IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT KIRSCH, Plaintiff, v. ALFREDO GARCIA, MUMPSAUDIOFAX, INC., and MUMPSAUDIOFAX, INC. PROFIT SHARING PLAN, Defendants.	: : : : : : : : : :	CIVIL ACTION NO. 96-8230

Newcomer, J. August , 1997

M E M O R A N D U M

Presently before the Court is Defendants' Motion for Partial Summary Judgment, plaintiff's response thereto, and defendants' reply thereto. For the reasons that follow, said Motion will be granted in part and denied in part, and judgment will be entered in favor of defendants and against plaintiff on Counts II and V of plaintiff's First Amended Complaint.

A. Background

Prior to April, 1991, plaintiff Robert Kirsch was the sole shareholder,[1] director, and president of START Software, Inc., and defendant Alfredo Garcia was the sole shareholder, director, and officer of Advanced MUMPS Systems, Inc. (First Am. Compl. ¶¶ 8-9.) On numerous occasions, Mr. Kirsch and Mr. Garcia, in their own right or on behalf of their corporations, performed joint venture services, involving the creation of computer software programs (the "software"), for SmithKline Beecham, Inc. (First Am. Compl. ¶ 10.) Mr. Kirsch and Mr.

[1]Mr. Kirsch's spouse might have been a shareholder as well. (First Am. Compl. ¶ 8.)

Garcia jointly held exclusive proprietary rights in the software. (First Am. Compl. ¶ 10.)

In April, 1991, Mr. Kirsch's corporation and Mr. Garcia's corporation formed a general partnership under the name of MUMPSAudioFax, Inc. (the "MAFI Partnership"). (First Am. Compl. ¶ 11.) Both Mr. Kirsch and Mr. Garcia were employees of the MAFI Partnership. (First Am. Compl. ¶ 11.) Upon its creation, Mr. Kirsch and Mr. Garcia assigned to it their exclusive proprietary rights in the software. (First Am. Compl. ¶ 12.)

In April, 1994, substantially all of the assets of the MAFI Partnership were transferred to a newly-incorporated company bearing the same name as the MAFI Partnership, namely, MUMPSAudioFax, Inc. (the "MAFI Corporation"). (First Am. Compl. ¶ 13.) At that time, the two corporations previously forming the MAFI Partnership ceased actively doing business. (First Am. Compl. ¶ 13.) Mr. Kirsch and Mr. Garcia were equal shareholders of the MAFI Corporation. (First Am. Compl. ¶ 14.)

In the spring of 1995, there was established for the MAFI Corporation's employees a Simplified Employee Pension Plan ("SEP"). (Dep. of Alfredo Garcia at 50-52, Ex. B to Appendix to Pl.'s Mem. of Law in Opp. to Defs.' Mot. for Partial Summ. J. ("Garcia Dep.").) The SEP was replaced, however, in December, 1995, by defendant MUMPSAudioFax, Inc. Profit Sharing Plan (the "Plan"). (Garcia Dep. at 50-51.) Unlike the SEP, the Plan contained a vesting schedule under which an employee's interest

in the Plan would not vest until some period of service had elapsed. (Garcia Dep. at 53.)

Throughout 1995 and early-1996, Mr. Kirsch and Mr. Garcia had major disagreements about the manner in which the MAFI Corporation should be run. (First Am. Compl. ¶ 16.) The malcontentedness between the two gentlemen culminated in April, 1996, when Mr. Garcia changed the locks to the MAFI Corporation's offices, thereby preventing Mr. Kirsch's entry thereto, and the MAFI Corporation ceased paying Mr. Kirsch's salary. (First Am. Compl. ¶¶ 38-41.) Mr. Kirsch ultimately, in June, 1996, sold all his stock in the MAFI Corporation, thereby terminating his relationship with it.

Mr. Kirsch thereafter filed the instant action, in which he, first, seeks payment of benefits under the Plan. Mr. Kirsch alleges that, under the Plan's vesting schedule, an employee receives credit for vesting purposes for years of service with the MAFI Partnership, in addition to the MAFI Corporation, the result of which, Mr. Kirsch contends, is that he is entitled to benefits. Defendants, on the other hand, assert that an employee receives credit only for his years of service with the MAFI Corporation, the result of which, defendants contend, is that Mr. Kirsch is not entitled to any benefits. Mr. Kirsch next seeks, in this action, reformation of the Plan to clarify that, under the Plan's vesting schedule, an employee receives credit for his years of service with the MAFI Partnership, in addition to the MAFI Corporation. Mr. Kirsch,

finally, seeks payment of his salary for the months of April, May, and June, 1996.

Mr. Kirsch asserts six causes of action in his First Amended Complaint, against Mr. Garcia, the MAFI Corporation, and the Plan. Counts I, II, and VI allege violations of the Employee Retirement Income Security Act ("ERISA"), 42 U.S.C. § 1001 et seq., with respect to the Plan. Count III asserts breach of contract with respect to the payment of Mr. Kirsch's salary, and Count IV alleges a violation of Pennsylvania's Wage Payment and Collection Law, 43 Pa. Cons. Stat. Ann. § 260.1 et seq., in connection also with the payment of Mr. Kirsch's salary. Finally, Count V states a claim for fraud arising out of statements allegedly made by Mr. Garcia to Mr. Kirsch regarding the Plan.

Defendants now move for partial summary judgment against Mr. Kirsch on Counts II, V, and VI.

B. Summary Judgment Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 249 (1986). "A genuine issue is not made unless the evidence . . . would allow a reasonable jury to return a verdict for [the nonmoving] party." Radich v. Goode, 886 F.2d 1391, 1395 (3d Cir. 1989) (citing Liberty Lobby, 477 U.S. at 248-49). In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

C. Discussion

1. Count II

This Court first determines that it will grant defendants' Motion with regard to Count II because the relief that plaintiff seeks is not recoverable under that claim. Count II, asserted against all defendants and captioned "Fraudulent and/or Negligent Failure to Properly Document Plan," alleges a violation of 29 U.S.C. § 1022(a)(1) and related sections. (First Am. Compl. ¶ 63.) Section 1022(a)(1) requires that a "summary plan description of any employee benefit plan [] be furnished to participants and beneficiaries." 29 U.S.C. § 1022(a)(1). The summary must be "written in a manner calculated to be understood by the average plan participant," must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan," and must include, inter alia, "the plan's requirements respecting eligibility for participation and benefits[,] a description of the provisions providing for nonforfeitable pension benefits[,]

circumstances which may result in disqualification, ineligibility, or denial or loss of benefits[, and] the source of financing of the plan and the identity of any organization through which benefits are provided . . ." 29 U.S.C. §§ 1022(a)(1), (b). Plaintiff alleges that he did not receive the information designated under 29 U.S.C. § 1022 and that the information which he did receive led him to believe that employees' years of service with the MAFI Partnership, in addition to the MAFI Corporation, would be credited for vesting purposes under the Plan. Under this claim, plaintiff seeks payment of Plan benefits and reformation of the Plan to clarify that, under the Plan's vesting schedule, an employee receives credit for vesting purposes for his years of service with the MAFI Partnership.

The relief that plaintiff seeks, however, is not recoverable under 29 U.S.C. § 1022(a)(1) and related sections. At issue under this claim are "procedural" violations, that is, violations of ERISA's reporting and disclosure requirements. See, Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1168 (3d Cir. 1990) (describing reporting and disclosure violations as "procedural" violations). The Third Circuit Court of Appeals has held that ERISA allows only two causes of action to remedy procedural violations. Id. at 1167. The first is found at 29 U.S.C. § 1132(a)(4), and the second is found at 29 U.S.C. § 1132(a)(1)(A). Relevant to this case is only the latter, 29

U.S.C. § 1132(a)(1)(A).[2] Section 1132(a)(1)(A) provides that an aggrieved participant or beneficiary may bring a civil action "for the relief provided for in [29 U.S.C. § 1132(c)]." Section 1132(c), in turn, provides as follows:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) 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 of 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).

Despite the fact that the Third Circuit Court of Appeals has held that ERISA allows only two causes of action to remedy procedural violations, Hozier, 908 F.2d at 1167, and that only one of those two causes of action, namely, a cause of action under 29 U.S.C. § 1132(a)(1)(A), applies in this case, plaintiff seeks relief under Count II pursuant to a wholly independent ERISA subsection, namely, 29 U.S.C. § 1132(a)(1)(B). Section 1132(a)(1)(B) provides that an aggrieved participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the

[2]Section 1132(a)(4) relates to the disclosure of certain tax information, which is not at issue in this case.

terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

The Third Circuit has held, however, that "[t]he injury produced by reporting and disclosure violations . . . is . . . not remediable under section [1132(a)(1)(B)]. . . . [Instead,] a participant aggrieved by any reporting and disclosure violation has an available, though limited, remedy under section [1132(a)(1)(A)]." Id. at 1169. In explanation of its holding, the Third Circuit has stated as follows:

> It is well settled that implied remedies are disfavored in the context of statutes that set out an expressly detailed remedial scheme. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. ERISA is a prime example of just such a statute. . . .
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> . . . It is perhaps arguable that Congress should have provided employees with more generous remedies under section [1132(a)(1)(A)] for reporting and disclosure violations. Through express textual provisions of ERISA, however, Congress has provided only limited remedies in this context. . . . [I]t is not the job of this court to second-guess Congress's judgment in these matters. Our task is to apply the text, not to improve upon it.

Id. at 1169-70. (internal citations and quotations omitted); see also, Lewandowski v. Occidental Chemical Corp., 986 F.2d 1006, 1009 (6th Cir. 1993) (stating that, after Hozier, "it is clear that the Third Circuit does not recognize a substantive remedy

for a violation of ERISA's procedures").[3]

In conclusion, under Hozier, the relief that plaintiff seeks under Count II is not recoverable. Accordingly, this Court will grant defendants' Motion for Partial Summary Judgment on Count II and enter judgment in favor of defendants and against plaintiff on that claim. See, Hozier, 908 F.2d at 1169-70 (affirming district court's grant of summary judgment because reporting and disclosure violations do not entitle plaintiff to payment of benefits); Lewandowski, 986 F.2d at 1009 (affirming district court's grant of summary judgment because ERISA does not provide substantive remedy for procedural violations).

2. Count V

This Court next determines that it will grant defendants' Motion with regard to Count V because the only evidence submitted to the Court regarding that claim, which is in the form of plaintiff's deposition testimony, refutes the allegations stated therein. Count V, asserted against defendant Garcia, alleges that "Garcia specifically represented to Kirsch,

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[3]This Court notes, as did the Third Circuit in Hozier, that section 1132(c) states that "the court may in its discretion order such other relief as it deems proper." 29 U.S.C. § 1132(c). This Court need not determine whether the relief that plaintiff seeks under Count II falls within that clause, however, because plaintiff has not advanced a claim under 29 U.S.C. § 1132(a)(1)(A), which incorporates 29 U.S.C. § 1132(c), at all. See, Hozier, 908 F.2d at 1179 n.16 (stating that it "need not determine the exact range of permissible remedies under § [1132(a)(1)(A)]" because plaintiffs, "who advance[d] no claim under § [1132(a)(1)(A)], d[id] not contend that their action to recover benefits c[ould] be sustained under the 'such other relief' clause in section [1132(c)]").

and Kirsch understood, that all service with the 'company,' both when it was a partnership and after its incorporation, would be credited toward vesting in the Plan." (First Am. Compl. ¶ 80.) Plaintiff admitted during his deposition, however, that Mr. Garcia made no such representation. In response to the question whether plaintiff "[was] ever told that service during the time of the MUMPSAudioFax partnership would count towards vesting in the profit sharing plan," plaintiff answered, "no." (Dep. of Robert A. Kirsch at 368, attached as Ex. A to Defs.' Mot. for Partial Summ. J. ("Kirsch Dep.").)

As the aforementioned statement is the only piece of evidence submitted to the Court that is relevant to plaintiff's fraud claim, there is no genuine issue as to any material fact regarding that claim, and defendants are entitled to judgment as a matter of law. See, White, 862 F.2d at 59 (describing the circumstances under which the entry of summary judgment is appropriate). Accordingly, this Court will grant defendants' Motion for Partial Summary Judgment on Count V and enter judgment in favor of defendants and against plaintiff on that claim.

3. Count VI

This Court finally will deny defendants' Motion with regard to Count VI because genuine issues of material fact exist with regard to that claim. Count VI, asserted against defendants Garcia and MAFI Corporation, alleges a violation of 29 U.S.C. § 1140. Section 1140 provides, in relevant part, as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

29 U.S.C. § 1140. Viewing the evidence submitted to the Court in the light most favorable to plaintiff, as the Court must do in ruling on defendants' Motion, White, 862 F.2d at 59, this Court determines that a factfinder could conclude that defendants took certain actions, such as locking plaintiff out of the MAFI Corporation's offices, to induce plaintiff to leave the employ of the MAFI Corporation and, in so doing, that defendants "expel[ed]," "discipline[d]," or "discriminate[d] against" plaintiff "for the purpose of interfering with the attainment of any right to which [plaintiff] may [have] become entitled under the [Plan]." 29 U.S.C. § 1140; see, Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1502-03 (3d Cir. 1994), cert. denied, 513 U.S. 1149 (1995) (stating that Congress enacted 29 U.S.C. § 1140 "primarily to prevent 'unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits'" (quoting West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980)). Accordingly, this Court will deny defendants' Motion for Partial Summary Judgment on Count VI.

D. Conclusion

In summary, this Court will grant defendants' Motion for Partial Summary Judgment with respect to Counts II and V and deny defendants' Motion for Partial Summary Judgment with respect to Count VI.

An appropriate Order follows.

Clarence C. Newcomer, J.

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O R D E R

AND NOW, this day of August, 1997, upon consideration of Defendants' Motion for Partial Summary Judgment, plaintiff's response thereto, and defendants' reply thereto, and in accordance with the foregoing Memorandum, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part. It is further ORDERED that JUDGMENT IS ENTERED in favor of defendants and against plaintiff on Counts II and V of plaintiff's First Amended Complaint.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.