United States District Court
Southern District of New York

JOHN STOLARZ,

Plaintiff,

03 Civ. 3083 (JGK)

OPINION AND ORDER

- against -

GORDON S. ROSEN, et al.

Defendants.

JOHN G. KOELTL, District Judge:

The plaintiff, John Stolarz ("Stolarz"), is a former employee of Airline Software, Inc. ("ASI"). Stolarz resigned from his position and subsequently filed a complaint alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., in connection with a money purchase pension plan sponsored by ASI. The plaintiff sued ASI; ASI Money Purchase Plan (the "Plan"); ASI Pension Trust Plan; and Gordon S. Rosen ("Rosen"), a principal of ASI (collectively, the "defendants"). The plaintiff's first three causes of action allege continuing violations of ERISA's reporting and disclosure requirements. First, the plaintiff seeks an accounting of all transactions of the Plan and Trust, $100 for each day that the defendants fail to comply with their ERISA obligations in violation of 29 U.S.C. §§ 1023 and 1024, as provided in 29 U.S.C. §

procedures in pursuing his claims and as a result, cannot maintain an ERISA claim. The plaintiff has filed a cross-motion on the issue of liability with respect to his first three causes of action.

I.

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Gallo v. Prudential Residential Servs. Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224. The moving party bears the initial burden of informing the district court of the basis for its motion and identifying the matter that it believes demonstrates the absence of a genuine issue of material fact. Celotex,

477 U.S. at 323. The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Consol. Edison, Inc. v. Northeast Utilities, 332 F. Supp. 2d 639, 642 (S.D.N.Y. 2004).

Summary judgment is appropriate if it appears that the non-moving party cannot prove an element that is essential to the non-moving party's case and on which it will bear the burden of proof at trial. See Cleveland v. Policy Mgt. Sys. Corp., 526 U.S. 795, 805-06 (1999); Celotex, 477 U.S at 322; Powell v. Nat. Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); see also Gallo, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See Chambers v. T.R.M. Copy Ctrs. Corp., 43 F.3d 29, 37 (2d

Cir. 1994). If the moving party meets its initial burden of showing a lack of a material issue of fact, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); see also Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998); Consol. Edison, 332 F. Supp. 2d at 643; see also Garvin v. Potter, 367 F. Supp. 2d 548, 553-54 (S.D.N.Y. 2005).

II.

Unless otherwise noted, the following facts are not in dispute. ASI adopted the Plan in 1985. (Defs' Rule 56.1 Stmt. ¶ 2; Pl.'s Rule 56.1 Stmt. ¶ 2.) At or near the time that the Plan was adopted, all employees, including the plaintiff, were given a copy of the Summary Plan Description ("SPD"), which explained the benefits available and the procedures to be followed under the Plan. (Defs' Rule 56.1 Stmt. ¶ 3; Pl.'s Rule 56.1 Stmt. ¶ 3; see also SPD attached as Ex. A to Defs.' Mot. for Summ. J ("Defs' Mot.").) Stolarz contributed to the Plan by making

voluntary deductions from his paycheck for as long as the Plan was in effect. (Defs' Rule 56.1 Stmt. ¶ 4; Pl.'s Rule 56.1 Stmt. ¶ 4.)

On February 16, 2001, Stolarz wrote a letter to ASI requesting information about the Plan (Defs' Rule 56.1 Stmt. ¶ 5; Pl.'s Rule 56.1 Stmt. ¶ 5). ASI responded on February 19, 2001. (Defs' Rule 56.1 Stmt. ¶ 6; Pl.'s Rule 56.1 Stmt. ¶ 6.)

On November 6, 2001, Stolarz resigned from his position at ASI. (Defs' Rule 56.1 Stmt. ¶ 7; Pl.'s Rule 56.1 Stmt. ¶ 7.) The plaintiff stated that he was resigning, in part, because ASI had failed to provide a statement of the balance of his Plan account. (See letter dated Nov. 6, 20001 [sic] from Stolarz to Rosen attached as Ex. B to Defs' Mot.) On November 16, 2001, ASI responded that it was unaware of any failure to provide Stolarz with a Plan account statement and that ASI would look into any possible oversight. (See Pl.'s Ex. 3.)

After Stolarz's resignation, ASI received letters from plaintiff's counsel dated December 31, 2001 and March 13, 2002. (Defs' Rule 56.1 Stmt. ¶ 8; Pl.'s Rule 56.1 Stmt. ¶ 8.) Among other things, the December 31, 2001 letter requested information about Stolarz's Plan account, and mentioned concern about possible under-funding of the Plan.

(See letter dated Dec. 31, 2001 from Christopher J. Prior ("Prior") to Rosen attached as Ex. C to Defs' Mot. at 2.) The March 13, 2002 letter mentioned issues that might arise under New York State law in connection with money allegedly owed by ASI to Stolarz. (See letter dated Mar. 13, 2002 from Prior to Rosen attached as Ex. D to Defs' Mot.) On May 1, 2003, the plaintiff filed the present action.

The defendants move for partial summary judgment dismissing the plaintiff's first three causes of action for violations of ERISA on the grounds that Stolarz failed to exhaust administrative remedies. See Kennedy v. Empire Blue Cross and Blue Shield, 989 F.2d 588, 594 (2d Cir. 1993); Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989); Benaim v. HSBC Bank USA, 94 F. Supp. 2d 518, 519 (S.D.N.Y. 2000), aff'd 23 Fed. Appx. 55 (2d Cir. 2001); Barnett v. IBM, Corp., 885 F. Supp. 581, 586-89 (S.D.N.Y. 1995). According to the defendants, the plaintiff failed to make a demand for the payment of Plan benefits on the Plan administrator and failed to file an appeal. The defendants argue that the plaintiff cannot make the required "clear and positive showing" that pursuing the available administrative remedies would be "futile" and that Stolarz has therefore failed to meet the sole exception to the exhaustion requirement. See Kennedy, 989

F.2d at 594 (citations and internal quotation marks omitted); see also Sandfilippo v. Provident Life and Cas. Ins. Co., 178 F. Supp. 2d 450, 457-59 (S.D.N.Y. 2002) (lack of administrative remedies does not demonstrate futility when such lack caused by claimant's failure timely to contest administrative decision).

The plaintiff argues that the defendants did not plead the failure to exhaust administrative remedies as an affirmative defense in their answer and that therefore, the defendants may not seek dismissal on this ground. See Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003); Neuner v. Horizon Blue Cross Blue Shield of New York (In re LymeCare, Inc.), 301 B.R. 662, 672 (Bankr. D. N.J. 2003); McCoy v. Bd. of Trustees of Baboree Int'l Union, 188 F. Supp. 2d 461, 467 (D.N.J. 2002) ("Failure to exhaust administrative remedies is generally an affirmative defense subject to waiver."), aff'd 60 Fed. Appx. 396 (3rd Cir. Mar 25, 2003). The defendants respond that the exhaustion requirement is jurisdictional, see Barnett, 885 F. Supp. at 586-87, and thus cannot be waived and that, in any event, that a district court has the discretion to entertain affirmative defenses and to construe the summary judgment motion as a motion to amend the defendants' answer. See Saks, 316 F.3d at 350. Therefore, the Court will consider

the affirmative defense of failure to exhaust administrative remedies.

The issue then, is whether the plaintiff was required to exhaust his internal administrative remedies under the Plan. The plaintiff argues that there was no obligation to exhaust ERISA remedies because he alleges statutory violations of ERISA rather than a denial of benefits. See Lindemann v. Mobil Oil Corp., 79 F.3d 647, 649-50 (7th Cir. 1996) (collecting cases and concluding that the decision whether to require exhaustion is within the discretion of the district court). The Court of Appeals for the Second Circuit has not ruled on whether exhaustion is required for "statute-based claims" as opposed to "plan-based claims." See Nechias v. Oxford Health Plans, Inc., No. 04-5100-CV, -- F.3d --, 2005 WL 2018630, at *4 (2d Cir. Aug. 24, 2005). There is a split among the Circuit Courts of Appeals on this issue. See Suozzo v. Bergreen, No. 00 Civ. 9649, 2003 WL 256784, at *7 (S.D.N.Y. Feb. 5, 2003) (collecting cases). Moreover, district courts within this Circuit have permitted claims for statutory violations of ERISA even though administrative remedies were not exhausted. See Campanella v. Mason Tenders' Dist. Council Pension Plan, 299 F. Supp. 2d 274, 281 (S.D.N.Y. 2004), aff'd 132 Fed. Appx. 855 (2d Cir. Feb. 22, 2005); De Pace v. Matsushi

Elec. Corp., 257 F. Supp. 2d 543, 560 (E.D.N.Y. 2003); Gray v. Briggs, No. 97 Civ. 6252, 1998 WL 386177, at *7 (S.D.N.Y. July 7, 1998); Lawford v. New York Life Ins. Co., 739 F. Supp. 906, 912 (S.D.N.Y. 1990); Schwartz v. Interfaith Medical Center, 715 F. Supp. 1190, 1193 (E.D.N.Y. 1989). An important consideration in excusing exhaustion under such circumstances is that while plan fiduciaries have expertise in interpreting plan documents, the Court has expertise in interpreting the statute. Moreover, no administrative record is required to determine whether the defendants have complied with the statute. The reasoning of these cases is persuasive and no exhaustion is required for the claims in this case.

In this case, there is particular merit to excusing the exhaustion of administrative remedies. The essence of the plaintiff's claim is that ASI never filed the documents necessary to establish an ERISA pension plan, and that, although deductions had been made from Stolarz's paycheck, the Plan was under-funded because the defendants failed to make the required employee contributions. (See Decl. of Andrew J. Luskin dated Apr. 22, 2005 ("Luskin Decl.") ¶¶ 17, 23-29, 32-47; see also Pl.'s Ex. 9.) No expertise of the plan fiduciaries is required to decide these issues.

ASI has provided no basis for resisting partial summary judgment in favor of Stolarz on the issue of liability on the first three causes of action. The record establishes that the Plan, intended to be a qualified plan under Section 401(a)(1) and other applicable provisions of the Internal Revenue Code, is now disqualified. There is also a pending application to the Voluntary Compliance Procedure established by the IRS and the Delinquent Filer Voluntary Compliance Program established by the Department of Labor to cure these ERISA defects, but the Plan is not and has never actually been qualified under ERISA. (See Decl. of Stanley Rand dated May 6, 2005 ("Rand Decl.") attached to Defs' Reply ¶¶ 20, 63; see also Pl.'s Ex. 12.) The defendants offer no explanation why the plaintiff is not entitled to an accounting, and have not even alleged that the monies paid by Stolarz were used as required.

The defendants submit the declaration of Stanley Rand, a principal of ASI, in opposition to the plaintiff's cross-motion. In the declaration, Rand acknowledges that the Plan had, at times, been under-funded. (See Rand Decl. ¶ 67.) Rand also purports to describe Rosen's thoughts regarding the funding of the Plan (id. ¶ 60) and attempts to explain why Rosen should be excused from not funding the Plan because Rosen had the laudable goal of bringing the

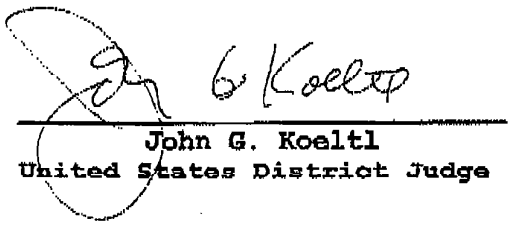
Plan into compliance with ERISA. (See id. ¶¶ 57, 64-70.) Rand does not deny that the defendants violated ERISA or that breaches of fiduciary duties occurred, but rather, attempts to excuse them. In fact, the Rand declaration concedes that "there may be breaches of fiduciary duties under ERISA" and raises the plaintiff's failure to exhaust his administrative remedies as the defendants' sole defense. (See Rand Decl. ¶ 37.) These arguments are without merit. Even if the Court were to ignore the plaintiff's argument that exhaustion should not be required where, as here, a statutory violation of ERISA is alleged, it would not make sense to require the exhaustion of administrative remedies where no qualified ERISA plan exists.

CONCLUSION

For the reasons explained above, the defendants' motion for summary judgment on Counts One through Three is **denied**, and the plaintiff's cross-motion for summary judgment on liability on Counts One through Three is **granted**.

SO ORDERED.

Dated: New York, New York
August 26, 2005



John G. Koeltl
United States District Judge