

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

JAMES BRYAN : CIVIL ACTION
 :
 v. :
 :
 THE PEP BOYS -- MANNY, MOE and :
 JACK : NO. 00-1525

MEMORANDUM AND ORDER

HUTTON, J.

June , 2000

Presently before this Court are Defendant the Pep Boys - Manny, Moe & Jack's Motion for Summary Judgment (Docket No. 16), Plaintiff James Bryan's Response to Defendant Pep Boys' Motion for Summary Judgment (Docket No. 23); Reply Memorandum of Law of Defendant the Pep Boys - Manny, Moe & Jack in Further Support of Motion for Summary Judgment (Docket No. 25), Plaintiff James Bryan's Sur-Reply in Opposition to Defendant Pep Boys' Motion for Summary Judgment (Docket No. 27). For the reasons stated below, the Motion is **GRANTED**.

I. FACTUAL BACKGROUND

In 1991, the Pep Boys ("Defendant") hired James Bryan ("Plaintiff") as Vice-President of Distribution. Defendant's offer letter contains a "summary" of the compensation and benefits package offered to Plaintiff. With respect to a retirement plan, the letter provides the following:

Participation in Pep Boys Executive Supplemental Pension Plan, which provides for a benefit of up to fifty (50%) of retiree's average five years' compensation. Benefit accrues at the rate of two (2%) per year of participation in the plan, up to a maximum of twenty five (25) years.

See Letter to James Bryan from Pep Boys dated February 12, 1991.

Defendants Executive Supplemental Pension Plan (the "Plan"), commonly referred to as a "Top-Hat" plan, is a Plan under ERISA that is unfunded and is maintained by Defendant primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. See 29 U.S.C. § 1031. The letter provides brief summaries of various other benefits available to Plaintiff, including Defendant's medical plan, dental plan, long-term disability salary continuation plan and 401-K plan. See Letter to James Bryan from Pep Boys dated February 12, 1991. Plaintiff accepted the offer letter and signed the "Acknowledgment" included in the letter of February 13, 1991. See *id.* Plaintiff affirmed that he had "carefully read and fully underst[oo]d each of the terms of the foregoing offer of employment" and "agree[d] to accept employment with" Defendant on those terms. See *id.* The Plan was explicitly referenced in the offer letter. See *id.*

Of particular importance to this matter, Defendant's Plan contained a forfeiture provision in Section 3.8. The provision reads as follows:

[A] person who is an Eligible Employee shall cease to have any right to receive any payment hereunder and shall cease to have any right to receive any payment hereunder and all obligations of the Company to make payments to or on account of an

Eligible Employee shall cease and terminate should this Administrator find . . . such Eligible Employee . . . has directly . . . as [a] . . . consultant . . . engaged in any business activity which is substantially similar to or competitive with any business activity conducted by [Defendant]

See Def.['s] Supplemental Executive Pension Plan, § 3.8.

Defendant filed a statement with United States Department of Labor describing the Plan. The filing satisfied the requirements of 29 C.F.R. § 2520.104-23. As a result, Defendant is exempt from providing a summary description of the Plan to Plan participants. See Pep Boys' filing concerning its Executive Supplemental Pension Plan pursuant to 29 C.F.R. § 2520.140-23.

On January 12, 1998, Plaintiff submitted a letter of resignation to Michael Riggan stating that he would retire in March of 1998. See Letter of January 12, 1998 from James Bryan to Michael Riggan. By January 16, 1998, Defendant had accepted Plaintiff's resignation. See Letter of January 16, 1998 from Roger Rendin to Jim Bryan. On January 16, 1998, Roger Rendin wrote a memorandum to Plaintiff and directed Plaintiff to read Section 3.8 of the Plan, which was enclosed with the memorandum. See *id.* As noted before, the provision provided, in sum, that if Plaintiff worked for a competitor of Defendant after his retirement, then his right to receive payment under the plan shall cease. See Executive Supplemental Pension Plan, § 3.8. Thereafter, Plaintiff elected the joint and survivor annuity as provided for in the Executive Supplemental Pension Benefit. See Letter from Paul L. Robbins to

James Bryan dated March 27, 1998; see also Executive Supplemental Pension Plan Benefit Summary (stating Plaintiff may elect benefits "in accordance with the provisions of the Pep Boys Executive Supplemental Pension Plan").

On March 31, 1998, Plaintiff retired from Defendant and Defendant commenced paying Plaintiff a monthly benefit of \$1,165.85 under the retirement plan. See *id.* Defendant paid these benefits until June 1999. About six months after Bryan retired, Bryan became consultant to Midas, a competitor. See Bryan Dep. at 65; Consulting Agreement dated December 5, 1998 between Midas and James Bryan. Plaintiff does not contest that the Midas is a competitor of Defendant. See Letter dated Sept. 7, 2000 from Pl.['s] Counsel to Def.['s] Counsel. In addition to Plaintiff's consulting agreement with Midas, Plaintiff and Midas executed an indemnification agreement which indemnifies Plaintiff for all attorneys' fees and any loss of benefits stemming from enforcement of Section 3.8 of the Plan. See Indemnification Agreement dated Dec. 5, 1998. The Indemnification Agreement explicitly states that Plaintiff "is a participant in the Executive Supplemental Pension Plan (Amended and Restated Effective January 1, 1988)" See *id.*

On June 10, 1999, Defendant wrote to Plaintiff and advised him that working for Midas triggered Section 3.8 of Defendant's plan. See Letter dated June 10, 1999 from Paul Robbins to Paul Bryan.

The letter also stated that Defendant was terminating payments to Plaintiff under the Plan. See *id.* The letter further instructed Plaintiff to refer to the claims procedure set out in Article VIII of the Plan if he should choose to contest the discontinuance of his benefits. See *id.* Bryan pursued an administrative appeal pursuant to Plan provisions and Plaintiff's appeal was denied on December 31, 1999. See Pl.['s] Response to Def.[s'] Mot. for Summ. J., at 13.

II. DISCUSSION

Plaintiff alleges the following causes of action: (1) breach of Plaintiff's employment contract, which Plaintiff alleges consisted of Defendant's offer letter and other oral representation made to Plaintiff; (2) as an alternative to the first count, Plaintiff alleges that if the terms of Defendant's written plan govern his rights to supplemental retirement benefits, then Section 3.8, the forfeiture provision, is void; (3) assuming the forfeiture provision is not void, Defendant is estopped from enforcing that provision against Plaintiff; and (4) Plaintiff seeks declaratory relief. In the instant motion, Defendant asks this Court to grant summary judgment on all counts and dismiss Plaintiff's First Amended Complaint.

A. Terms of Plaintiff's Employment Contract

Plaintiff asserts in his First Amended Complaint (the "Complaint") that Defendant's offer letter of February 12, 1991,

the representations made during oral discussions about the terms of Defendant's offer of employment, along with Plaintiff's acknowledgment, constitute a contract between the parties. See Pl.['s] Compl. ¶¶ 33-37. This contract, it is alleged, constitutes the entirety of Plaintiff's supplemental executive pension plan. Plaintiff's Complaint further asserts that, pursuant to his pension plan, he has been entitled to Top Hat benefits of at least \$1,165.85 a month since March 27, 1998. It is further alleged that Defendant's termination of those benefits constitutes a breach of Plaintiff's employment contract.

The Court noted, in its discussion of the undisputed facts above, that Plaintiff accepted benefits that are detailed in Defendant's Supplemental Executive Pension Plan. Plaintiff elected to receive benefits under the Plan and also utilized Defendant's appeal process after Defendant terminated payment of Plaintiff's benefits. Because Plaintiff accepted the benefits of certain provisions of the Plan, such as the Early Retirement formula and joint and survivor annuity and having taken advantage of the appeals process set forth in Article VIII of the Plan, Plaintiff is estopped from claiming that the Plan as a whole does not apply to him. See *McIntyre v. Philadelphia Suburban Corp.* 90 F. Supp. 2d 596, 600 (E.D. Pa. Mar. 7, 2000)(declining to engage in legal selectivity or to assist plaintiff in enforcing selected provisions of stock option plan, while exempting plaintiff from other

provisions). Because Plaintiff has accepted certain provision of Defendant's Supplemental Executive Benefits Plan, the Court finds that Plaintiff cannot now renounce other provisions of Defendant's Plan. The Court holds that because Plaintiff has accepted certain benefits of Defendant's Plan, Plaintiff's employment contract does not consist solely of the offer letter and the oral representations made to him, but also includes Defendant's Plan. As a result, the Court grants summary judgment on Count One of Plaintiff's Complaint.

B. Validity of the Supplemental Executive Pension Plan's Forfeiture Provision

Count Two of Plaintiff's Complaint asserts, as an alternative to Count One, that Defendant breached the terms of the Plan. Plaintiff asserts that Defendant breached the Plan because, among other things, the forfeiture provision of the Plan is unreasonably broad in scope and unlimited in time and there was no consideration for the provision. See Pl.['s] Compl. ¶ 43. As a result, Plaintiff alleges, Section 3.8 is invalid on its face, void and unenforceable. See id.

The Court first addresses Plaintiff's claim that Section 3.8 of the Plan should not be enforced because Plaintiff was not informed about Section 3.8 by way of a Summary Plan Description ("SPD") as is required by 29 U.S.C. § 1022(a). Plaintiff

acknowledges that:

an employer can exempt itself from the SPD requirement for a Top Hat Plan only by complying with certain Department of Labor Regulations. The DOL regulation requires that the employer file a certificate with the Department "within 120 days after the plan, is created or amended and restated In 1992 the Department of Labor created a safe harbor for employers that had previously failed to file the required certificate. Under this safe harbor provision, employers could comply with the alternative disclosure method by filing their certificates "on or before September 30, 1992.

See Pl.['s] Response to Def.['s] Summ. J., at 22, n. 8 (citations omitted).

Contrary to Plaintiff's assertion, Defendant took advantage of the safe harbor provision by filing the appropriate statement as required by the Department of Labor. See Letter dated September 15, 1992 Re: notice Under DOL Reg. 2520.104-23 for Exemption for Top Hat Plan Maintained by the Pep Boys. As a result, the Court grants Defendant's motion for summary judgment with respect to this aspect of Plaintiff's argument.

Plaintiff also argues that the Plan's forfeiture provision detailed in Section 3.8 is unenforceable because it is unreasonably overly broad and protects no legitimate interest business of Defendant.

The Court notes that ERISA's coverage provisions, 29 U.S.C. §§ 1003, 1051, 1081, and 1101, state that ERISA shall apply to any employee benefit plan, other than listed exceptions. One of these exceptions, known as a Top Hat Plan, is defined as: "a plan which is unfunded and is maintained by an employer primarily for the

purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). Top Hat plans are exempt from the participation and vesting provisions of ERISA, 29 U.S.C. §§ 1051-1061, its funding provisions, 29 U.S.C. §§ 1081-1086, and its fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, though not from its reporting and disclosure provisions, 29 U.S.C. §§ 1021-1031, or its administration and enforcement provisions, 29 U.S.C. §§ 1131-1145. Of particular importance to this discussion, ERISA intentionally omits Top Hat plans from its nonforfeitability protection. See 29 U.S.C. 1051; 1053.

Courts use federal common law to fill in the interstices of ERISA's statutory scheme, deciding claims that are allowed by ERISA, but where ERISA does not provide substantive law. See *Bidga v. Fishbach*, 898 F. Supp. 1004, 1016 (S.D.N.Y. June 8, 1995), *aff'd*, 101 F.3d 108 (2d Cir. 1996). The failure of ERISA to provide nonforfeitability coverage to Top Hat plans is not an "interstice" because it is the result of a deliberate decision to let executives use their positions of power to negotiate such protection for their plans on their own. See *id.* Federal common law must further the purposes of the statute under which it is used; it may not be used "to re-write the federal statute." See *id.* Since ERISA intentionally omits Top Hat plans from its nonforfeitability protection, federal common law may not be used to

create nonforfeitability protection under ERISA.

Applying Section 3.8 to the undisputed fact that Plaintiff accepted employment with Midas, a competitor, Plaintiff forfeited his right to receive any payment under Defendant's Plan. As a result, Defendant's motion to grant summary judgment on Count Two of Plaintiff's Complaint is granted.

C. Estoppel Claim

Plaintiff's third claim against Defendant is based on a theory of estoppel. Plaintiff asserts that Defendant only represented that Plaintiff would accrue pension benefits under the Top Hat Plan as detailed in Defendant's letter offering employment with Defendant. See Pl.[']s Compl. ¶ 48. Plaintiff also asserts that he relied on these representations by accepting employment and continuing to work for Defendant for seven years. See *id.* ¶ 49. Because Defendant has failed to "live up to its representations," Plaintiff asserts that he has relied on Defendant's representations to his detriment.

The "ordinary elements" of equitable estoppel include: "(1) a material representation, (2) reasonable reliance upon that representation, and (3) damage resulting from that representation." See *Gillis V. Hoechst Celanese Corporation*, 4 F.3d 1137, 1142 (3d Cir. 1993). When a plaintiff asserts an equitable estoppel claim based on an ERISA reporting and disclosure violation, the plaintiff

must satisfy more than simply the "ordinary elements" of equitable estoppel. See *id.* The Third Circuit has stated that precedent indicates that an ERISA reporting or disclosure violation cannot provide a basis for equitable estoppel in the absence of "extraordinary circumstances." *Id.*

Plaintiffs bear the burden of proof on each estoppel element. See *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996). The Third Circuit has stated that to show extraordinary circumstances, a claimant must produce evidence of "affirmative acts of fraud or similarly inequitable conduct by an employer, . . . misrepresentations that arise[] over an extended course of dealings between parties, . . . [or] the vulnerability of particular plaintiffs." *Id.* at 1553.

Here, Plaintiff has presented no evidence which supports an inference of bad faith and/or fraudulent conduct on the part of the Defendant, misrepresentations over an extended course of dealing, or the particular vulnerability of the Plaintiff. Consequently, the Court grants Defendant's motion for summary judgment on Count Three.

The foregoing shall constitute the court's findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52.

An appropriate Order follows.

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O R D E R

AND NOW, this day of June, 2001, upon consideration of, Manny, Moe & Jack's Motion for Summary Judgment (Docket No. 16), Plaintiff James Bryan's Response to Defendant Pep Boys' Motion for Summary Judgment (Docket No. 23); Reply Memorandum of Law of Defendant the Pep Boys - Manny, Moe & Jack in Further Support of Motion for Summary Judgment (Docket No. 25), Plaintiff James Bryan's Sur-Reply in Opposition to Defendant Pep Boys' Motion for Summary Judgment (Docket No. 27), IT IS HEREBY ORDERED that said motion is **GRANTED** and Plaintiff's First Amended Complaint is dismissed.

BY THE COURT:

HERBERT J. HUTTON, J.