

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SPEAR, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
FENKELL, et al.	:	NO. 13-02391

RICHARD A. LLORET
U.S. MAGISTRATE JUDGE

November 3, 2014

REPORT AND RECOMMENDATION

This case has been referred to me under 28 U.S.C. § 636(b)(1) for the purpose of scheduling and conducting conferences on all pretrial matters. Doc. No. 183. Defendant David B. Fenkell (Fenkell) filed a Motion for Preliminary Injunction seeking to prohibit the payment of various third-party Defendants attorneys’ fees and expenses. *See* Defendant’s Motion for a Preliminary Injunction Prohibiting the Payment of Third-Party Defendants’ Attorneys’ Fees and Expenses, Doc. No. 233 [“Def. Br.”]. In response, those third-party defendants filed a motion in opposition to the preliminary injunction. Doc. No. 241. Oral argument was held on October 16, 2014. Because Fenkell has failed to meet his burden of proving the elements necessary to justify a preliminary injunction, I recommend that his Motion be denied.¹

¹ Motions for injunctive relief are among the pretrial matters that a magistrate judge may not determine. 28 U.S.C. § 636(b)(1)(A); *see Sharp v. Owens Corning Fiberglas*, 785 F.2d 310 (6th Cir. 1986); *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 108 (2d Cir. 1987). Accordingly, I am submitting a recommendation to the district judge, under 28 U.S.C. § 636(b)(1)(B), which is subject to *de novo* review. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976).

Standard of Review

Preliminary injunctions are extraordinary remedies “which should be granted only in limited circumstances.” *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 29 F.3d 578, 586 (3d Cir. 2002). A party seeking a preliminary injunction must prove 1) he is likely to succeed on the merits 2) he is likely to suffer irreparable harm in the absence of preliminary injunctive relief 3) the balance of equities tips in his favor and 4) the injunction is in the public interest. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 675, 689-90 (2008)); *see also McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009). Failure to establish any of these elements is fatal to a preliminary injunction. *See NurtaSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). The movant bears the burden of proving all four elements by evidence “sufficient to convince the court.” *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987).

Analysis

i. Likelihood of Success on the Merits

The movant has failed to convince me that he is likely to succeed on the merits. Fenkell argues in his Third-Party Complaint that Spear and others were responsible for knowingly participating in breaches of fiduciary duty and various other prohibited transactions. *See* Third-Party Complaint, Doc. No. 214 ¶¶ 37-38 (asserting claims against Spear); ¶48 (asserting claims against Wanko and Lynn). As explained by Fenkell, this claim depends upon a key assumption: that assets of Alliance were assets of the ESOP at the time allegedly impermissible actions were taken by fiduciaries. *See* Def. Br. at 3. Tellingly, Fenkell has never asserted that Alliance assets are plan assets in

various pleadings on the record. *See* Defendants' Answer, Doc. No. 168 ¶ 94 (conceding that, at all relevant times, Alliance was an "operating company"); Defendants' Counterclaims, Doc. No. 168 ¶ 23 (writing that "at no time were Alliance's assets the assets of the Alliance ESOP trust, or 'plan assets,' as that term is defined and determined under the provisions of ERISA and the regulations promulgated thereunder"). Fenkell's counsel carefully reiterated his client's position at oral argument.² A party seeking an injunction cannot rely on contingent facts that he himself refuses to acknowledge are correct. The burden of a party seeking an injunction is to produce evidence sufficient to convince the judge that he is likely to succeed on the merits. A hypothetical state of affairs that the party actually disputes is not convincing evidence.

Spear highlights the fact that she, and other third-party defendants, have never alleged the assets of Alliance were ESOP assets after August 2011. *See* First Amended Complaint, Doc No. 65 ¶ 25. Because of this admission in the pleadings, Spear notes that "even if Fenkell were not adjudged an ERISA violator (*Chesemore*)³ with no credible claim to protecting the ESOP, because Alliance has been an operating company since 2011 (now three years), there is literally nothing to support Fenkell's contrived injunctive-relief argument (much less to prove a substantial likelihood of success for a preliminary injunction)." *See* Plaintiff's Memorandum of Law in Opposition for a

² This position is understandable. Fenkell's own liability as a fiduciary depends in large part on whether Alliance assets were ESOP assets during all or part of his tenure as a fiduciary. *See* Pl's Br. at 7 n. 2; Amended Complaint, Doc. No. 65, ¶ 158.

³ Fenkell was found liable for numerous ERISA violations during a federal bench trial in the Western District of Wisconsin in 2012. *See Chesemore v. Alliance Holdings, Inc.*, 886 F. Supp.2d at 1007, 1054-59 (W.D. Wis. 2012); *Chesemore v. Alliance Holdings, Inc.*, No. 09-cv-413-WMC, 2014 WL 4415919 at *12 (W.D. Wis. Sept. 5, 2014) (barring Fenkell from serving as a continuing trustee for Alliance). Some discussion during oral arguments turned on this decision and the possibility of a pending appeal filed to the 7th Circuit. This case has had no impact on my preliminary injunction findings or recommendation.

Preliminary Injunction [Plaintiffs' Br.], Doc. No. 241 at 3. I agree. The record is clear that this Complaint was filed in May of 2013. *See id.* at 5. Nearly two years elapsed between the time of the complaint and the time Alliance assets were last ESOP assets, if ever they were. Fenkell's argument that he is likely to succeed on the merits fails.

ii. Demonstration of Irreparable Harm

Fenkell has not demonstrated "irreparable harm" to his position should the preliminary injunction fail.⁴ It is the movant's responsibility to demonstrate a "clear showing of immediate irreparable injury." *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989). Dilatory conduct on the movant's part often defeats any contention of "immediate" injury. *See Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 726-27 (3d Cir. 2004). Evidence of negotiations, however, may allow for an irreparable harm claim to move forward even if there was a significant gap in time between injury and a preliminary injunction filing. *See Times Mirror Magazines v. Las Vegas Sports News*, 212 F.3d 157, 161 (3d Cir. 2000). In this case, the lawsuit was filed in May 2013. Fenkell filed this motion sixteen months later. *See Pl. Br.* at 9. No evidence of negotiations explains this gap. The delay demonstrates with irrefutable eloquence that no immediate action is required.

Not just the timing of the claim, but the type of harm alleged, urges against injunctive relief. Merely monetary harm does not qualify for preliminary injunctive relief. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 485 (3d Cir. 2000). While Fenkell's counsel noted at oral argument that Alliance was spending a great deal of

⁴ While I do not need to proceed further, because Fenkell has not established a likelihood of success on the merits, it is helpful to elaborate my findings on each factor. *See In re Arthur Teacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982) (finding a movant's failure to show a likelihood of success on the merits "must necessarily result in the denial of a preliminary injunction").

money on legal fees in this litigation, he failed to describe any extra-monetary injuries. In his brief, Fenkell cites to two cases out of the Ninth Circuit that found irreparable harm where there was a likelihood that a defendant being indemnified for attorneys' fees would not have the resources to reimburse those fees if the defense were unsuccessful. *See* Def. Br. at 13 (citing *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009); *Stanton v. Couturier*, 661 F.Supp.2d 1141 (E.D. Cal. 2009)). Those cases, as Spear notes in her brief, are factually distinct decisions “in which the ESOP was going to be liquidated and all remaining equity paid out to the ESOP participants as shareholders.” Pl. Br. at 10. The consequence was that every dollar paid to reimburse attorneys' fees was a dollar that would not be paid to ESOP participants. 572 F.3d at 1080. The practical effect of this situation was that ESOP participant plaintiffs would be paying their opponents' attorneys' fees, a result not countenanced by ERISA. 572 F.3d at 1081.

Here, by contrast, Alliance's assets are not being liquidated and distributed to ESOP participants. There appears to be little danger that ESOP assets will be used to pay attorneys' fees.⁵ The logic of the Ninth Circuit cases does not apply here. Fenkell has failed to produce evidence convincing me that he will suffer “irreparable harm.”

iii. Balance of Equities

In deciding whether to grant injunctive relief, a court ““must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”” *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v.*

⁵ Again, both Fenkell and the Alliance parties seem to be in agreement that Alliance assets are not ESOP assets, at least not now. There is nothing invidious about Alliance paying attorneys' fees for its officers. The problem arises if ESOP assets are used to pay indemnification.

Vill. of Gambell, AK, 480 U.S. 531, 542 (1987)). To succeed, a party seeking an injunction must demonstrate “that the balance of equities tips in his favor.” *Id.* at 20.

Fenkell argues that the interests of the Alliance ESOP participants trump those of the various plaintiffs seeking to have their attorneys’ fees paid from the ESOP itself. Def Br. at 13. Fenkell points again to *Johnson* in support of his argument. *Id.* Yet this case is very different from *Johnson*. Based upon the pleadings and the various documents on the record, if Alliance wins, it would recover money for the ESOP, money that Fenkell allegedly misappropriated. If Alliance loses, it has by all appearances spent Alliance money – not ESOP money – on attorneys’ fees, whether in pursuit of the affirmative case against Fenkell or defense of counterclaims. By contrast, if Fenkell wins, he keeps many millions of dollars. Fenkell has not presented evidence sufficient to convince me that the balance of equities tips in his favor.

iv. Public Policy Considerations

Finally, Fenkell argues that public policy favors an injunction. *See id.* at 14. Certainly it is the case, as Fenkell argues, that plan fiduciaries, under ERISA, are held to a high standard. *See id.* (citing *Shaw v. Delta Airlines Inc.*, 463 U.S. 85, 90 (1983) (noting that ERISA is designed to promote the interests of employees and employee beneficiaries in benefit plans)); *Perelman v. Perelman*, 919 F. Supp. 2d 512, 525 (E.D. Pa. 2013); *Herman v. Mercantile Bank, N.A.*, 143 F.3d 419, 425 (8th Cir. 1998). Nevertheless, this truism cuts at least as sharply against Fenkell as it does against Spear. The ultimate effect of Fenkell’s litigating position would be to prohibit recovery by the ESOP of substantial assets from Fenkell. The net effect of Spear’s litigating position would be to provide the ESOP with additional assets. The cold logic of public policy

suggests that expanding the pot of money available to the ESOP would further Congress' goal, under ERISA, of ensuring the viability of pension plans. *See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (drafters of ERISA were "primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.") Fenkell has not met his burden of supplying convincing evidence that public policy favors the injunctive relief he seeks.

CONCLUSION

Because he has failed to establish any of the four predicate elements of injunctive relief, Fenkell's motion for injunctive relief should be denied. Hence, the following Recommendation.

RECOMMENDATION

AND NOW, this 3d day of November, 2014, for the reasons described in the accompanying Memorandum, it is recommended that Defendant David B. Fenkell's Motion for a Preliminary Injunction Prohibiting the Payment of Third-Party Defendants' Attorneys' Fees and Expenses (Doc. No. 183) be **DENIED**.

s/Richard A. Lloret
RICHARD A. LLORET
U.S. Magistrate Judge