

97-7277

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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IDA MORELLI,

*Plaintiff-Appellant,*

-against-

CEDEL,

*Defendant-Appellee.*

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**REPLY BRIEF OF PLAINTIFF-APPELLANT**

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POINT I

**MORELLI HAS STATED A CAUSE
OF ACTION UNDER ERISA SINCE
SHE HAS A "COLORABLE CLAIM"
TO VESTED BENEFITS**

Cedel argues (Appellee's Br. at 9), and we agree, that under Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989), Morelli must have a "colorable claim" to vested benefits in order that she have standing to pursue an ERISA claim.

Morelli relied on three facts to establish that she has a colorable claim:

First, the Separation Agreement¹ (51A-53A) which was an exhibit to Morelli's Amended Complaint (42A-53A), provided in paragraph 3,

"(f) Pension Plan: Ida shall be paid an unique and tax protected lump sum of USD on April 30, 1994."

This Separation Agreement, standing alone, was sufficient to confer standing upon Morelli, since it constituted an admission by Cedel that Morelli was to be paid a sum of US dollars as and for her pension.²

Second, Cedel's 1990 Annual Report (109A-137A), which was Exhibit B to Morelli's counsel's Affidavit in Opposition

¹ Had Morelli brought a claim for breach of the promise to pay a pension as contained in the Separation Agreement, Cedel would no doubt have argued that such breach of contract claim was preempted by ERISA.

² Cedel's assertion, that this Separation Agreement is "apparently a translation of a standard form European separation agreement" (Appellee's Br. at 21) is not supported by any fact in the record, and is, in any event irrelevant since Cedel drafted the agreement and presented it to Morelli for her signature.

to Cedel's Motion to Dismiss the Amended Complaint (104A-105A), provided at page 127A

"(g) Pension Plan

The Company has concluded a non-contributory pension plan covering all employees having more than thirty months service. The plan provides for the beneficiaries to receive an annuity as a supplement to their legal pension The last actuarial valuation of the plan was established at December 31, 1990."

Morelli, who had been employed by Cedel since 1984 (44A), had substantially more than thirty months' service as of December 31, 1990. The Annual Report's disclosure of a pension plan covering all employees having thirty months service did not contain any reference to an exclusion of Cedel's United States employees.³

³ Cedel's assertion that Morelli's argument based on the Annual Report is raised for the first time on appeal (Appellee's Br. at 18) mischaracterizes the facts and the law. The Annual Report was submitted to the district court as an exhibit to an affidavit in opposition to Cedel's motion to dismiss (104A-139A), and the pension plan was incorporated by reference into the Amended Complaint (42A-53A, at ¶¶ 18, 20, 25, 28, 30 and in ¶ 3[f] of Exhibit 1 to the Amended Complaint, the Separation Agreement, which also speaks of Morelli's pension). Referring to evidence of the pension plan which was in the record below does not create a new argument on appeal. See, e.g., Brass v. American Film Tech, Inc., 987 F.2d 142, 150 (2d Cir. 1993) (holding that on a Rule 12(b)(6) motion, a court may consider, *inter alia*, documents attached to the complaint or incorporated by reference therein); Gerzog v. London Fog Corp., 907 F. Supp. 590, 601 (E.D.N.Y. 1995) (holding that "[a]lthough the pension plan at issue is not attached to the complaint . . . , the Court may consider a retirement plan on a motion to dismiss where the plan is incorporated in the complaint by reference." In any event, the standard of review of the grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is *de novo*. Citibank v. K-H Corp., 968 F.2d 1489, 1494 (2d Cir. 1992) ("A dismissal under Rule 12(b)(6) will be affirmed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."))

Third, the July 12, 1994 letter from Cedel's counsel to

Morelli's counsel contained the following statement:

"With respect to Ms. Morelli's pension plan rights, I explained to you last week that the Plan did not become effective until July 1, 1994. Accordingly, Cedel could not distribute pension funds to Ms. Morelli, or any other Plan participant, prior to that date. Ms. Morelli will be contacted shortly by Guardian, the administrator of the Plan. She will be given a number of options from which to choose in connection with the distribution of the USD 22,304.00 in her account." (140A-141A)(emphasis added).

Cedel argues that this letter is inadmissible under FRE 408. Whether or not the letter is admissible, the Separation Agreement⁴ and the Annual Report clearly evidence

⁴ Cedel also argues (Appellee's Br. at 21) that

"As a matter of law, such an agreement is insufficient to create an ERISA pension benefit plan. It is well settled that an undertaking to pay a lump sum payment to an employee does not create an ERISA plan under the statute. See, James v. Fleet/Norstar Financial Group, Inc., 992 F.2d 463, 464 (2d Cir. 1993); see also, Fort Halifax Packing Co., v. Coyne, 482 U.S. 1, 12 (1987)."

Morelli does not argue that the Separation Agreement created the ERISA pension benefit plan. Rather, the Separation Agreement avers the existence of an ERISA pension benefit plan (as does Cedel's Annual Report) from which Morelli was to receive a sum of US dollars on a specified date. James and Fort Halifax relate to severance pay plans, not pension benefit plans. The plan at issue is like the plain vanilla pension plan Congress had in mind when it passed ERISA [see, 29 U.S.C. § 1001(a) and § 1002(2)(a)]. The pension plan did not become a severance pay plan merely because it was referred to in the Separation Agreement.

Cedel's further assertion that Morelli would have known of the existence of the pension plan (Appellee's Br. at 16, fn 5, and at 20) is beside the point and contrary to the Congressional findings that underlie ERISA. Congress recognized that employees may not have access to information about their pensions. As the Congressional findings and declaration of policy in the very first section of ERISA (a) state:

". . . owing to the lack of employee information and
(continued...)

Morelli's entitlement to her pension. The letter does no more than set forth the amount of that pension and a reason why it had not yet been paid.

Cedel's further argument regarding the 401(K) plan (Appellee's Br. at 13-19, 29-30) is a red herring designed to obscure its obligation to pay Morelli her pension. Morelli never conceded that the 401(K) plan was the plan that she was suing under. Only after Cedel introduced evidence of the 401(K) plan (there was no evidence Morelli had ever seen that plan before), and alleged that it was Cedel's only pension plan for its New York employees, did Morelli try to show that, if it indeed was the only such plan, it also applied to her. As she stated at page 10 of her Memorandum in Opposition to Defendant's Motion to Dismiss the Amended Complaint:

"Defendant relies upon an affidavit from Office Manager Precy P. Lopez for the proposition that Mrs. Morelli was not covered by Cedel's pension plan. However, a review of the exhibit to Mr. Lopez' affidavit, which purports to be the pension plan, clearly evidences that Mrs. Morelli was covered by the plan...." (emphasis added).

Thus, this Court should find that Morelli stated a cause of action under ERISA for Cedel's failure to pay her pension.

⁴(...continued)
adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries ... that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans" 29 U.S.C. §1001(a).

POINT II

**THIS COURT SHOULD FIND THAT
IT HAS SUBJECT MATTER
JURISDICTION OVER MORELLI'S
TITLE VII CLAIM**

Cedel, in making light of Morelli's public policy argument, claims that the "so-called 'public policy' argument is her contention that the twenty employee requirement for ADEA jurisdiction does not apply where the employer is a large foreign employer with a very small office in the United States " Cedel then goes on to argue that "[s]ubjecting such an employer to ADEA, Title VII and ADA jurisdiction could discourage investment in the United States." (Appellee's Br. at 39 fn 15).

Morelli's public policy argument is more straightforward than that: She asserts that Congress did not intend that the benefit of the ADEA's small business exception be used to immunize the United States operations of a gigantic foreign securities and precious metals dealer with billions of dollars in assets and hundreds of employees in a far flung international operation, from complying with our laws which prohibit discrimination against United States citizens employed by that foreign employer on our soil. If Congress so intended, it would have said so.

As to Cedel's argument that subjecting such a foreign employer to our laws "could discourage investment in the United States," Morelli has three responses: First, foreign employers doing business in the United States are, with rare

exception (most of which derive from treaties, none of which apply here), subject to virtually all of our laws -- that is the price of doing business in the United States. Second, Congress has never evidenced any intention that foreign employers doing business in the United States be exempt from compliance with the obligations of the ADEA. Third, Cedel's mercenary argument begs this Court to exalt the value of foreign investment over the value of enforcing our laws within our territorial sovereignty and over the right of our citizens to protection from such invidious discrimination.

Thus, this Court should find that the District Court has subject matter jurisdiction over Morelli's ADEA claim.

CONCLUSION

For the reasons stated herein, the Judgment should be reversed and the matter remanded to the district court for the commencement of discovery and for further proceedings in light of this Court's opinion.

Respectfully,

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July 31, 1997

CERTIFICATE OF SERVICE

I, MARC A. STADTMAUER, an attorney, do hereby affirm that I caused a copy of the foregoing Reply Brief of Plaintiff-Appellant to be served on counsel for Defendant-Appellee, Gary D. Friedman, Esq., Mayer Brown & Platt, 1675 Broadway, New York, New York 10019 by hand, on July 31, 1997.

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Marc A. Stadtmauer, Esq. (MS