F.3d 738, 748 (2d Cir. 2000). In his affidavit, Flynn states, inter alia, the following:

> 8. With regard to the AICPA Long Term Disability Plan, no contributions are made by anyone other than participants in that Plan.
> 9. Participation in the AICPA Long Term Disability Plan is completely voluntary.
> 10. The AICPA's function in offering its Long Term Disability Plan is to provide insurance to eligible individual members of the AICPA pursuant to Prudential's group insurance policy.
> 11. Although participants make contributions under the AICPA Long Term Disability Plan to the Trust, the Trustee remits those contributions in the form of premiums to Prudential.
> 12. The Trustee receives no consideration other than reasonable compensation for services rendered in connection with the AICPA Long Term Disability Plan.

Def. Memo., Exh. C, ¶¶ 8-12 [Doc. #28]. These statements show that the Plan comes within the exception set forth in 29 C.F.R. § 2510.3-1(j).

The plaintiff has not met his burden of rebutting the pertinent facts contained in the affidavit submitted by the defendants, and establishing that the court has subject matter jurisdiction. "After all, when a bona fide dispute is raised

as to the presence of federal jurisdiction it is the affirmative burden of the party invoking such jurisdiction . . . to proffer the necessary factual predicate – not simply an allegation in a complaint – to support jurisdiction." London v. Polishook, 189 F.3d 196, 199 (2d Cir. 1999) (emphasis added). The plaintiff has offered no such factual predicate. Therefore, the court finds that it lacks subject matter jurisdiction.

For the reasons set forth above, the Defendants' Motion for Judgment on the Pleadings [Doc. # 27] is hereby GRANTED. Judgment shall enter in favor of the defendants. The Clerk shall close this case.

It is so ordered.

Dated this 26th day of June, 2001, at Hartford, Connecticut.

Alvin W. Thompson
United States District Judge