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. **PLAINTIFFS' MEMORANDUM *CONTRA* DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING COMPLAINT**

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

* * * *

Defendants' argument that plaintiffs' receipt of a portion of the ERISA plan benefits due them strips them of standing to seek payment of the full amount of benefits due them is without merit. Moreover, based on defendants' admissions of their prior deceptive acts plaintiffs have moved simultaneously herewith to amend their complaint; these newly-pleaded claims are unaffected by defendants' motion. Accordingly, defendants' motion for summary judgment dismissing complaint should be **DENIED.**

COUNTERSTATEMENT OF THE CASE

The "factual background" set forth in defendants' memorandum contradicts representations in their Answer and omits many material facts that undercut their contentions.

The Deceptive and Misleading Correspondence from defendant Pike

Long before the filing of this lawsuit defendant John R. Pike, Jr. (Pike) acting effective as the plan administrator on behalf of himself and/or for Radio-Electronic Equipment Company, Inc. (Radio-Electronic) began a stream of deceptive and

misleading correspondence with the plaintiffs regarding the benefits payable to them through a profit sharing plan applicable to their father, Arthur Johns Archer, III, when he was employed by Radio-Electronic.

Following their father's death on June 13, 2001, plaintiffs had attorney John D. Meyers correspond with Pike regarding the monies left by Mr. Archer in this plan for his sons. A copy of that letter is attached hereto and marked as Exhibit 1.

Pike replied to Meyers' letter on plaintiff's behalf by letter dated November 29, 2001.[1] Contrary to what defendants now represent to be the obligations to distribute plaintiffs' monies under the plan, Pike responded to Meyers, that, among other things, he anticipated "a lump sum distribution [of plaintiffs' monies] would be made sometime before December 31, 2006." In addition, Pike attached pages from a plan that he represented to be the applicable plan which identified him as the trustee and/or plan administrator.

Although the terms of the plan required that the distribution "shall" occur "as soon as practicable" on or after May 1, 2002, the distribution did not occur and plaintiff Matt Archer caused the letter dated October 1, 2002, attached to the Complaint and marked Exhibit B to be sent to Pike. Among other things it inquired "who makes the decision on when this money

[1] Marked as Exhibit 2 and attached hereto.

will be disbursed to us? Is it you or some other institution, and if it is you, when and why do you intend to follow through?"

As in his response attorney Meyers, Pike again responded deceptively and contrary to the position regarding the plan's requirements now taken before this Court. First, he provided pages of a plan that neither he nor Radio-Electronic now claim was correct. *Complaint, ex. C*. Second, he took responsibility for administering the plan, stating "I anticipate making a distribution to you, and Toby at the end of the plan year closest to the fourth or fifth anniversary of your dad's death." *Id.* Pike did not then or since and certainly not before this Court indicate what provision in the plan provided him or any other person or entity to time the distribution in this manner; similarly, neither then nor since has Pike or any defendant or anyone on defendants' behalf offered any justification or explanation for his totally arbitrary decision to defer distribution of plaintiffs' benefits to 2005 or 2006.

Understandably finding Pike's response unsatisfactory plaintiff Matt Archer replied by letter dated October 4, 2002, again asking among other things "why then do you insist on holding this money from us?" *Complaint, ex. D.* Archer also pointed out Pike's deception regarding the applicable plan noting, "I still don't understand why there seems to be a big difference between the parts of the plan that you supplied me

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." *Id.*

Pike responded with the letter attached as Exhibit E to the Complaint stating in pertinent part as follows:

> A particular value is only determined at the close of the plan year in which a participant is due a disbursement.
>
> 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.
>
> Don't you think that if your father was truly the owner of and had access to over $400,000 he would have collected it before his death.
>
> Regardless, the value of the money which you have an opportunity to collect will not be determined until an evaluation of the plan's assets as of the close of business April 30 the year between the fourth and fifth anniversary of your father's death.

Plaintiffs' then submitted the letter to Pike dated October 7, 2002, attached as Exhibit F to the Complaint demanding as follows: "Pursuant to Article 7.8a, this is a formal written demand for payment of the benefit determined on April 30, 2002, immediately." Plaintiffs further inquired, "We have yet to receive a distribution of any type subsequent to the amount being determined at the end of the plan year. We need to know why?" *Id.*

Pike subsequently and nonsensically responded about two months later by saying he was going to take an additional ninety

(90) days to consider the claim, which is attached hereto as exhibit 3. Unsurprisingly, Pike never followed up on that letter with an answer.

Plaintiffs' then again engaged counsel who wrote Pike on January 7, 2003, the letter is attached hereto as exhibit 4.

Defendants' Contradictory Positions on the Identity of the Plan Administrator

Although plaintiffs' alleged in paragraph 6 of their Complaint that "Radio-Electronic is … the plan administrator of the [plan]." Defendants denied that allegation. *Answer* ¶6. However, defendants in their memo state that "Radio-Electronic …is the plan administrator of the [plan]." *Defendants' Memo at 1.*

Defendants Post Filing Plan Disclosure

After the lawsuit was filed, defendants produced a plan that they claimed to be applicable that accompanied the letter of defense counsel dated March 17, 2003. The most pertinent part of the plan is section 7.8(b) which provides as follows in the event of the death of a participant:

> 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 participant attains Normal Retirement Age, dies or becomes Disabled, whichever occurs first.[2]

[2] A copy is attached hereto and marked exhibit 5.

The Plan Year coincident with the death of plaintiffs' father ended April 30, 2002. Benefits due plaintiffs therefore became payable and subject to mandatory distribution "as soon as practicable" as of May 1, 2002. No representation of any kind has ever been made by defendants or on defendants' behalf that the mandatory distribution of the benefits due plaintiffs was not practicable as of May 1, 2002. Instead, defendants have misrepresented the applicable plan, deceived plaintiffs and falsely informed them that the plan allowed delay of the payment of their benefits to four or five years after their father's death.

The cumulative value of plaintiffs' benefits as calculated and due as of May 1, 2002, was $375,455.27 or $125,151.76 individually. They sought payment of these benefits in their complaint.

Plaintiffs' Receipt of a Portion of their Benefits and Under Reservation of Rights

Plaintiffs have received a portion of the benefits the $125,451.76 in benefits due and payable to each of them "as soon as practicable" after April 30, 2002. Specifically, plaintiffs have received payment each in the sum of $112,413.19, which defendants represented to be the benefits due and payable to them as calculated May 1, 2003. Thus, plaintiffs continue to seek $13,038.57 each in benefits due and payable to them since

May 1, 2002. They likewise seek interest due on the delay and their attorney's fees.

Defendants omit the correspondence on behalf of plaintiffs reserving their rights to pursue their claims, despite their receipt of the payment made them. By letter dated July 8, 2003, plaintiffs advised defendants through correspondence of counsel that their "receipt of these payments in no way compromises claims in the pending lawsuit." (letter attached and marked exhibit 6). Notably, defendants entirely omit this letter from their "Factual Background."

ARGUMENT

PLAINTIFFS' RECEIPT OF A PORTION OF THE BENEFITS DUE AND PAYABLE TO THEM DOES NOT STRIP THEM OF STANDING TO SEEK PAYMENT OF THE FULL AMOUNT OF THE BENEFITS DUE THEM.

Defendants' argument that plaintiffs' receipt of a portion of the benefits due and payable to them strips them of standing to seek payment of the full amount of benefits due them is without merit. Furthermore, even if defendants were correct, plaintiffs have filed herewith a proposed amended complaint, which is based on defendants' concessions of their misleading conduct prior to the filing of this lawsuit that presents claims that plaintiffs may continue to prosecute. Accordingly, defendants' motion should be **DENIED.**

Defendants' central premise – that plaintiffs' acceptance of their calculated benefits as of May 1, 2003, eliminates their standing to seek payment of the greater sum of their calculated benefits as of May 1, 2002 – is incorrect, unsupported by either statute or case law. Notably, defendants do not cite any Sixth Circuit authority and the cases they do cite do not support their position.

Crawford v. Roane, 53 F.3d 750 (6th Cir. 1995), the case defendants principally rely on, is not germane and does not support defendants' position. *Crawford* involved a pension plan that paid some benefits to a Dr. Crawford before he passed away prematurely, being survived by a wife and three children. 53 F.3d at 752. Dr. Crawford had never designated any beneficiary under the plan nor executed a waiver of the survivor annuity. *Id.* Following Dr. Crawford's death the plan administrator and trustees determined that the children were not beneficiaries under the plan and his surviving wife was paid all the remaining benefits. *Id.* The children then filed suit claiming that they were beneficiaries and the monies should have been paid them. Since Dr. Crawford had not identified his children as beneficiaries, the Sixth Circuit affirmed the dismissal of their ERISA lawsuit claiming that they were.

Crawford would be helpful to defendants if plaintiffs had not been designated as beneficiaries by their father. However,

as defendants concede, plaintiffs' father "designated his sons … as the beneficiaries of his benefits under the Plan." Defendants' memo at 2. This case unlike *Roane* does not turn on whether or not plaintiffs are beneficiaries under the plan; that fact is conceded. Rather this case turns on whether plaintiffs should have been paid the full amount of their benefits "as soon as practicable" after May 1, 2002, of $125,151.76. *Roane* offers no instruction on defendants' argument that plaintiffs' receipt of a portion of the benefits due and payable to them "as soon as practicable" after May 1, 2002, precludes their pursuit of payment of the full amount.

Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994), does not support defendants' position and the carefully stated caveats of that decision in fact undercut defendants. *Lamantia* involved an employee who opposed formation of an employee stock ownership plan (ESOP). Later the employee filed a *pro se* complaint, subsequently resigned his employment and then later "elected to receive his total vested distribution from the ESOP in the form of 47 shares of [stock] and a check in the amount of $51.49." 34 F.3d at 31. After receiving this sum, the plaintiff sought to amend his complaint to seek recovery on behalf of the ESOP plan for the trustees' alleged breaches of fiduciary duty and also class certification. *Id.* The district court dismissed the action based on a lack of standing.

The First Circuit affirmed the dismissal in a carefully limited opinion. First, the court noted that the plaintiff had terminated his employment and collected all the ESOP benefits due him. 34 F.3d at 32. Second, the court noted that the plaintiff was not making and could not sustain a claim that he "was not paid the full extent of [his] benefits." *Id.* at 33.

This case and *Lamantia* are most fundamentally distinguishable because plaintiffs are claiming that remaining owed to them are a sum of benefits due them that should have been paid them in May 2002. Specifically, plaintiffs claim that the sum of $125,151.76 in benefits should have been paid them "as soon as practicable" after May 1, 2002. *Lamantia* does not support the conclusion that plaintiffs' acceptance of a lesser sum strips them of standing to seek payment of the sum that should have been paid them and remains due and owing. Furthermore, the caveat stated by the *Lamantia* court that it was not faced with a claim that benefits had not been fully paid the plaintiff indicate the limits of that case's holding.

Crotty v. Cook, 121 F.3d 541 (9th Cir. 1997), directly addresses the argument made by defendants and just as directly rejects it. The plaintiff in *Crotty* was a lawyer who filed ERISA claims for unfunded and unpaid plan benefits relating to profit sharing and money purchase plans maintained by his law firm. After the plaintiff left the law firm, he filed his suit.

Subsequently, the plan trustees and the plaintiff stipulated to the trustees' calculations of the vested benefits for the two relevant years and the plaintiff accepted payment of that sum, while reserving his right to pursue his claims that additional sums were owed. 121 F.3d at 544.

Like defendants here the trustees in *Crotty* argued that the plaintiff "lost his ERISA standing during the course of the district court litigation because they paid Crotty all his vested benefits *after* he filed suit." 121 F.3d at 545. The Ninth Circuit reversed the district court ruling that "the district court erred in holding that an ERISA plaintiff who had standing at the time an ERISA lawsuit was filed loses standing by accepting payment of vested benefits during the litigation." 121 F.3d at 545.

The Court cited numerous pertinent grounds for its holding. First, it noted that dismissal would "defeat ERISA's purpose of 'providing for appropriate remedies, sanctions, and ready access to the Federal courts,' because it would unjustly force plaintiffs to "accept their vested benefits immediately [while losing] their right to pursue compensatory damages or attorney's fees." *Id.* at 546. This would achieve the unjust result of imposing on the plaintiff "both the financial burden of damages imposed by the plan administrator's wrongdoing and the costs of

retaining an attorney, and they would only receive what they were entitled to all along: their vested benefits." *Id.*

Secondly, "such a rule does not provide an 'appropriate' remedy or sanction under the ERISA statute." *Id.* Thirdly, "such a rule does not provide ready access to the federal courts." *Id.* Finally, the Court noted that the plaintiff had also claimed that an SPD had not been timely disclosed and sought imposition of damages pursuant to 29 U.S.C. §§ 1132(a)(1)(A) and 1132(c). Accordingly, the Court reversed and held that the plaintiff maintained his standing to pursue his ERISA claims.

Crotty appears to be the case closest in point to that presented here and its reasoning is directly contrary to defendants' position. First, if this Court was to accept the defendants' position, it would cede to defendants the decision about what benefits were due plaintiffs and when they should be paid. Plaintiffs were presented with a situation where they could accept a portion of the benefits they sought or decline them and subject them to continuing dissipation by defendants. Moreover, plaintiffs received and accepted the portion of their benefits under a strict reservation of rights, specifically advising defendants that such did not prejudice their right to seek recovery of the full amount of benefits due them. Despite that caveat, defendants paid anyway.

Second, ruling in defendants' favor would deny plaintiffs an appropriate remedy or sanction under the ERISA statute and would deny ready access to the courts. In fact, it would sanction the misleading and deceptive conduct of defendants regarding the payment of plaintiffs' benefits.

Thirdly, plaintiffs have tendered an amended complaint seeking recovery of statutory penalties for defendants' failure to provide an accurate SPD. This additional remedy further weighs against defendants' motion, as the *Crotty* court held. Furthermore, plaintiffs' proposed amended complaint seeks recovery of equitable remedies based on defendants' breaches of their fiduciary duties. This likewise weighs against defendants' motion.

CONCLUSION

There is no support for defendants' contention and their motion is without merit. Accordingly, defendants' motion should be **DENIED**, and plaintiffs' motion to file an amended complaint should be **GRANTED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed, postage prepaid, this _____ day of October, 2003, to the following:

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