UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN STOLARZ,

Plaintiff,

-against-

GORDON S. ROSEN, et al.,

Defendants.

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03 Civ. 3083 (DF)

MEMORANDUM AND ORDER

DEBRA FREEMAN, United States Magistrate Judge:

This case, brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), is currently before this Court on consent pursuant to 28 U.S.C. § 636(c). On January 27, 2009, the Court held a conference with counsel and, based on submissions by the parties, made a number of rulings on the record regarding the damages and statutory penalties to be awarded to Plaintiff, following the Court's earlier grant of summary judgment in Plaintiff's favor on issues of liability. The Court deferred ruling, however, on the question of whether Plaintiff should be awarded his attorneys' fees in this action. On that question, the Court requested further submissions.

Having now received the parties' additional submissions, the Court finds that Plaintiff is entitled to recover his fees. As Plaintiff has pointed out, while the Court has discretion to order attorneys' fees in an ERISA case, the fee provision of ERISA "must be liberally construed" in favor of those whom ERISA was intended to protect. (*See* Letter to the Court from Andrew J. Luskin, Esq., dated Feb. 13, 2009 (citing *Citrin v. Erikson* 918 F. Supp. 792, 799-800 (S.D.N.Y. 1996) (quoting *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987))). Thus, this circuit "favors awarding attorneys' fees to prevailing plaintiffs in ERISA

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cases 'in the absence of some particular justification for not doing so.'" (*Id.* (citing *Citrin*, 918 F. Supp. at 800 (quoting *Birmingham v. SoGen-Swiss Int'l Corp. Ret. Plan*, 718 F.2d 515, 523 (2d Cir. 1983))).

In making a determination as to whether an award of attorneys' fees is warranted, the Court considers the following five factors:

> (1) the degree of the offending party's culpability or bad faith, (2) the ability of the offending party to satisfy an award of attorney's fees, (3) whether an award of fees would deter other persons from acting similarly under like circumstances, (4) the relative merits of the parties' positions, and (5) whether the action conferred a common benefit on a group of pension plan participants.

Chambless, 815 F.2d at 871.

To recover attorneys' fees, "a plaintiff need not show bad faith." *Gennamore v. Buffalo Sheet Metals, Inc.*, 568 F. Supp. 931, 936 (S.D.N.Y. 1983) but, instead, may recover fees upon a demonstration that "the offending party was culpable or at fault in causing the underlying dispute." *Citrin*, 918 F. Supp., at 800 (citation omitted). In this case, Defendants accepted Plaintiff's contributions to the pension plan, but suspended making matching contributions, without justification or notice to Plaintiff. Further, Defendants repeatedly, and for a significant period of time, failed to provide requested information to Plaintiff regarding the status of his pension account, thereby failing to make statutorily required reporting disclosures. The first factor in the attorneys' fees analysis thus weighs heavily in favor of Plaintiff. At the very least, Defendants were at fault in causing the instant suit, and, even if they did not act in bad faith, their degree of culpability is high.

The third and fourth factors in the analysis also weigh in Plaintiff's favor. Defendant's argument that it was going through difficult financial times during the relevant periods is insufficient to excuse the complete breach of its obligations under ERISA, and an award of attorneys' fees, in addition to the statutory penalty that the Court has already awarded, may serve as a further caution to others that such obligations cannot simply be ignored. *See Chambless*, 815 F.2d at 871 (noting that an attorneys' fees award may "deter others from acting similarly in like circumstances"). In addition, the relative merits of the parties' positions favor an award of fees; indeed, as noted above, the Court previously granted summary judgment in Plaintiff's favor on issues of liability.

With respect to the fifth factor, the parties do not dispute that this lawsuit has not conferred a common benefit on plan participants, as Plaintiff is the only remaining beneficiary of the plan and was, in fact, the only beneficiary when the suit was filed. This factor thus favors Defendants.

Finally, the Court turns to the factor as to which the parties have devoted most of their energy in their supplemental submissions -- the second factor – regarding Defendants' ability to pay a fee award. Although the Court has offered Defendants an opportunity to demonstrate an inability to pay, the evidence that has now been submitted to the Court by Defendants does not clearly demonstrate that they would be unable to satisfy a fee award. Moreover, the Court takes note of the precedent cited by Plaintiff for the proposition that courts should not place significant weight on this factor. *See Zervos v. Verizon N.Y., Inc.*, 01 Civ. 0685 (GBD) (RLE), 2002 U.S. Dist. LEXIS 22051, at *7 (S.D.N.Y. Nov. 13, 2002) ("Most courts pay little attention to this factor, and find it to be ok little significance"(internal quotation marks and citation omitted)). Upon full consideration of the parties' arguments, the Court is not persuaded that Defendants' financial circumstances are so dire so as to overshadow and outweigh the other factors weighing in Plaintiff's favor.

The party seeking an award of attorneys' fees "need not establish all five [factors] and no one factor is dispositive." *Veltri v. Bldg. Serv. 32 B-J Pension Fund*, 02 Civ. 4200 (HB), 2004 U.S. Dist. LEXIS 6834, at *4 (S.D.N.Y. Apr. 20, 2004), *see Mendez v. Teachers Ins. & Annuity Ass'n*, 789 F. Supp. 139, 141 (S.D.N.Y. 1992) (noting that the absence of a factor does not preclude an award of attorneys' fees). Here, taking into consideration Defendants' high level of culpability and the fact that the majority of the relevant factors weigh in favor of a fee award, the Court finds that an award of attorneys' fees would be appropriate in this case.

Plaintiff is directed to submit a proposed Judgment to the Court, incorporating the Court's prior rulings as to the damages and penalties to be awarded on Plaintiff's ERISA claims,[1] with interest on the damages award to run from the date of plaintiff's termination, and awarding attorneys' fees in plaintiff's favor. If the parties are unable to agree on the amount of attorneys' fees and related costs that have been reasonably incurred by plaintiff in connection with this case, then plaintiff may make a separate fee application.

Dated: New York, NY
March 10, 2009

SO ORDERED

DEBRA FREEMAN
United States Magistrate Judge

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[1] The Court notes that it has not previously addressed the state-law claims pleaded by Plaintiff in this action, as Plaintiff himself has never set out any argument as to the damages that may be recoverable on those claims. The Court assumes, however, that the question of such damages is moot, as Plaintiff's counsel has indicated to the Court that Plaintiff would likely voluntarily withdraw his state claims with prejudice, in light of the Court's rulings as to the amounts recoverable on Plaintiff's federal claims. In connection with his submission of a proposed judgment on the federal claims, Plaintiff is directed to clarify whether he is, in fact, withdrawing his state claims.

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