UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN STOLARZ,

Plaintiff,

- vs. -

GORDON S. ROSEN, et al.

Defendants.

CIVIL ACTION NO.
03 CV 3083 (JGK)

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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ASI replied to plaintiff by stating that it was unaware of any failure to provide him a statement of the balance in his account

PRELIMINARY STATEMENT

Airline Software ("ASI"), the New York-based corporate defendant[1] in this matter, is a small software vendor that develops, sells, installs and maintains software for the airline industry. Plaintiff John Stolarz is a former employee of ASI who resigned from his position with ASI and subsequently filed this action, claiming various violations by Airline Software of the Employee Retirement Income Security Act of 1974 ("ERISA").

Airline Software has filed the instant Rule 56 motion for summary judgment on the grounds that plaintiff has repeatedly failed to follow proper procedures with regard to pursuing his claim, and thus can no longer be deemed to maintain cognizable ERISA claims. Airline Software respectfully requests that this Court grant its summary judgment motion.

STATEMENT OF FACTS

ASI has employed numerous employees in the course of its business, including plaintiff. In 1985 ASI adopted a pension plan (the "Plan") for the benefit of its employees. At the time the Plan was adopted, all employees, including plaintiff, were provided a copy of the Summary Plan Description, which explained

[1] The individual defendant is a principal of ASI, and the other named defendants are employee benefit plans maintained by ASI. For convenience, all are referred to collectively herein as "Airline Software."

Once such a claims procedure has been established, the procedure is considered an "administrative remedy" for a

judgment as a matter of law." Fed.R.Civ.P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). The moving party may discharge its burden of showing that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325, 106 S.Ct. 2548, 91 L.Ed.2d 265. If the moving party demonstrates this, the burden of proof shifts to the non-moving party, which "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Genuine issues are those that "can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party." Id. at 250, 106 S.Ct. 2505, 91 L.Ed.2d 202.

In weighing evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *See* T.W. Elec. V. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (*citing* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475

remedies would be futile, the purposes behind the requirement of exhaustion are no longer served, and thus a court will release the claimant from the requirement." Kennedy at 594.

Although the exhaustion requirement has usually been applied to claims for benefits, it has also been applied to claims for enforcing other ERISA rights. In Leonelli, the Circuit Court cited the plaintiff's failure to exhaust administrative remedies in a case involving statutory rights under ERISA as one reason for granting summary judgment for the company-defendant. Leonelli at 1199. Most Circuits agree with this view. Lindemann v. Mobil Oil Corp., 79 F.3d 647, 650 (7th Cir. 1996)(noting that requiring exhaustion serves the same public policies, whether the claim is for statutory or plan rights, of allowing a factual record to be developed for the court and attempting to resolve disputes privately rather than through the court system, and *citing* Hickey v. Digital Equip. Corp., 43 F.3d 941, 945 (4th Cir. 1995); Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 986 (6th Cir. 1991); Simmons v. Willcox, 911 F.2d 1077, 1081 (5th Cir. 1990); Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 846 (11th Cir. 1990); Leonelli; Drinkwater v. Metropolitan Life Ins. Co., 846 F.2d 821, 825-826 (1st Cir. 1988), *certiorari denied*, 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 249.)

III. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN DISPUTE WITH REGARD TO PLAINTIFF'S ERISA CLAIMS, SO SUMMARY JUDGMENT SHOULD BE GRANTED PURSUANT TO FED.R.CIV.P. 56.

Summary judgment is appropriate when there are no material facts in dispute as to a claim. As demonstrated below, even assuming the validity of the allegations in plaintiff's complaint there are no material facts in dispute here because plaintiff has failed to allege the relevant facts necessary to proceed with the claim.

a. Plaintiff cannot maintain claims for violations of ERISA because plaintiff has failed to exhaust all administrative remedies.

Plaintiff makes the following three ERISA-related claims in his complaint, all of which are premised upon the claim that he has not received or been credited for monies he is owed under the Plan: in the first claim he demands an accounting of the relevant money; in the second he alleges that ASI did not pay required money into the Plan; and in the third he alleges that he did not receive benefits he was owed upon his resignation. Regardless of the merits of these allegations, however, Stolarz's claims must fail because he has failed to fulfill procedural prerequisites to filing this lawsuit.

Under ERISA, a company offering an employee benefit plan must establish a claims procedure for employees who wish to make

Fagan, 92 F.3d at 442 (stating that federal courts are "not free to substitute [their] judgment for that of the [plan administrator]"). Therefore, absent a

a claim for benefits owed. ASI did just that, and clearly set forth the process in its Summary Plan Description. That document contained a section entitled "Claims Procedure," which provided as follows:

> 2. WHAT SHOULD BE DONE IF I OR MY BENEFICIARY THINK A BENEFIT SHOULD BE PAID AND NONE IS PAID?
>
> A claim should be filed with the plan administrator.
>
> 3. HOW CAN A CLAIM BE FILED?
>
> To claim a benefit for which you think you are eligible, mail a letter to the plan administrator stating:
>
> A. The Type of benefit; e.g. retirement, disability, etc.
>
> B. Your estimate of the amount of the benefit.
>
> C. The form of payment; e.g. life annuity, 10 year certain and continuous, etc.
>
> 4. WHAT IF MY CLAIM IS TURNED DOWN?
>
> If your claim is turned down, the plan trustees will provide you or your beneficiary with adequate notice, in writing. The notice of denial will explain the reason for denial in simple language.
>
> 5. CAN THE DECISION OF THE PLAN ADMINISTRATOR BE APPEALED?
>
> Yes. If you notify the plan trustees that you do not agree with the denial he will arrange a full and fair review of the decision.
>
> 6. WHAT IS A FULL AND FAIR REVIEW?
>
> A full and fair review allows you or your beneficiary to appear in person before the plan

IV. PLAINTIFF CANNOT EVADE EXHAUSTION REQUIREMENT BY CLAIMING FUTILITY.

As stated above, the one exception to the exhaustion requirement is when a plaintiff can meet the high burden of showing that attempts to comply with the requirement would have been futile. A futility claim, however, requires more than a mere showing that an appeal was **unlikely** to succeed; rather, a plaintiff claiming futility must make a "clear and positive showing" demonstrating such futility.

The futility standard is intentionally an extremely high one because reliance on the exception would force a court to disregard the public policy considerations that necessitate the exhaustion requirement in the first place - reducing frivolous lawsuits, promoting the consistent treatment of benefit claims, allowing for nonadversarial procedures and minimizing costs. Kennedy at 594, citing Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980). Hence, courts are very reluctant to concede that an administrative process would have been futile. Courts have held, for instance, that even lack of administrative remedies does not demonstrate futility within the meaning of the doctrine when such lack was caused by the failure of a claimant to timely challenge a contested decision. Sanfilippo v. Provident Life and Cas. Ins. Co., 178 F.Supp.2d 450 (S.D.N.Y. 2002).

In the instant case, there is no question that plaintiff has not clearly and positively demonstrated the futility of following the claims procedures provided. Lacking in plaintiff's complaint is any allegation, let alone facts supporting such an allegation, that following the claim process would have been futile. Indeed, plaintiff's complaint does not contain any allegation that he even contemplated his administrative options before filing this suit. This failure to allege futility is fatal.

At most, plaintiff's claim may be read to allege that ASI was uncooperative in responding to correspondence. But in Kennedy, the Circuit Court rejected the sufficiency of such an argument:

> Plaintiffs argue that although the ERISA plaintiffs did not appeal their benefit reductions to Empire, the correspondence between Kennedy's representatives and Empire demonstrates the futility of any such appeal, thus the district court erred in dismissing the complaint as to the ERISA plaintiffs on grounds of failure to exhaust administrative remedies. We reject this reasoning.

Kennedy at 594.

Given plaintiff's failure to develop any sort of record, plaintiff now cannot possibly demonstrate "clear and convincing" evidence that his attempts to resolve the situation administratively would have been futile. Hence, plaintiff's

CERTIFICATION OF MAILING

The undersigned herewith certifies that on the date set forth below, a copy of the within Notice of Motion, Motion, Brief, Certification and proposed form of Order were served via regular mail upon plaintiff's counsel at the following address:

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Dated: January 14, 2005 By: 

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