

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY AT LEXINGTON
CIVIL ACTION NO. 03-88-JBC

MATTHEW J. ARCHER, et al PLAINTIFFS

vs. **AMENDED COMPLAINT**

RADIO-ELECTRONIC EQUIPMENT COMPANY, INC., et al DEFENDANTS

* * * * *

Plaintiffs Matthew J. Archer, Anthony T. Archer and Andrew Archer for their amended complaint against Radio-Electronic Equipment Company, Inc. and John R. Pike, Jr. state as follows:

I

NATURE OF THE ACTION

1. This action arises under the Employee Retirement Income Security Act (ERISA) and plaintiffs seek the following remedies: (1) payment to them of monetary benefits due them under the Radio Electronic Equipment Co., Inc., Employee Profit Sharing Plan in the amount of \$375,455.27 cumulatively and \$125,151.76 individually as when the benefits became due and owing to them effective May 1, 2002; (2) statutory penalties pursuant to 29 U.S.C. §1132(c) arising from defendants' failure to provide them with an accurate summary plan description (SPD) in violation of 29 U.S.C. §1024(b)(4) while affirmatively providing them with pages of a plan defendants, including Pike, no longer claim is applicable; (3) appropriate equitable relief, including restitution, arising from Pike's deceptions and

misrepresentations and breaches of his fiduciary duties to plaintiffs; and, (4) their costs and attorney's fees herein incurred.

II

JURISDICTION OF VENUE

2. This Court has jurisdiction over this case pursuant to 29 USC §1132(e), defendants having removed it from Fayette Circuit Court. Venue is proper in this Court because defendants' principal place of business is located in Fayette County, Kentucky, and all the acts giving rise to this lawsuit occurred in Fayette County, Kentucky

III

PARTIES

3. Plaintiff Matthew J. Archer is a citizen of the United States, and he is a beneficiary under the Radio Electronic Equipment Company, Inc. Employee's Profit Sharing Plan.

4. Plaintiff Anthony T. Archer is a citizen of the United States, and he is a beneficiary under the Radio Electronic Equipment Company, Inc. Employee's Profit Sharing Plan.

5. Plaintiff Andrew Archer is a citizen of the United States, and he is also a beneficiary under the Radio Electronic Equipment Company, Inc. Employee's Profit Sharing Plan.

6. Defendant Radio-Electronic Equipment Company, Inc., (Radio-Electronic) is a corporation organized under the laws of Kentucky with its principal place of business at 480 Skain Avenue, Lexington, Fayette County, Kentucky. Radio-Electronic is, upon information and belief, the plan administrator of the Radio-Electronic Equipment Company, Inc. Employee's Profit Sharing Plan. Radio-Electronic is sued in this capacity. The agent for service of process for Radio-Electronic is John R. Pike, Jr., 480 Skain Avenue, Lexington, KY 40508.

7. Defendant John R. Pike, Jr. is the President of Radio-Electronic. Upon information and belief, Pike has succeeded Radio-Electronic as the plan administrator of the Radio-Electronic Equipment Company, Inc. Employee's Profit Sharing Plan or Pike as been delegated those responsibilities *de facto* by Radio-Electronic.

IV

FACTS GIVING RISE TO THE LAWSUIT

8. Arthur Johns Archer, III, was the father of plaintiffs and was an employee of Radio-Electronic.

9. As a result of his employment at Radio-Electronic, Arthur Johns Archer, III, became enrolled as a participant in the Radio-Electronic Equipment Company, Inc. Employee's Profit Sharing Plan (hereinafter referred to as "the plan").

10. The plan is an employee pension and/or welfare plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 USC §1101, *et seq.*

11. Based on representations made by defendant Pike in response to plaintiffs' requests for information, plaintiffs alleged in their initial complaint that Exhibit A attached thereto was a true and accurate copy of the relevant and controlling plan.

12. Subsequent to the filing of this lawsuit, defendants, including defendant Pike, disavowed the applicability of the plan attached to the Complaint and marked exhibit A. Instead, defendants produced a plan on March 17, 2003, after this lawsuit was filed, that they claimed was controlling and applicable hereto.

13. According to defendants', including defendant Pike, Pike acting for himself and on behalf of the plan, responded deceptively and misleadingly to plaintiffs' request for information about the plan by providing to plaintiffs pages of a plan which Pike and Radio-Electronic now say are not controlling or applicable hereto.

14. Defendants have a duty imposed by 29 U.S.C. §1024(b)(4) to provide plaintiffs with an accurate SPD upon request.

15. Plaintiffs made a written request for an accurate SPD on or about October 1, 2002.

16. Defendants failed from October 1, 2002, to March 17, 2003, to provide plaintiffs with an accurate SPD or to otherwise correct the misinformation provided by Pike.

17. As a result of the failure by defendants to provide an accurate SPD from October 1, 2002, to March 17, 2003, or to otherwise correct the misinformation spread by Pike, defendants violated 29 U.S.C. §1024(b)(4) and are subject to imposition of the penalties applicable under 29 U.S.C. §1132(c).

18. Defendants maintained at all times pertinent hereto and continue to maintain a fiduciary duty to plaintiffs within the meaning of 29 U.S.C. §1104.

19. Defendants have breached their fiduciary duties toward plaintiffs by providing misleading and false information regarding the plan, regarding a plan that defendants now claim to have been superseded, regarding plaintiffs' rights under the plan and failed to correct that misinformation when defendants knew or should have known that plaintiffs were acting in reliance on that misinformation.

20. As a direct and proximate result of defendants' breach of their fiduciary duty owed plaintiffs, plaintiffs have suffered injury entitling them to equitable relief pursuant to 29 U.S.C. §1132(a)(3)(B).

21. The plan that defendants produced on March 17, 2003, and claim is controlling herein provides in its Article 11 that a "Retirement Committee" be created and that it perform the duties of a plan administrator.

22. It is unknown whether a Retirement Committee was ever created but defendant Pike performed the duties and acted in the capacity of the plan administrator on all matters pertinent hereto.

23. Arthur Johns Archer, III, passed away June 13, 2001.

24. Plaintiffs Matthew J. Archer, Anthony T. Archer and Andrew Archer were identified by Arthur Johns Archer, III, as equal beneficiaries to the monies in the plan attributed to him as a participant.

25. Section 7.8(b) of the plan produced by defendants on or about March 17, 2003, and claimed to be applicable and controlling herein provides as follows in the event of the death of a participant whose employment has been terminated:

Benefits payable to a participant who incurs a Termination of Employment, shall be distributed, or distribution shall commence, as soon as practicable after the end of the Plan Year coincident with or immediately following the Plan Year in which the participants attains Normal Retirement Age, dies or becomes Disabled, whichever occurs first.

26. The plan produced by defendants and claimed to be applicable and controlling herein defines a "Plan Year" as

beginning on May 1 and ending April 30 of the following year. This is set forth in Article 2, section 2.40 of the plan.

27. According to the plan defendants claim is applicable, the end of the Plan Year coincident with the death of participant Arthur Johns Archer III occurred on April 30, 2002.

28. The terms of the plan relied upon by defendants commanded that benefits payable to plaintiffs, as beneficiaries to participant their father, Arthur Johns Archer III, to be distributed "as soon as practicable" after April 30, 2002.

29. The plan's assets are held in stocks and cash, including those monies attributable to participant Arthur Johns Archer III and now due plaintiffs as the beneficiaries thereto.

30. The benefits that became due and owing to plaintiffs on May 1, 2002, were cumulatively valued at \$375,455.27 or \$125,151.76 per plaintiff.

31. The plan's assets are liquid and there is no legitimate reason why distribution of the plan benefits due plaintiffs, as the beneficiaries of participant Arthur Johns Archer III, was not practicable on or about May 1, 2002, and full distribution of same should have been completed in May 2002.

32. Prior to institution of this lawsuit plaintiffs have demanded payment of the benefits due them as beneficiaries to participant Arthur Johns Archer III.

33. Prior to October 1, 2002, plaintiffs verbally requested to defendant Pike that the benefits due them as beneficiaries to participant Arthur Johns Archer III be distributed and paid them.

34. Defendant Pike for himself as Plan Administrator and/or as the agent of Radio-Electronic as the Plan Administrator declined to cause distribution of the benefits to which plaintiffs' are entitled.

35. At no time and never did defendant Pike decline to cause distribution of the benefits to which plaintiffs' are entitled because distribution of same was not practicable.

36. By letter dated October 1, 2002, plaintiff Matt Archer, on his own behalf and on behalf of plaintiffs Anthony T. Archer and Andrew Archer, requested in writing distribution in full of the benefits due them. A copy of this written request is attached hereto to the Complaint and marked Exhibit B; it is incorporated as if fully set forth herein.

37. In his October 1, 2002, letter, plaintiff Matt Archer also requested information that constituted a request for the plan's SPD. Specifically, Archer noted to defendant Pike that "parts of the plan that you sent to me and, when comparing them to the copy of the plan that sent to my mother, they didn't match up?"

38. Defendants failed to provide any of the plaintiffs an SPD or other accurate copy of the plan up to March 17, 2003, when a copy of same was mailed by defendants' present counsel to plaintiffs' counsel.

39. By letter dated October 1, 2002, a copy of which is attached to the Complaint, marked Exhibit C and incorporated as if fully set forth herein, defendant Pike for himself as Plan Administrator and/or as the agent of Radio-Electronic as the Plan Administrator declined to cause distribution of the benefits to which plaintiffs' are entitled.

40. Pike referred to section 7.9(c)(ii) of a plan that he and Radio-Electronic now claim has been superseded by the plan they produced on March 17, 2003, allowed him to wait up to 5 years after the death of participant Arthur Johns Archer III before causing distribution of the benefits to plaintiffs.

41. Pike's misleading and false representation in his October 1, 2002, to plaintiffs was made in breach of his fiduciary duties owed plaintiffs.

42. Pike did not and has never asserted any reason why full distribution of the benefits due plaintiffs was not practicable.

43. Pike's refusal to cause full distribution of the benefits due plaintiffs was arbitrary and capricious.

44. By letter dated October 4, 2002, a copy of which is attached to the Complaint, marked Exhibit D thereto and incorporated as if fully set forth herein, plaintiff Matt Archer for himself and on behalf of plaintiffs Anthony T. Archer and Andrew Archer again demanded payment of the benefits due them from the plan.

45. Plaintiff Matt Archer again requested clarification of the plan's terms, again observing: "I still don't understand why there seems to be a big difference between the parts of the plan that you have supplied me with and the copy of the plan that my mother has. The wording is entirely different and most page numbers don't match up, as my attorney has brought to my attention."

46. Plaintiff's observations regarding the discrepancy in the plans and request for clarification regarding same constituted a request for an accurate SPD within the meaning of 29 U.S.C. § 1024(b)(4).

47. By letter dated October 7, 2002, a copy of which is attached to the Complaint, marked Exhibit E thereto and incorporated as if fully set forth herein, defendant Pike for himself as Plan Administrator and/or as the agent of Radio-Electronic as the Plan Administrator declined to cause distribution of the benefits to which plaintiffs' are entitled.

48. Pike informed plaintiffs in his October 7, 2002, letter that "you will receive your opportunity to collect a sum of money during the year falling between the fourth and fifth anniversary of John Archer's death."

49. Pike did not in his October 7, 2002, letter and has never asserted any reason why full distribution of the benefits due plaintiffs was not practicable.

50. Pike's repeated refusal in his October 7, 2002, letter to cause full distribution of the benefits due plaintiffs was arbitrary and capricious.

51. Pike, while noting plaintiffs' confusion about the discrepant plans provided them and acknowledging their right to an SPD, failed to provide plaintiffs with an accurate SPD.

52. Despite Pike's repeated verbal refusals to cause distribution in full of the benefits due plaintiffs under the plan and despite Pike's two written refusals to cause distribution in full of the benefits due plaintiffs under the plan, plaintiffs submitted a third written demand for payment of the benefits due them by letter dated October 7, 2002, a copy of which is attached to the Complaint, marked a Exhibit F and incorporated as if fully set forth herein.

53. Defendant Pike has continued his refusal to pay the full benefits due plaintiffs.

54. The plan administrator has wrongfully refused to pay the full sum of the benefits due plaintiffs as the beneficiaries of Arthur Johns Archer, III.

55. Benefits under the plan are due to the plaintiffs, as beneficiaries of Arthur Johns Archer, III, in the cumulative amount of \$375,455.27 or \$125,151.76 each and plaintiffs have complied with all conditions in order to receive such benefits.

56. Defendant Pike has erroneously, arbitrarily and capriciously interpreted plan provisions in refusing to timely pay plaintiffs the full sum of the benefits due them and causing them to institute this lawsuit to secure payment of even a portion of the benefits.

57. The decision by defendant Pike to refuse to commence payment to plaintiffs of the benefits due them under the plan was arbitrary, capricious, not made in good faith, unsupported by substantial evidence, erroneous as a matter of law, in violation of ERISA .

58. After this lawsuit was filed, plaintiffs received a portion of the benefits owing to them. They accepted this payment while reserving their right to seek payment of the full sum of benefits due them. Further, the filing of this lawsuit was the cause and catalyst for defendants paying plaintiffs even that portion of the benefits due them.

59. As a direct and proximate result of the actions of defendants, plaintiffs have been caused to incur attorney's fees in amount currently not known but determinable at the time of trial.

V

CAUSES OF ACTION

Count 1 - For the Payment of Benefits - 29 U.S.C. §1132(a)(1)(B)

60. Plaintiffs incorporate Paragraphs 1-59 as fully set forth herein.

61. The refusal of defendants to timely and fully distribute to plaintiffs the benefits due them as beneficiaries of participant Arthur Johns Archer, III, was arbitrary, capricious, not made in good faith and unsupported by substantial evidence, erroneous as a matter of law, and in violation of ERISA.

62. Benefits under the plan are due to the plaintiffs, as beneficiaries of Arthur Johns Archer, III, in the cumulative amount of \$375,455.27 or \$125,151.76 each and plaintiffs have complied with all conditions in order to receive such benefits.

Count 2 - Failure to Provide SPD & Statutory Penalties

63. Plaintiffs incorporate paragraphs 1 - 62 hereof as if fully set forth herein.

64. Defendants failed to honor plaintiffs' request for information and to provide an accurate SPD from the time period October 1, 2002, to March 17, 2003, when an accurate plan was provided by defendants.

65. Defendants are liable to plaintiffs for statutory penalties for the time period October 1, 2002, to March 17, 2003, pursuant to 29 U.S.C. §§1132(a)(1)(A) and 1132(c).

Count 3 - Breach of Fiduciary Duty

66. Plaintiffs incorporate paragraphs 1 - 65 hereof as if fully set forth herein.

67. Defendants by providing false and incorrect information regarding the plan and the plaintiffs' rights under it breached their fiduciary duties to plaintiffs under 29 U.S.C. §1104.

66. Plaintiffs are entitled to recover from defendants restitution pursuant to 29 U.S.C. §1132(a)(3)(B) of the losses caused them by defendants' breaches of their fiduciary duties.

VI

DEMAND FOR RELIEF

WHEREFORE, plaintiffs request judgment against defendant as follows:

(1) An order for defendants to distribute the benefits due plaintiffs under the plan as accrued as of May 1, 2002, in the cumulative sum of \$375,455.27 and individual sum of \$125,151.76;

(2) An Order that defendants pay them statutory penalties under 29 U.S.C. §§1132(a)(1)(A) and 1132(c) for their failure to provide plaintiffs with an accurate SPD for the time period October 1, 2002, to March 17, 2003;

(3) An Order for plaintiffs to recover from defendants restitution in the amount caused by defendants' breaches of their fiduciary duties;

(4) Awarding plaintiffs' prejudgment interest from May 1, 2002, until date of judgment on all monies paid them;

(5) Awarding plaintiffs attorney's fees, court costs and all other reasonable costs incurred; and,

(6) Granting plaintiffs such other further relief as the court may deem just and proper.

Respectfully submitted,

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