STATE OF OHIO)
)SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. CV-437548

WILLIAM R. BENNETT, et al

Plaintiffs

vs.

CASHEL MANAGEMENT CO., INC., et al

Defendants

OPINION AND ORDER

MICHAEL J. RUSSO, JUDGE:

On March 5, 2002, Plaintiff William R. Bennett (hereinafter "Bennett") voluntarily dismissed all claims against the Defendants. The only remaining claims are Bennett's cross-claims for declaratory judgment and other relief against Involuntary Plaintiffs Ohio Vision Service Plan (hereinafter "OVSP") and its successor, Vision Service Plan (hereinafter "VSP"). Bennett and Involuntary Plaintiffs have filed cross-motions for summary judgment. For the following reasons, Involuntary Plaintiffs' motion for summary judgment is granted in part and denied in part, and Bennett's motion for partial summary judgment is granted in part and denied in part.

Facts

The following facts are not in dispute. In the mid-1960's, Bennett founded OVSP and served as its President and Chief Executive Officer until it merged with VSP in 1994. (Affidavit of William R. Bennett, dated 6/24/02, at ¶2; hereinafter "Bennett ¶ "). After the merger, Bennett remained as an employee/senior consultant of VSP until January 2, 2001, when he retired. In 1988, while Bennett was employed at OVSP, he entered into an Amended and Restated Deferred Compensation Agreement (hereinafter "1988 Plan") by which he deferred a portion of his compensation into an account administered by OVSP. (Bennett ¶3). The 1988 Plan is a "top-hat plan," meaning it is "unfunded" and there are no real assets securing payment under the plan. Unfunded top-hat plans create an unsecured contract claim against the employer collectible only out of the employer's general assets.

By 1990, Bennett began withdrawing funds from his OVSP-administered deferred account for deposit with an outside investment firm. (Affidavit of Patricia Cochran, dated 8/13/02, at ¶16; hereinafter "Cochran ¶ "). In May 1993, he liquidated his outside account and had the proceeds sent back to his deferred compensation account at OVSP. (Cochran ¶22). In advance of the merger, Bennett transferred his entire deferred compensation account to VSP. These funds were held pursuant to the 1988 Plan. (Bennett ¶5).

As part of the affiliation and merger in 1994, a second deferred compensation account was established pursuant to Deferred Compensation Agreement for William R. Bennett (hereinafter "1994 Plan"). (Cochran ¶32-33). The 1994 Plan is another "top-hat plan." VSP opened a custodial account that Bennett's investment advisor, Cashel Management, used to invest the funds held in his 1994 plan. Cashel Management was hired by VSP at Bennett's request. (Bennett ¶4). In June 1999, VSP transferred $619,625.00 - - all of the money in Bennett's 1988 plan - - to another custodial account to be managed by Cashel Management. (Bennett ¶7 & Cochran ¶30). During the year 2000, Bennett deferred additional compensation pursuant to the

1988 Plan in the amount of $6, 383.00. (Bennett ¶7).

Cashel Management proceeded to invest a majority of these funds in RX Remedy. All of these funds ultimately were lost when RX Remedy became insolvent due to fraud involving Cashel Management and RX Remedy. Cashel Management principals, Jack Orin and Tom Durkin, and Karamjeet Paul, principal of RX Remedy, have pled guilty to various felony offenses in connection with the RX Remedy embezzlement scheme. (Affidavit of William R. Bennett, dated 9/2/02, at ¶ 5).

Analysis

Bennett seeks a declaratory judgment to determine the rights and obligations of the parties under the 1988 and 1994 Plans. With respect to the 1994 Plan, the Court hereby determines that pursuant to section 5(A) of the Deferred Compensation Agreement for William R. Bennett, Bennett was permitted to select the investment vehicle; further, section 5(B) of the Plan shifts "all risks in connection with any decrease in value of the funds which are invested" to Bennett. Section 11 of the 1994 Plan also limits the employer's liability. Pursuant to section 11, Bennett agreed to assume all risks in connection with any increase and/or decrease in value of the assets or the amount identified in the Measuring Account. He also agreed to hold VSP harmless with respect to any expenses or losses incurred by the Measuring Account. As a result, the Court declares that Bennett bears the risk of loss he sustained with respect to funds he deferred under the 1994 Plan.

With respect to the 1988 Plan, however, the language of that Plan does not specifically shift the risk of loss to Bennett. The only section of the 1988 Plan which touches on the issue of loss is section 7.03, which states that "Bennett specifically agrees not to seek recovery against VSP or any other employee, contractee, or agent of VSP for any loss sustained by Bennett or his beneficiary, for the non-performance of their duties, negligence, or any other misconduct of the above named persons except that this paragraph shall not excuse fraud or wrongful taking by any person." The Court hereby determines that this provision allows Bennett to seek recovery from VSP for loss due to fraud. In light of the evidence submitted before the Court, a fraud was perpetrated by the Cashel Defendants, agents of VSP, to the detriment of Bennett.

Involuntary plaintiffs argue at length that Bennett should bear the risk of loss because he self-directed investment of the funds. In particular, they point to the fact that when Bennett worked for OVSP, he self-directed investment of some of the 1988 deferred compensation funds, and that when the assets did well he did not return the difference to OVSP. The Court finds the course of dealings between Bennett and OVSP is irrelevant. At the time of the merger, VSP could have declined to accept the 1988 Plan and could have insisted on the parties entering into a different agreement to have included a risk shifting provision. This was not done. The Court is not authorized to insert language where it is lacking. Thus, VSP and Bennett are stuck with the poorly drafted language contained in the 1988 Plan. Since the Plan is "unfunded," Bennett has a claim against VSP, which is collectible out of VSP's general assets. Accordingly, the Court declares that VSP bears the risk of loss of the funds deferred under the 1988 Plan and is obligated to make payment in accordance with that Plan to the now-retired Bennett.

Conclusion

Plaintiff's motion for summary judgment is granted as to the 1988 Plan, but denied as to the 1994 Plan. Involuntary Plaintiffs' motion for summary judgment is granted as to the 1994 Plan, but denied as to the 1988 Plan. Pursuant to the 1988 Plan, Bennett is entitled to an award of benefits in the amount of $626,008.00 plus interest from the date of judgment at the statutory rate of 10%. Bennett is not, however, entitled to an award of attorney fees pursuant to the hold harmless provision of section 7.05 of the 1988 Plan. Further, since he is not the prevailing party under the 1994 Plan, he is not entitled to attorney fees pursuant to section 21 of that Plan. Finally, by virtue of this ruling on the cross-motions for summary judgment, no claims remain between Plaintiff and Involuntary Plaintiffs.

IT IS SO ORDERED.

2-17-04
DATE:

MICHAEL J. RUSSO, JUDGE

RECEIVED FOR FILING
FEB 17 2004
GERALD E. FUERST
By ___ Dep.

CERTIFICATE OF SERVICE

A copy of the foregoing **Opinion and Order** has been sent by facsimile and regular U. S. mail this 17th day of February, 2004 to: James A.DeRoche, 1600 Rockefeller Building, 614 West Superior Avenue, Cleveland, Ohio 44113, Counsel for William R. Bennett and Michael E. Smith, 55 Public Square Bldg., 19th Floor, Cleveland, Ohio 44113-1999, Counsel for Vision Service Plan and Ohio Vision Service Plan.

THE STATE OF OHIO } SS. I, GERALD E. FUERST, CLERK OF
Cuyahoga County } THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND COPIED FROM THE ORIGINAL 432598 Opinion 2-17-04
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 17
DAY OF Feb A.D. 2004
GERALD E. FUERST, Clerk
By ___ Deputy

MICHAEL J. RUSSO, JUDGE