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Citation #1
48 N.Y.2d 84

LEXSEE

Jack E. Post et al., Appellants, v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al., Respondents

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

48 N.Y.2d 84; 397 N.E.2d 358; 421 N.Y.S.2d 847; 1979 N.Y. LEXIS 2314

September 5, 1979, Argued
October 18, 1979, Decided

PRIOR HISTORY: Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 28, 1978, which modified, on the law, and, as modified, affirmed an order of the Supreme Court at Special Term (Hyman Korn, J.), entered in New York County, denying defendants' motion and plaintiffs' cross motion for summary judgment. The modification consisted of granting defendants' motion.

Plaintiffs were employed as account executives by defendant and elected to be paid a salary and to participate in the firm's pension and profit-sharing plans rather than take a straight commission. Plaintiffs both began working for a competitor of their former employer after their employment with defendant was terminated. They were thereafter informed that all of their rights in the company-funded pension plan had been forfeited pursuant to a provision of the plan which permitted forfeiture in the event that an employee directly or indirectly competed with the firm. Alleging that they had been discharged without cause, plaintiffs brought this action against defendant employer for conversion and breach of contract, to recover amounts allegedly owed them on account of the pension plan and for punitive damages.

Special Term denied defendants' motion for summary judgment and plaintiffs' cross motion for the same relief, holding that the termination and forfeiture provisions of the plan are not unenforceable as a violation of plaintiffs' rights under the Employee Retirement Income Security Act of 1974 (ERISA) (US Code, tit 29, § 1001 *et seq.)* since the statute was enacted after plaintiffs' employment had been terminated and the forfeiture occurred prior to the effective date of the statute, and that various factual issues exist which necessitate a trial and preclude defendants' motion for summary relief. The Appellate Division, sustaining the validity of the forfeiture provision, reversed, granted defendants' motion and dismissed the complaint.

The Court of Appeals reversed, denied defendants' motion for summary judgment and reinstated the complaint, holding, in an opinion by Judge Wachtler, that where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand, and that the question concerning whether plaintiffs' termination was voluntary is not appropriate for resolution on a motion for summary judgment.

Post v Merrill Lynch, Pierce, Fenner & Smith, 66 AD2d 743. Post v Merrill Lynch, Pierce, Fenner & Smith, 48 NY2d .

DISPOSITION: Order, insofar as appealed from, reversed, with costs, defendants' motion for summary judgment denied and the complaint reinstated.

COUNSEL: *Benedict Ginsberg* and *Milton B. Franklin* for appellants. I. Plaintiffs were discharged as employees of Merrill Lynch after the vesting of their pension rights. Accordingly, Merrill Lynch could not properly forfeit those rights. Even if the hearsay evidence submitted by it that plaintiffs had voluntarily resigned is considered as raising a factual issue, the court could not properly determine that issue by summary judgment. *(* *Kristt v Whelan*, 4 AD2d 195, 5 NY2d 807; *Friedman v Romaine*, 77 Misc 2d 134; *Smith v Meyer*, 78 Misc 2d 711, 44 AD2d 778, 34 NY2d 517; *Titus v Glens Falls Ins. Co.*, 81 NY 410; *Cox v McElligott*, 163 Misc 619, 276 NY 604, 304 U.S. 564; *Feiger v Iral Jewelry*, 85 Misc 2d 994, 52 AD2d 524, 41 NY2d 928; *Walker v Phoenix Ins. Co. of Hartford, Conn.*, 156 NY 628.) II. Additional reasons why the order of the court below should be reversed. *(* *Titus v Glens Falls Ins. Co.*, 81

NY 410; *Hedeman v Fairbanks Morse & Co.*, 286 NY 240; *Utica Sheet Metal Corp. v Schecter Corp.*, 25 AD2d 928; *Cox v McElligott* , 163 Misc 619, 276 NY 604, 304 U.S. 564.)

Roger J. Hawke and *Thomas J. Mullaney* for respondents. I. The court below properly awarded summary judgment dismissing plaintiffs' pension plan claim. *(Kristt v Whelan*, 4 AD2d 195, 5 NY2d 807; *Kidd v Oakes*, 39 Misc 2d 100, 645; *Kerpen v First Investors Corp.*, 45 Misc 2d 793, 26 AD2d 620; *Silfen v United Whelan Corp.*, 30 AD2d 523; *Matter of Kumm v Allen*, 36 Misc 2d 816; *Smith v Meyer*, 78 Misc 2d 711, 44 AD2d 778, 34 NY2d 517; *Stover v Gamewell Fire Alarm Tel. Co.*, 164 App Div 155; *Martin v Bankers Trust Co.*, 417 F Supp 923, 565 F2d 1276; *Nolan v Meyer*, 520 F2d 1276, 423 U.S. 1034; *Keller v Graphic Systems of Akron, Employees Profitsharing Plan*, 422 F Supp 1005.) II. Plaintiffs have no claim under the profit-sharing plan.

JUDGES: Wachtler, J. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Fuchsberg and Meyer concur.

OPINION BY: WACHTLER

OPINION

[*86] [**359] [***847] **OPINION OF THE COURT**

The narrow issue presented by this appeal from a grant of summary judgment for the defendant is the efficacy of a private pension plan provision permitting the employer to forfeit pension benefits earned by an employee who competes with the employer after being involuntarily discharged.

[***848] We begin with the premise that "powerful considerations of public policy * * * militate against sanctioning the loss of a man's livelihood" *(Purchasing Assoc. v Weitz*, 13 NY2d 267, 272). So potent is this policy that covenants tending to restrain [*87] anyone from engaging in any lawful vocation are almost uniformly disfavored and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer and not unduly harsh or burdensome to the one restrained. * *(Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307; see, also, 6A Corbin, Contracts, § 1394, at p 100.)

* Several States control covenants not to compete by statute. (See, e.g., *Ware v Merrill Lynch, Pierce, Fenner & Smith*, 24 Cal App 3d 35, affd 414 U.S. 117; Blake, Employee Agreements Not to Compete, 73 Harv L Rev 625, 648.)

Merrill Lynch employed Post and Maney as account executives at its Rochester offices beginning April 20, 1959 and May 15, 1961, respectively. Both men elected to be paid a salary and to participate in the firm's pension and profit-sharing plans rather than take a straight commission, which would have returned approximately twice the amount they earned in salary during the period in question.

The employment of both plaintiffs by Merrill Lynch terminated August 30, 1974. On September 4, 1974 both began working for Bache & Company, admittedly a competitor of Merrill Lynch, in Rochester. Merrill Lynch learned about their new employment in September, 1974.

Fifteen months after their termination, and following repeated inquiries by the plaintiffs into the status of their pensions, the plaintiffs were informed by Merrill Lynch that all of their rights in the company-funded pension plan had been forfeited pursuant to a provision of the plan which permitted forfeiture in the event that an employee directly or indirectly competed with the firm.

[**360] Plaintiffs brought this action against Merrill Lynch for conversion and breach of contract, to recover amounts allegedly owed them on account of the pension plan and for punitive damages. They aver that they were discharged by Merrill Lynch without cause. Merrill Lynch does not, for the purpose of this motion, dispute plaintiffs' version, contending, rather, that for this purpose the reason for termination is irrelevant.

The Appellate Division granted Merrill Lynch's motion for summary judgment and dismissed the complaint, relying principally on the Appellate Division decision in *Kristt v Whelan* (4 AD2d 195, 199, affd 5 NY2d 807) to sustain the validity of [*88] the forfeiture provision. As the Appellate Division in *Kristt* held: "It is no unreasonable restriction of the liberty of a man to earn his living if he may be relieved of the restriction by forfeiting a contract right or by adhering to the provisions of his contract [citations omitted]. The provision for forfeiture here involved did not bar plaintiff from other employment. He had the choice of preserving his rights under the trust by refraining from competition with [his former employer] or risking forfeiture of such rights by exercising his right to compete with [him]."

Now, in determining the effect to be accorded a forfeiture-for-competition provision in an employees' pension, we are for the first time invited to distinguish between voluntary and involuntary termination of employment of the affected employee. Examination of our cases discloses no prior instance in which enforcement of such a forfeiture clause has been sought in circumstances where the employment has been terminated by the employer without cause. Rather, as in *Kristt*, they have

involved [***849] claims by an employee who sought pension benefits from his former employer despite having voluntarily left the employer and joined forces with a competitor. In such situations effect has been given to the forfeiture-for-competition provision, and the employee's claim has been rejected.

Not only do we find no dispositive judicial precedent in our State where the employee has been terminated by the employer without cause. Now we also must take into account the declaration of a strong public policy against forfeiture of employee benefits manifested by the Employee Retirement Income Security Act of 1974 (ERISA) (US Code, tit 29, § 1001 *et seq.*). Indeed, had the relevant provisions of ERISA been in effect at the time of termination of these appellants' employment, its mandatory provisions might well have been dispositive in this case and have precluded the forfeiture countenanced by the court below.

Impelled as we are then by that powerfully articulated congressional policy, and confronted with no decisions which command a contrary result, we now conclude that our own policies -- those in favor of permitting individuals to work where and for whom they please, and against forfeiture -- preclude the enforcement of a forfeiture-for-competition clause where the termination of employment is involuntary and without cause.

In the case at bar we note that the particular provision in [*89] the pension plan was not drawn explicitly to cover employees whose employment had been involuntarily terminated; it indiscriminately mandates forfeiture by any "Participant who enters employment or engages directly or indirectly in any business deemed by the Committee to be competitive". Therefore we need not consider now what would have been our decision had the draftsman of this pension plan manifested an unmistakable intention to impose the heavy penalty of forfeiture for engaging in competition even after discharge of an employee without cause.

Acknowledging the tension between the freedom of individuals to contract, and the reluctance to see one barter away his freedom, the State enforces limited restraints on an employee's employment mobility where a mutuality of obligation is freely bargained for by the parties. An essential aspect of that relationship, however, is the employer's continued willingness to employ the party covenanting not to [**361] compete. Where the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.

Under the circumstances of the case at bar it would be unconscionable to tolerate a forfeiture, precipitated as it is by the unwarranted action of the employer. We find, therefore, that in the case of an involuntary discharge, the rule stated in *Kristt v Whelan* (4 AD2d 195, affd 5 NY2d 807, *supra)* does not apply. Further, we hold, that where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand.

The question to be resolved concerning whether plaintiffs' termination was voluntary is not appropriate for resolution on a motion for summary judgment. Therefore the order, insofar as appealed from, should be reversed, the motion for summary judgment denied and the complaint reinstated.

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