No. _____

In the Supreme Court of the United States

JIM MILLER, PETITIONER

v.

ERIC OLSEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
***

PETITION FOR A WRIT OF CERTIORARI

Jon Weiner
Counsel for Petitioner
1415 Commercial St. SE
Salem, OR 97304
(503) 399-7001
jweiner@nw-attorneys.com

QUESTION PRESENTED

Whether (1) the Oregon District Court and Ninth Circuit erred in applying the "primary purpose" test rather than the "surrounding circumstances" test to determine whether a written "retirement" plan is governed by the Employee Retirement Income Security Act (ERISA), where there existed no ERISA plan against which to reference that plan in making this determination; and (2) whether those Courts erred in their application of the "primary purpose test" in the event that the test provided the appropriate analytic framework under the circumstances of the case.

PARTIES TO THE PROCEEDING

The petitioner is Jim Miller.

The respondents are Eric Olsen; Does 1 through 5; Euterpe, Inc., an Oregon domestic corporation; and Somerset, LLC, an Oregon Limited Liability Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ORDERS

LAWS

CASES

TABLE OF AUTHORITIES (cont.)

OPINIONS BELOW

The opinion of the court of Appeals is not published but is attached below. The Oregon District Court opinion is available at 2016 WL 4154936 and attached below. Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2018, and a petition for rehearing *en banc* was denied on August 14, 2018. Appendices A, D. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. Section 1002:

> (1)The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,
>
> (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or

unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or

(B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A)Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i)provides retirement income to employees, or

(ii)results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or

> program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

STATEMENT

The question presented in this case is whether whether (1) the Oregon District Court and Ninth Circuit erred in applying the "primary purpose" test rather than the "surrounding circumstances" test to determine whether a written "retirement" plan is governed by the Employee Retirement Income Security Act (ERISA), where there existed no ERISA plan against which to reference that plan in making this determination; and (2) whether those Courts erred in their application of the "primary purpose test" in the event that the test provided the appropriate analytic framework under the circumstances of the case.

On August 4, 2016, the Oregon District Court held that the EGP did not, conflicting with long-standing Ninth Circuit and U.S. Supreme Court precedent. Particularly, the District Court refused to apply the "surrounding circumstances" test set forth in *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982), and furthermore erroneously applied the "primary purpose" test set forth in in *Rich v. Shrader*, 823 F.3d 1205, 1210 (9th Cir. 2016). The Ninth Circuit affirmed on May 31, 2018, and

petitioner's motion for *en banc* review was denied on August 14, 2018. This timely petition now follows.

Facts and Procedural History

Petitioner worked for Respondents from 2004 until the date of his discharge on August 8, 2013. Petitioner's work entailed both the supervision of certain job sites and the performance of a considerable amount of manual labor. Id. In December 2007, Respondents created the Euterpe, Inc. Employee Equity Growth Plan. Petitioner became a participant in that plan on January 1, 2008.

Participants are issued "shares" representing a phantom ownership interest in Somerset, LLC. The plan defines the "Retirement value" of a single share as well as the "Total Retirement Value" of all shares combined. The plan provides that "when a Participant reaches 62 years of age, the Participant automatically becomes fully vested in the Plan and shall be entitled to receive 100% of the Retirement Value of the Participant's Shares…." There is a similar provision for participants who complete twenty years of service. Although participants are permitted to withdraw their benefits early, they may do so only subject to penalties ranging from 75% to 25%.

Other Relevant Circumstances

At the time he received the plan documents, Petitioner was told "you are now eligible for

retirement[.]" As retirement time neared, Petitioner was advised by his accountant to request a printout of benefits. Petitioner attempted repeatedly to obtain information from Respondent Olsen. He never succeeded.

As it turned out, Somerset LLC contained only one asset – a building sold by Olsen in 2013 without notice to Petitioner. Thus, Olsen misappropriated the sole asset of the trust – leaving it worthless and any benefit to Petitioner even more illusory than it had been previously. Petitioner sued, inter alia, under ERISA for several violations.

Legal Issues

Here, Petitioner sued under ERISA, 29 U.S.C. sections 1001-1461, for several violations: under section 1025(a)(1)(A) for failure to provide annual reports; under section 1025(a)(1)(A) for failure to provide requested information; under section 1104(a)(1) for breach of fiduciary duties; and under section 1140 for interference.

As a threshold matter, Petitioner's ERISA claims hinged on whether the EGP counted as a plan under ERISA. *See* 29 U.S.C. section 1002(2)(A) (defining qualifying plans as those in which the plan, "by its express terms **or as a result of surrounding circumstances**" "(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond…" (emphasis added). The Oregon District Court erroneously refused to apply a "surrounding circumstances" test (as articulated in *Donovan*), and instead misapplied the

Rich "primary purpose" test in determining whether the EGP qualified as a plan under ERISA.

Under the *Donovan*-articulated "surrounding circumstances" test, "A 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan*, at 1373. In *Rich v. Shrader*, 823 F.3d 1205, 1210 (9th Cir. 2016), the Ninth Circuit explained the "primary purpose" test:

> [W]e agree with our sister circuits that have determined that the paramount consideration is whether the primary purpose of the plan is to provide deferred compensation or other retirement benefits. See *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980) ("The words 'provides retirement income' patently refer only to plans designed for the purpose of paying retirement income whether as a result of their express terms or surrounding circumstances.").

The District Court refused to apply the *Donovan* test on the basis that it could not do so when a formal, express agreement was in place between the parties. *See* May 31, 2018 order. However, the federal statute allows for consideration of either the "express terms" or the "surrounding circumstances," and the former analysis does not preclude the latter. Furthermore, as noted in *Golden*

Gate Restaurant Ass'n v. City and County of San Francisco, 546 F.3d 639 (9th Cir 2008), the Ninth Circuit has "relied on these criteria from *Donovan*…in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir.1985), in *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374 (9th Cir.1994), and in *Winterrowd v. American General Annuity Ins. Co.*, 321 F.3d 933 (9th Cir.2003). The 9th Circuit also relied upon *Donovan* in *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064 (9th Cir 2005); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1355-56 (9th Cir 1984); and *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1442 (9th Cir. 1995).

Accordingly, the District Court erred, and conflicted with Ninth Circuit precedent, in solely applying the primary purpose test, and refusing to apply the surrounding circumstances test. It further erred in holding that Petitioner's EGP retirement plan did not qualify under its express terms. The Ninth Circuit panel erred in upholding the District Court. *See* August 14, 2018 order. This Petition now follows seeking reversal and remand.

REASONS FOR GRANTING THE PETITION

This Court should grant Petitioner's petition for a writ of certiorari because the Ninth Circuit has created a circuit conflict on an important, recurring issue of federal law: whether the *Rich* "primary purpose" test precludes the *Donovan* "surrounding circumstances" test simply because a formal, express plan existed. Furthermore, the 9th Circuit Panel's decision, and the case upon which it relies (*Rich v. Shrader*) is reflective of conflict and confusion

regarding the continuing viability of *Donovan* and application of the primary purpose test.

Every circuit that has addressed the issue has adopted *Donovan*. *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir 1994) (adopting *Donovan* and noting that the 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th Circuits have each adopted *Donovan*). However, some circuits have more recently applied the primary purpose test (see *Oatway v. Am. Int'l Grp., Inc.*, 325 F.3d 184, 188–89 (3d Cir. 2003) (holding a plan was not an ERISA plan "because its purpose was to operate as an incentive and bonus program, and not as a means to defer compensation or provide retirement benefits"); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 931–34 (8th Cir. 1999) (focusing throughout its analysis on the "purpose" of the defendant company's stock plan); *Pasternack v. Shrader*, 863 F.3d 162,169 (2nd Cir 2017) (company's stock plan was not a pension plan because its "primary purpose" was not to provide retirement income within the meaning of § 1002(2)(A)).

Some circuits have questioned the continuing viability of *Donovan* in light of the United States Supreme Court's decisions in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 16, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987); and *Massachusetts v. Morash*, 490 U.S. 107, 109, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989). For example, similar to this Circuit's statement in *Golden Gate Restaurant Ass'n*, the 7th Circuit noted without deciding, " [i]t is not clear that the approach taken in [*Donovan*] is compatible with more recent decisions of the Supreme Court, which emphasize

different considerations when asking whether an informal policy or arrangement is a plan.'" *Sandstrom v. Cultor Food Science, Inc.*, 214 F.3d 795, 797 (7th Cir. 2000).

The 9th Circuit's conflict between *Donovan* and the primary purpose test, and its uncertainty regarding the continuing viability of *Donovan* in light of Fort Halifax and Morash, is identical to a nationwide conflict and uncertainty among the other circuits. This Court should grant Rehearing En Banc given the muddled circuit-wide (and national) conflict and confusion regarding *Donovan*.

Put simply, the Ninth Circuit's affirmation in this case not only conflicts with its prior precedent in relying on the *Donovan* test, it also conflicts with the plain language of the ERISA statute which unambiguously defines a qualifying plan based on its "express terms or as a result of surrounding circumstances." 29 U.S.C. section 1002(2)(A). Simply refusing to do a surrounding circumstances test runs afoul of the federal statute, and creates a disjointed, confusing circuit split where the Ninth Circuit now essentially treats the tests as mutually exclusive. This Court should reverse the decisions of the Panel and District Court, and remand for further proceedings.

/
/
/
/
/
/

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Jon Weiner, OSB # 993944
Counsel for Petitioner
1415 Commercial St. SE
Salem, OR 97304
(503) 399-7001
jweiner@nw-attorneys.com

724 Fed.Appx. 625 (Mem)
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Jim MILLER, Plaintiff-Appellant,
v.
Eric OLSEN, an individual, president of the Board of Directors of Euterpe, Inc., and administrator of the Euterpe, Inc. Emplyee Equity Growth Plan; et al., Defendants-Appellees.

No. 16-35717
|
Argued and Submitted May 18, 2018 Portland, Oregon
|
Filed May 31, 2018

Appeal from the United States District Court for the District of Oregon, John V. Acosta, Magistrate Judge, Presiding, D.C. No. 3:15-cv-00571-AC

Attorneys and Law Firms

Jon H. Weiner, Jon H. Weiner Attorney at Law, Salem, OR, for Plaintiff-Appellant

Graham M. Sweitzer, Attorney, Robert B. Miller, Esquire, Attorney, Kilmer Voorhees & Laurick, P.C.,

Portland, OR, for Defendant-Appellee Eric Olsen

Robert B. Miller, Esquire, Attorney, Kilmer Voorhees & Laurick, P.C., Portland, OR, for Defendants-Appellees Does, Euterpe, Inc., Somerset, LLC

Before: McKEOWN and PAEZ, Circuit Judges, and LASNIK,* District Judge.

***626** MEMORANDUM**

Plaintiff Jim Miller appeals the district court's order granting defendants' motion for summary judgment on Miller's Employment Retirement Income Security Act ("ERISA") claims, on the basis that the Euterpe Employee Equity Growth Plan ("EGP") was not a defined contribution plan subject to ERISA. 29 U.S.C. § 1011-1461. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court.

We recently explained that whether or not the primary purpose of a plan is to provide deferred compensation or retirement income is the "paramount consideration" in determining whether a compensation plan qualifies as an employee pension benefit plan under ERISA. *See Rich v. Shrader*, 823 F.3d 1205, 1210 (9th Cir. 2016); *see also* 29 C.F.R. § 2510.3-2(c) (exempting "bonus payments" from the definition of a "pension plan" "unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees").

The "primary purpose" of the EGP is not to provide retirement benefits or deferred income, but rather to encourage longevity and provide increased compensation to select Euterpe employees. Although the EGP provided participants with shares that vested over twenty years, participants were allowed to "retire" their shares prior to completing twenty years of service and prior to retirement. *Cf. Rich*, 823 F.3d at 1208 (stating that an expectation that participants hold their shares until leaving the firm did not mean that the primary purpose of the plan was to provide retirement benefits or deferred income); *see also id.* at 1211 (finding that a vesting schedule in the plan reinforces the conclusion that the plan is not subject to ERISA). Given the option to retire shares early under the EGP, there is no "systematic deferral" of redemption until retirement or termination. *Id.* at 1210. Additionally, the selection of employees to participate in the EGP was at the sole discretion of the Board of Directors of Euterpe, which further demonstrates that the primary purpose of the EGP was not to provide retirement or deferred income. *Id.*

Defendants argue that we could also affirm the district court on the basis that the EGP lacks a source of financing and that it does not have an ongoing administrative scheme. As the EGP fails the primary purpose test, we need not reach either of these issues. *Id.* Additionally, Miller argues that the "surrounding circumstances" test adopted in ***627** *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), applies, while defendants argue against applying that test. We need not resolve whether to apply the test, as even

considering all the surrounding circumstances, a "reasonable person" could not conclude that the EGP passed the "primary purpose" test. *Id.* at 1373.

AFFIRMED.

All Citations

724 Fed.Appx. 625 (Mem), 2018 Employee Benefits Cas. 192,373

Footnotes

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

App. 5

2016 WL 4154936
United States District Court,
D. Oregon,
Portland Division.
Jim MILLER, Plaintiff,
v.
Eric OLSEN, Does 1 Through 5, Euterpe, Inc., an Oregon domestic corporation; Somerset, LLC, an Oregon Limited Liability Company, Defendants.
3:15–cv–00571–AC

Signed 08/04/2016

OPINION AND ORDER

JOHN V. ACOSTA, United States Magistrate Judge

***1** This matter comes before the court on defendants Eric Olsen, Does 1 through 5, Euterpe Inc., and Somerset, LLC's (collectively, "Defendants") motion (ECF No. 25) for summary judgment on plaintiff Jim Miller's ("Plaintiff") lawsuit (ECF No. 1), filed in this court on April 6, 2015. Upon consideration of the motion and the entire file, the motion is GRANTED.

Background

Plaintiff filed this lawsuit on April 6, 2015, alleging violations of the Employee Retirement Income Security Act ("ERISA"), breach of contract, promissory estoppel, breach of fiduciary duty, and fraud. (ECF No. 1.) Plaintiff is a 62–year-old construction supervisor who has worked in the residential construction industry for the last 30 years. Defendant Euterpe, Inc. ("Euterpe") is a residential construction company based in Monmouth, Oregon and owned by defendant Erik Olsen ("Olsen"). Between August 2004 and August 2013, Euterpe

employed Plaintiff as a construction supervisor. Euterpe's 2004 employment agreement with Plaintiff included terms of salary, health insurance, paid vacation, paid sick time, and mileage reimbursement. Euterpe did not have a retirement plan at the time of Plaintiff's hire.

In 2006, Olsen created an employee incentive program called the Equity Growth Plan ("EGP") to increase his employees' compensation and encourage longevity. To that end, Olsen formed Somerset, LLC ("Somerset") and purchased a building in Somerset's name. The building was Somerset's sole asset. Olsen then offered Plaintiff and a number of other employees to participate in the EGP by accepting a phantom ownership interest in Somerset, which provided an interest in the building's equity. Plaintiff became a participant in the EGP on January 1, 2008. (ECF No. 33, ¶5.)

The EGP's terms provide that participants are chosen at the "sole and absolute discretion" of Euterpe's Board of Directors and are issued "shares," which represent an ownership interest in Somerset. (ECF No. 26–2, p. 1.) The EGP's sole trust asset is "Somerset, LLC." (ECF No. 26–2, p. 2.) When a participant reaches 62 years of age, the participant automatically becomes fully vested and "shall be entitled to receive 100% of the Retirement Value of the Participant's Shares." (ECF No. 26–2, p. 3.) Although participants are permitted to withdraw benefits early, they may do so subject to penalties. *Id.* The EGP also provides a detailed formula for the calculation of benefits, (ECF No. 262, p. 4.)

Olsen sold Somerset's sole asset in 2013. For reasons unrelated to this lawsuit, Euterpe terminated Plaintiffs employment in August, 2013. Following Plaintiffs termination, Euterpe issued a check to Plaintiff for $10,000 which represented his total benefits under the EGP. (ECF No. 39, p. 3.) Plaintiff did not accept the tender, and brought this lawsuit.

Legal Standard

The court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). An issue is "genuine" if a reasonable jury could return a verdict in favor of the non-moving party. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). A fact is "material" if it could affect the outcome of the case. *Id.* The court views the evidence in the light most favorable to the non-moving party and draws "all justifiable inferences" in that party's favor. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006) (*quoting Hunt v. Cromartie*, 526 U.S. 541, 552 (1999)). When the moving party has met its burden, the non-moving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*quoting* FED. R. CIV. P. 56(e)). Conclusory allegations, unsupported by factual material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (*quoting Angel v. Seattle–First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981)).

Discussion

I. ERISA Claims

***2** The viability of Plaintiff's ERISA claims turns on whether the EGP qualifies as a plan governed by ERISA. There are few formal requirements for the creation of an ERISA plan. *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985) ("Although ERISA contains numerous requirements that a plan must adhere to—a written instrument, named fiduciaries, public reports, etc.—these requirements are not part of the definition of 'plan.' ") (citations omitted). However, an ERISA plan must invoke an "ongoing administrative program," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987), and must enable reasonable persons to "ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Winterrowd v. American General Annuity Ins. Co.*, 321 F.3d 933, 938–39 (9th Cir. 2003) (citing *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)).

Defendants ask the court to dismiss plaintiff's ERISA claims because the EGP does not qualify as an ERISA plan, arguing: (1) its express terms do not contemplate a method of funding; (2) its express terms do not contemplate an ongoing administrative scheme; and (3) its primary purpose is not to provide deferred compensation. Defendants also argue that the EGP does not qualify as an ERISA plan based on the circumstances surrounding its creation.

1. Source of Financing

Plaintiff maintains that the EGP qualifies under ERISA in part because the EGP terms include a method of funding by providing for "annual equity contributions." He argues that the EGP is funded by

annual equity contributions of 5 percent in between appraisals of Somerset.

The terms of the EGP, however, contain no description of a policy or method for funding a pension plan. Rather, the Section 4(b)(6) provides only for a method of valuing an employee's shares.

> "Total Retirement Value of all SHARES" is an amount equal to 90% of the appraised value of [Somerset], multiplied by the ratio of the Total Face Value of all SHARES to the Corporation's equity contributions to the LLC. An appraisal of the LLC shall be conducted at least once every five years. On each anniversary of the most recent appraisal, the Total Retirement Value of all SHARES shall increase by 5% until another appraisal is conducted.

(ECF No. 26–2, p. 2.) The fact that the value of shares may increase by 5 percent during the years between appraisals does not constitute a "method of funding," but a method of tracking increase in value over time in the years between appraisals of the building owned by Somerset. Under the EGP, if the subsequent appraisal is less than the value of the shares, the value of all shares decreases. Contrary to Plaintiff's contention, then, the EGP does not provide for source of financing that a reasonable person could ascertain; nothing in the plan identifies how money is placed in a fund for later distribution. Therefore, the plan fails to satisfy this condition. *Winterrowd*, 321 F.3d at 938–39 (the terms of an ERISA plan must enable reasonable persons to ascertain the plan's source of financing).

2. Ongoing Administrative Scheme

The Ninth Circuit has stated that "a relatively simple

test has emerged to determine whether a plan is covered by ERISA: does the benefit package implicate an ongoing administrative scheme?" *Delay e v. Agripac, Inc.*, 39 F.3d 235, 237 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987)). An ongoing administrative scheme requires an employer to apply more than "some modicum of discretion." *Velarde v. Pace Membership Warehouse, Inc.*, 105 F.3d 1313, 1317 (9th Cir. 1997). In *Velarde*, the Ninth Circuit stated that an ongoing administrative scheme requires "enough ongoing, particularized, administrative, discretionary analysis" to make a plan subject to ERISA. *Id.* An employer's exercise of "slight" discretion in determining whether an employee met the eligibility requirements for severance pay under the plan was not sufficient to show an ongoing administrative scheme. *Id.*

***3** Here, paragraph five of the EGP provides guidelines for administering the plan, including (1) an automatic vesting schedule, describing when a participant becomes 25%, 50%, and 100% vested; (2) a provision that the Board of Directors may allow a participant to borrow money from Euterpe or Somerset against his or her shares; and (3) the requirement that the Board to request an appraisal of Somerset's assets every five years.[1] (ECF No. 26–2, p. 3.)

These guidelines provide parameters that control when and how payments can be made from the plan to participants. Like the plan at issue in *Delaye*, the EGP guidelines contemplate little by way of ongoing management or discretionary analysis; they merely provide a formula for calculating the value of shares,

which allows for no discretion in its administration. *Delaye*, 39 F.3d 235 (9th Cir. 1994), (ECF No. 26–2, p. 2.)

On this record, the court finds the EGP's express terms do not provide ongoing, particularized, administrative, discretionary analysis sufficient to qualify the EGP as an ERISA plan. *Velarde*, 105 F.3d at 1317. Any discretion exercised by Defendants in determining whether an employee met the eligibility requirements for the EGP is not sufficient to show an ongoing administrative scheme under *Verlarde*. The EGP therefore also fails to meet the "ongoing administrative scheme" criterion to qualify as an ERISA plan. *Delaye*, 39 F.3d at 237.

3. Primary purpose

The Ninth Circuit recently stated that the "paramount consideration" in determining whether a plan is subject to ERISA is whether the primary purpose of the plan is to provide deferred compensation. *Rich v. Shrader*, No. 14–55484, 2016 WL 2994736, at *4 (9th Cir. May 24, 2016), The *Rich* opinion held that a retirement plan whose primary purpose was to provide capital to the firm and whose secondary purpose was to "provide a wealth creation vehicle for the partners," was not a qualified plan under ERISA, because its primary purpose was not to provide deferred compensation to its members. *Id.* at *4. The *Rich* court further noted that the administrators of the plan at issue held "sole discretion" to "grant Stock Rights in such amounts and to such Officers as it determines." *Id.* at *4. The discretionary administrative scheme provided further evidence that the plan at issue was not covered under

ERISA. Finally, the *Rich* court noted that the fact that participants in the plan could hold their shares until the end of employment was not sufficient to establish ERISA coverage, again because its primary purpose was not to provide deferred compensation. *Id.* at *5.

Here, the EGP's primary purpose was to reward employees and encourage longevity by creating shares that employees could cash-out upon termination of their employment with the company. Like the plan in *Rich*, the EGP's primary purpose was not to provide deferred compensation, even though participants could hold their shares until the end of their employment. Further, like the plan in *Rich*, participation rights in the EGP were determined at the total discretion of its administrators. For all of these reasons, EGP fails to meet the primary purpose criterion articulated by the Ninth Circuit.

***4** In sum, applying the EGP's express terms, the court finds that it is not subject to ERISA because its primary purpose is not to provide deferred compensation, and its terms do not include a "policy or method of funding" or an "ongoing administrative scheme." (ECF No. 26–2.) Based on an examination of its express terms, the EGP is not subject to ERISA. *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1443 (9th Cir. 1995).

4. Surrounding Circumstances Test

Plaintiff contends alternatively that the EGP is subject to ERISA based on the circumstances surrounding his enrollment in the EGP. Plaintiff contends Olsen represented to him that the "purpose

of the plan was to provide [him and others] with pension benefits commensurate with [his] long-term commitment to Euterpe, and to provide an opportunity for [him and others] to share in the profits and growth enjoyed by Euterpe." (ECF No. 1, ¶ 11.) Plaintiff also states that he relied on "Olsen's representation that the [EGP] was being funded in a manner commensurate with the profits and growth enjoyed by Euterpe." *Id.*

In *Donovan v. Dillingham*, 688 F.2d 1367 (9th Cir. 1982), the Ninth Circuit articulated a test that applies "where a formal plan is absent and the question remains whether a de facto plan has been created." *Cinelli*, 61 F.3d at 1443. *Donovan* provides that a " 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373.

The Ninth Circuit has stated, however, that the *Donovan* "surrounding circumstances" inquiry is limited to instances where a formal written plan is absent and the question remains whether a de facto ERISA plan exists. *Cinelli*, 61 F.3d at 1443. Here, the EGP is a formal plan and therefore must be evaluated by its express terms to determine whether it is subject to ERISA. *Id.* at 1443; *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1523 n.l (9th Cir. 1993). Because the EGP is based expressly on a written plan, the *Donovan* test does not apply.

Even if the EGP could be considered as evidence of

surrounding circumstances in the *Donovan* test, the facts do not establish that a de facto plan has been created. Here, the source of financing for the EGP cannot be determined from the EGP or other communications between Olsen Plaintiff. Thus, even when the surrounding circumstances test is applied, the EGP does not qualify as a plan under ERISA.

In sum, Plaintiffs ERISA claims fail as a matter of law because he fails to establish that the EGP was subject to ERISA. Because there is no genuine issue of material fact as to whether the EGP qualifies as an ERISA plan, Defendants' motion is granted with respect to Plaintiff's ERISA claims.

II. Breach of Contract Claim

To prevail on his breach of contract claim, Plaintiff must prove by a preponderance of evidence (1) the existence of a contract; (2) the relevant terms of the contract; (3) Plaintiffs full performance and lack of breach; and (4) the Defendants' breach resulting in damage. *Slover v. Oregon State Bd. Of Clinical Soc. Workers*, 144 Or. App. 565, 570 (1996). Defendants argue that Plaintiffs claim for breach of contract should be dismissed because no contract other than the EGP ever existed between the parties, and Defendants abided by the terms of the EGP at all times.

***5** Plaintiff alleges that a contract was formed through the parties' words and actions when Olsen told Plaintiff that he was eligible for retirement. As discussed above, Olsen invited Plaintiff to become a participant in the EGP in 2007. At that time Olsen told Plaintiff he was "now eligible for retirement" and

handed him an envelope containing two stock certificates and a copy of the EGP. (ECF No. 26–1, pp. 8, 11.) Plaintiff did not read the EGP and assumed that he was receiving shares of stock in Euterpe. (*Id.* at pp. 9–10; ECF No. 36, p. 67.) At his deposition, Plaintiff testified that he believed that he was a participant in a bona fide retirement plan based on Olsen's statements and conduct described above. (ECF No. 36, p. 67.) Plaintiff continued to work for Euterpe under the belief that his terms of employment included a retirement benefit plan. *Id.*

By contrast, former Euterpe employees Tyler Reid and Martha Anderson also participated in the EGP and understood that the EGP was not a retirement or pension plan. (ECF No. 28, 29.) Both Ms. Anderson and Mr. Reid understood that when they enrolled in the EGP they were receiving phantom shares in Somerset, but not an actual ownership interest in either Somerset or Euterpe. *Id.* While Plaintiff was enrolled in the EGP on January 1, 2008, he did not speak with anyone about the possibility of a retirement program until January, 2013.[2] (ECF No. 26–1, pp. 13, 15–16.) When Plaintiff requested information about the terms of the plan, Olsen responded that everything Plaintiff needed to know was in the EGP booklet, in the envelope he'd given him in 2007. *Id.* at p. 22–23.

This record does not contain an allegation that Defendants promised or formed a contract with Plaintiff for pension benefits. The evidence shows that a contract existed between the parties, governed by the terms of the EGP. Defendants did not breach the terms of the EGP because they tendered the

amount owed to Plaintiff upon his discharge. Therefore Defendants have not breached the contract formed under the EGP, and Plaintiff has not incurred any damages as a result. In sum, Plaintiff has not pleaded sufficient facts to show a genuine issue of material fact as to whether a contract with terms other than those in the EGP existed between the parties. Defendants' motion is therefore granted with respect to Plaintiffs breach of contract claims.

III. Promissory Estoppel

Promissory estoppel requires the promisee to establish: (1) a promise; (2) which the promisor, as a reasonable person, could foresee would induce conduct of the kind which occurred; (3) actual reliance on the promise; and (4) a substantial change in position by the plaintiff as a result of his or her reliance. *Bixler v. First Nat. Bank of Oregon*, 49 Or. App. 195, 199–200 (1980). Defendants argue that Plaintiff has not pleaded facts to satisfy the elements of promissory estoppel.

Here, Plaintiff testified that he relied on Defendants' statements, and that they created an expectation of pension benefits that led him to not seeking outside employment. As discussed above, however, the record does not contain a promise of pension benefits. While Defendant Olsen told Plaintiff "you are now eligible for retirement," a reasonable factfinder could not determine that Defendants promised to provide pension benefits to Plaintiff on these facts alone. Further, even if Olsen's statement of retirement eligibility constituted a promise, no reasonable promisor in Olsen's position would foresee that his statement could induce Plaintiff to remain employed

with Euterpe, not seek other employment, or otherwise refrain from taking steps to plan for his retirement. Because Plaintiff has not pled sufficient facts to support the first two elements of his promissory estoppel claim, Defendants' motion for summary judgment on Plaintiff's promissory estoppel claims is granted.

IV. Breach of Fiduciary Duty

***6** The elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary duty between the parties; (2) a breach of duty arising from that relationship; and (3) identifiable loss or injury caused by the breach. *Lindland v. United Business Investments, Inc.*, 298 Or. 318, 327 (1984). Defendants argue that (1) no fiduciary duty existed between the parties; and (2) to the extent that there was such a duty, Defendants were not in breach.

Plaintiff argues that Defendants' words and conduct created a fiduciary duty that was breached because Defendants failed to manage the trust in a way that would ever provide something akin to a pension or retirement benefit, failed to make regular equity contributions to the plan, and sold Somerset's sole trust asset. As discussed above, however, the contract formed between the parties was governed by the express terms of the EGP. Therefore Plaintiff has not established that Defendants owed him a fiduciary duty to manage the trust so as to provide pension benefits.

A reasonable factfinder, however, could determine that the terms of the EGP create a fiduciary duty insofar as they dictate payment terms and rules for

administering the plan. (ECF No. 26–2, pp. 2–3.). It is undisputed, however, that after Plaintiff was discharged Defendants calculated and tendered an amount exceeding[3] the total amount due to Plaintiff under the EGP. (ECF No. 39.) On this record, any fiduciary duty was discharged according to the terms of the EGP after Plaintiff ceased working for Defendants in 2013.[4]

V. Fraud claim

To establish fraud, Plaintiff must plead and prove: (1) a representation; (2) its falsity; (3) its materiality; (4) the defendant's knowledge of its falsity or his recklessness in that respect; (5) the defendant's intent that plaintiff should act on it in the manner reasonably contemplated; (6) the plaintiffs ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) damages. *Gerke v. Burton Enterprises, Inc.*, 80 Or. App. 714, 718 (1985). A claimant alleging fraud has the burden of proving the elements by clear and convincing evidence. *Miller v. Protrka*, 193 Or. 585, 592 (1951). Defendants argue that Plaintiff has failed to plead facts to establish the elements of a fraud claim.

Here, Plaintiff claims that Defendant Olsen made material misrepresentations and committed fraud when he informed Plaintiff that he was eligible for retirement, leading him to believe that he was part of a retirement plan. However, Plaintiff testified at his deposition that he had only one conversation with Olsen about the terms of the EGP, and cannot recall what he was told during that conversation; he was merely left with the impression that he was receiving shares of stock in a company, which he assumed to be

Euterpe. (ECF 26–1, pp. 5–6.) On this record, Plaintiff has not met the heightened pleading standard to support a claim that Defendants made false statement about the EGP, or suggested that it contained sufficient assets to provide meaningful retirement benefits commensurate with the performance of Euterpe. Defendants' motion is granted and Plaintiffs fraud claim is dismissed.

Conclusion

***7** For the reasons stated above, Defendant's motion (ECF No. 25) is GRANTED and Plaintiffs Complaint (ECF No. 1) is DISMISSED with prejudice.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 4154936, 62 Employee Benefits Cas. 1845

Footnotes

1 The EGP also provides that it "may be amended at any time and from time to time and may be discontinued at any time by the Board of Directors," and that questions of interpretation or application are to be determined by the board of directors or a committee selected at the discretion of the board. (ECF No. 26–2, p. 4.)

2 At deposition, Plaintiff testified that he was not told that Euterpe had a retirement program prior to beginning his employment there in 2004. (ECF No. 26–1, p. 6.) Plaintiff maintains he has no recollection of any discussion of a retirement plan at Euterpe

prior to his acceptance of employment there in 2004. Id. at p. 18.

3 Defendants calculated the value of Plaintiff's 20,000 shares on August 9, 2013 at $12,841; because they were only 50 percent vested under the EGP, the value of Plaintiff's shares on his discharge was $6,420. (ECF No. 27–1.)

4 Further, while Plaintiff contends that the sale of Somerset's sole trust asset left Somerset "essentially worthless," the members of Somerset viewed the transfer of the building's ownership as a sound business decision to protect the value of the LLC against falling real estate prices. (ECF No. 39, pp. 3–5.) There is no evidence to the contrary in the record. The sale of Somerset's asset was thus in good faith and does not constitute a breach of fiduciary duty.

End of Document

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON
PORTLAND DIVISION

Civ. No 3:15-cv-00571-AC
JUDGMENT

JIM MILLER,

Plaintiff,

v.

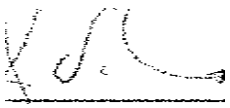
ERIC OLSEN, DOES I THROUGH 5, EUTERPE, INC., SOMERSET, LLC,

Defendants.

ACOSTA, Magistrate Judge.

IT IS HEREBY ORDERED and ADJUDGED that Defendants' Motion for Summary Judgment (ECF No. 25) is GRANTED and plaintiff's Complaint (ECF No. I) is DISMISSED with prejudice. Judgement is hereby entered accordingly.

DATED this 4th day of August, 2016.



JOHN V. ACOSTA, United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35717
D.C. No. 3:15-cv-00571-AC
District of Oregon,
Portland

ORDER

JIM MILLER,
Plaintiff-Appellant,

v.

ERIC OLSEN, an individual, president of the Board of Directors of Euterpe, Inc., and administrator of the Euterpe, Inc. Emplyee Equity Growth Plan; et al.,
Defendants-Appellees.

Before: McKEOWN and PAEZ, Circuit Judges, and LASNIK,* District Judge.

Judge McKeown and Judge Paez voted to deny the petition for rehearing en banc, and Judge Lasnik so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.
The petition for rehearing en banc is DENIED.

---

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.