14-1058
Gill v. Bausch & Lomb

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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1        At a stated term of the United States Court of Appeals
2    for the Second Circuit, held at the Thurgood Marshall United
3    States Courthouse, 40 Foley Square, in the City of New York,
4    on the 3rd day of December, two thousand fourteen.
5
6    PRESENT: DENNIS JACOBS,
7             REENA RAGGI,
8             DEBRA ANN LIVINGSTON,
9                       Circuit Judges.
10
11   - - - - - - - - - - - - - - - - - - - - - - -X
12   DANIEL E. GILL, THOMAS C. MCDERMOTT,
13   and JAY T. HOLMES,
14        Plaintiffs-Appellees,
15
16        -v.-                                    14-1058
17
18   BAUSCH & LOMB SUPPLEMENTAL RETIREMENT
19   INCOME PLAN I, BAUSCH & LOMB
20   INCORPORATED, and the COMPENSATION
21   COMMITTEE OF THE BAUSCH & LOMB BOARD
22   OF DIRECTORS,
23        Defendants-Appellants.
24   - - - - - - - - - - - - - - - - - - - - - - -X
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26   FOR APPELLANTS:              HOWARD SHAPIRO, with Nicole A.
27                               Eichberger, Proskauer Rose LLP,
28                               New Orleans, Louisiana.
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 1                                    Anthony S. Cacace, Proskauer
 2                                    Rose LLP, New York, New York.
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 4   FOR APPELLEES:                   HAROLD A. KURLAND, with William
 5                                    R. Leinen, Ward Greenberg Heller
 6                                    & Reidy LLP, Rochester, New
 7                                    York.
 8
 9        Appeal from a judgment of the United States District
10   Court for the Western District of New York (Telesca, J.).
11
12        UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
13   AND DECREED that the judgment of the district court be
14   AFFIRMED.
15
16        Defendants-appellants (collectively, "Bausch & Lomb")
17   appeal from the judgment of the United States District Court
18   for the Western District of New York (Telesca, J.), granting
19   summary judgment in favor of plaintiffs-appellees Daniel E.
20   Gill, Thomas C. McDermott, and Jay T. Holmes ("plaintiffs").
21   We assume the parties' familiarity with the underlying
22   facts, the procedural history, and the issues presented for
23   review.
24
25        Plaintiffs, three former Bausch & Lomb executives,
26   brought suit under the Employee Retirement Income Security
27   Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., alleging
28   that when Bausch & Lomb was bought out by a private equity
29   firm, new management misconstrued the "change-in-control"
30   provision in their retirement plan ("the plan"), and thus
31   unlawfully reduced their pension benefits.  The district
32   court agreed, granting plaintiffs' cross-motion for summary
33   judgment.  Bausch & Lomb appeals, raising two issues: (1)
34   whether Bausch & Lomb's interpretation of the plan's change-
35   in-control provision was correct (under a de novo standard
36   of review), and (2) if not, whether the district court's
37   remedy for that violation was an appropriate exercise of its
38   discretion.  We affirm.[1]
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[1]   The standard of review on the first issue was contested before the district court, which held that the decision should be reviewed de novo, but also that Bausch & Lomb's decision could not even survive the deferential arbitrary and capricious standard. We assume without deciding that the proper standard of review is de novo, because Bausch & Lomb does not challenge this aspect of the district court's ruling on appeal.

1   **1.** The Compensation Committee of the Board of
2 Directors interpreted the "change-in-control" provision
3 (Section 13 of the plan) to apply to plaintiffs, as "Retired
4 Participants." Although Section 13 only mentions
5 "Participants"--a separately defined term under the plan--
6 Bausch & Lomb argues that, reading the plan as a whole,
7 "Retired Participants" are a subset of "Participants," so
8 they too are subject to the lump-sum cash-out provision in
9 Section 13. The district court disagreed with Bausch &
10 Lomb's interpretation. As do we.

12   The major problem with Bausch & Lomb's interpretation
13 is that Section 13 explicitly mentions "Participants," but
14 contains no mention of "Retired Participants." That
15 omission cannot be ignored, because the definitions section
16 of the plan defines the two categories to be mutually
17 exclusive:

19   (f) <u>Participant</u> means an employee of the Company
20   who has been selected to participate in the Plan
21   pursuant to Section 4.

23   [...]

25   (h) <u>Retired Participant</u> means a former Participant
26   who is receiving benefits under this Plan.

28 Plan § 2. Accordingly: (1) Retired Participants such as
29 plaintiffs are, in fact, retired, so they are no longer
30 "employee[s] of the Company," as is required to be a
31 Participant; and (2) a Retired Participant, as a matter of
32 logic, cannot be both a "former Participant" and a current
33 Participant (due to the temporal element inherent in the
34 word "former").

36   Moreover, Section 13 presents one more textual problem
37 for Bausch & Lomb's interpretation. It provides that, for
38 purposes of "determining the Participant's accrued benefit,"
39 the "date of the Change of Control" will act as a stand-in
40 for "the date of Termination of Employment." In other
41 words, Section 13 creates an artificial termination date in
42 the event of a change in control (the age of the beneficiary
43 on his termination date is relevant to determining the size
44 of the benefit payment, <u>see</u> Plan § 5(a)). But, as Bausch &
45 Lomb concedes, this provision is critical as applied to
46 Participants (who would need an artificial termination date,
47 because they are still working for the company), but is
48 senseless as applied to Retired Participants (who already

1   have a termination date--that is, their actual retirement or
2   separation date). Bausch & Lomb argues that "the most
3   plausible reading of that provision is that it would only
4   redefine termination dates where *necessary*." But it never
5   explains why the rest of Section 13 should apply to Retired
6   Participants, even though (as it concedes) this language
7   does not.

9   Bausch & Lomb falls back on a series of arguments about
10 the overall structure and purpose of the plan, which it
11 claims compel the inference that, at least in Section 13, a
12 reference to "Participants" necessarily includes "Retired
13 Participants." To be sure, an ERISA plan, like any
14 contract, "should be read to give effect to all of its
15 provisions and to render them consistent with each other."
16 Perreca v. Gluck, 295 F.3d 215, 224 (2d Cir. 2002) (quoting
17 Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63
18 (1995)). But most of Bausch & Lomb's structure and purpose
19 arguments are unpersuasive, and in any event, none comes
20 close to the showing required to overcome the plan's plain
21 text, which strongly favors plaintiffs' interpretation.

23   In sum, because it is plain that Section 13 applies
24 only to Participants, Retired Participants such as
25 plaintiffs do not fall within its scope.

27   **2.** Bausch & Lomb also challenges the district court's
28 remedy, which ordered reinstatement of Bausch & Lomb's
29 monthly benefit obligation, while allowing for a one-time
30 "credit" in the amount of the (unlawful) lump-sum that
31 Bausch & Lomb already paid. "We review a district court's
32 chosen remedy of an identified ERISA violation for an excess
33 of allowable discretion." Frommert v. Conkright, 535 F.3d
34 111, 117 (2d Cir. 2008), rev'd on other grounds, 559 U.S.
35 506 (2010); accord Zervos v. Verizon N.Y., Inc., 277 F.3d
36 635, 648 (2d Cir. 2002).

38   The district court was faced with an unusual remedial
39 problem. On one hand, plaintiffs are in possession of a
40 large sum of money they should not yet have (as a result of
41 their successful ERISA lawsuit); on the other hand, Bausch &
42 Lomb will owe them *more* money, in the future, if they live
43 long enough. The district court's chosen remedy was an
44 appropriate exercise of discretion. We need not decide
45 whether Bausch & Lomb's proposed alternative--to require
46 return of the lump sum, then begin monthly benefit payments
47 immediately--would also have been permissible. But the need
48 to craft a remedy, even if imperfect, is the result of

1   Bausch & Lomb's own violations of ERISA. Under these
2   circumstances, the district court's remedy is not an abuse
3   of discretion.
4
5   The district court's remedy does not run afoul of the
6   principle, announced by the U.S. Supreme Court in <u>CIGNA</u>
7   <u>Corp. v. Amara</u>, 131 S. Ct. 1866 (2011), that a district
8   court has no authority to "reform" an ERISA plan. The only
9   relief ordered by the district court--reinstatement of
10   monthly benefit payments that Bausch & Lomb had unlawfully
11   withheld--was explicitly called for by the plan itself. And
12   the district court's practical measure of a "credit" in the
13   amount of the lump sum is a traditional application of the
14   remedy of contractual expectation damages--ensuring that
15   plaintiffs are restored to the same financial position they
16   would have been in, but for Bausch & Lomb's breach. <u>See,</u>
17   <u>e.g.</u>, <u>United States v. Boccagna</u>, 450 F.3d 107, 119 (2d Cir.
18   2006) ("Expectation damages strive to place an aggrieved
19   party in the same economic position it would have been in
20   had both parties fully performed their contractual
21   obligations.") (internal quotation marks and citation
22   omitted). <u>Amara</u> instructs a district court to limit itself
23   to "the simple enforcement of a contract as written," 131 S.
24   Ct. at 1877; the district court did just that.
25
26   For the foregoing reasons, and finding no merit in
27   Bausch & Lomb's other arguments, we hereby **AFFIRM** the
28   judgment of the district court.
29
30   FOR THE COURT:
31   CATHERINE O'HAGAN WOLFE, CLERK
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