UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT TESTA,

Plaintiff,

-against-

LAWRENCE BECKER,
As Plan Administrator of the Xerox Corporation Retirement Income Guarantee Plan, an employee Pension Benefit Plan, et al.,

Defendants.

Civil Action No.: 10-06229(L)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT & IN SUPPORT OF DEFENDANTS' CROSS MOTION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted by Defendants Lawrence Becker, as Plan Administrator of the Xerox Retirement Income Guarantee Plan ("RIGP"), and the RIGP in opposition to Plaintiff's motion for summary judgment and in support of Defendants' cross-motion for summary judgment dismissing the sole remaining claim in the Complaint.

The material facts not in genuine dispute demonstrate that the statute of limitations defense bars Plaintiff's breach of fiduciary duty claim, asserted under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a)(1). Pursuant to this Court's Decision and Order, reported at *Testa v. Becker*, 979 F. Supp. 2d 379, 384 (W.D.N.Y. 2013) ("*Testa*") (Dkt. No. 44), this remaining claim is solely based on an alleged failure to pay benefits, as purportedly ordered by the Ninth Circuit in *Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006) ("*Miller*") and *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert I*"). As discussed below, under settled law, an ERISA plan administrator has no duty to pay ERISA plan benefits to plan participants who are not parties to an action and who themselves do not file timely benefit claims.

Accordingly, this Court should deny Plaintiff's motion for summary judgment in its entirety and grant Defendant's cross-motion for summary judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Plaintiff's Employment with Xerox and Participation in the RIGP

As alleged in the Complaint, Plaintiff worked for Xerox intermittently commencing in 1972 until his retirement on or about August 30, 2008. (Compl. ¶¶ 51-53[1]; Becker 2016 Decl.,

[1] References to Plaintiff's Complaint (Dkt. No. 1), which is attached as Exhibit A to the Declaration of Margaret A. Clemens, Esq., dated September 27, 2016 ("Clemens Decl."), are cited as "Compl. ¶ [paragraph number]."

Ex. D).[2] Plaintiff's first period of employment was for approximately five years, from April 1972 to May 1977; his second period of employment was for about four years, from approximately October 1977 until February 1983; and his third stint with the Company was for a period of about twenty-three years, from July 1985 until August 2008. (Compl. ¶¶ 51-53; Becker 2016 Decl., Ex. D). Plaintiff was a participant in Xerox's pension plan, known as the RIGP. Upon the termination of his employment in 1983, Plaintiff received a lump sum distribution of the present value of his pension benefit. (Compl. ¶ 54). When Plaintiff was rehired by Xerox in 1985, he again became a participant in the RIGP. (*Id.* ¶¶ 54-57).

B. Plaintiff's Retirement and Exhaustion of Administrative Remedies

Plaintiff alleges that after he retired, his pension benefit was lower than it should have been due to the application of an offset to his benefit for his prior distribution from the RIGP in 1983. (Compl. ¶ ¶ 65, 67-68). Plaintiff alleged that he exhausted his administrative remedies by submitting a claim in the form of a letter, dated May 26, 2009, addressed to Becker. (Compl. ¶ 80; Becker 2016 Decl., ¶ 9, Ex. C). Plaintiff further alleges that his claim was denied by letter, dated June 2, 2009, signed by Arlyn Kaster, Manager Pension and Life Insurance Benefits. (Compl. ¶ 81; Becker 2016 Decl., ¶ 10, Ex. D). Plaintiff filed an appeal of the denial by letter addressed to Becker, dated July 28, 2009. (Becker 2016 Decl., ¶ 11, Ex. E; Compl. ¶ 82). The appeal was denied by Becker by letter, dated August 4, 2009. (Becker 2016 Decl., ¶ 12, Ex. F; Compl. ¶ 83).

[2] References to the Declaration of Lawrence M. Becker, dated September 26, 2016 and submitted in opposition to Plaintiff Robert Testa's motion for entry of summary judgment and in support of Defendants' cross-motion for summary judgment are designated as "Becker 2016 Decl., ¶ [paragraph number], Ex. [exhibit letter]."

C. The Commencement of this Action and the Prior Motions

Plaintiff commenced this action by filing a Summons and Complaint in the District Court for the Central District of California on January 28, 2010, and thereafter the case was transferred to the Western District of New York. *Testa v. Becker*, No. CV 10-638-GHK (FMOx), 2010 U.S Dist. LEXIS 47130 (C.D. Cal. Apr. 22, 2010). Plaintiff's first two claims, asserted pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), sought to recover benefits Plaintiff claims are due to him under the RIGP, enforcement of his purported rights under the terms of the RIGP, and clarification of his rights to future benefits under the RIGP. (Compl. ¶¶ 92-97). The First Claim was based on the terms of the Plan itself, and the Second Claim was based on the terms of the SPD. (*Id.*) Plaintiff's Third and Fourth Claims were based on 29 U.S.C. § 1132 (a)(3) and sought an order: (i) compelling defendants to comply with the purported direct order of the Ninth Circuit in *Miller v. Xerox Corporation Retirement Income Guarantee Plan*, 464 F.3d 871, which Plaintiff claims "directs that the RIGP and such Defendants shall provide, as of his Benefit Commencement Date, a benefit from the RIGP that subtracts from the aggregate RIGP benefit no more than the benefit actually attributable to his Prior PSP Distribution," (Compl. ¶ 99) (Third Claim)); and (ii) compelling Becker to exercise his fiduciary duties with respect to Plaintiff's benefit claims "in an independent and appropriate manner" or issuing a substitute fiduciary if Becker fails to do so. (*Id.* ¶ 102) (Fourth Claim).

Defendants filed a motion to dismiss the Complaint on May 21, 2010. In a Decision and Order, dated October 30, 2013, granting in part and denying in part Defendants' motion to dismiss the Complaint (Dkt. No. 44) (the "Decision and Order"), this Court dismissed Plaintiff's First, Second and Fourth Claims in their entirety. *Testa*, 979 F. Supp. 2d at 384; (Dkt. No. 44). The Court denied the motion to dismiss as to the Third Claim, "insofar as that cause of action sets forth a claim for breach of fiduciary duty under 29 U.S.C. § 1132 (a)(3)." *Testa*, 979 F.

Supp. 2d at 384; (Dkt. No. 44, at 8). More specifically, this Court explained that "plaintiff has stated a facially valid claim for breach of fiduciary duty based on defendants' alleged failure to follow either *Frommert* or *Miller* with respect to his benefits." *Testa*, 979 F. Supp. 2d at 384 (*citing Kunsman v. Becker*, 2013 U.S. Dist. LEXIS 148998); (Dkt. No. 44, at ¶ 7). This Court, however, did not decide precisely when the claim arose or whether the Plaintiff should prevail on the claim. *Testa*, 979 F. Supp. 2d 279; (Dkt. No. 44).

Defendants filed a timely Answer denying any liability for the sole remaining claim in the Complaint on January 15, 2014. (Dkt. No. 47). Plaintiff now moves for summary judgment on the remaining claim and Defendants cross-move for summary judgment in their favor.

ARGUMENT

WELL-ESTABLISHED LAW AND RECENT DECISIONS OF THIS COURT WARRANT A DISMISSAL OF PLAINTIFF'S REMAINING CLAIM

It is undisputed that Plaintiff in this action, like the plaintiffs in the *Miller* and the *Frommert* actions, seeks additional pension benefits based on a claim that his benefits were improperly reduced by an offset for a prior distribution from the Plan. There is a critical difference, however: both the *Miller* and the *Frommert* plaintiffs initiated their respective actions within the applicable statute of limitations period, *i.e.,* within six-years of receiving notice of the offset provision of which they complained (either by way of the 1998 Summary Plan Description for the RIGP ("1998 SPD") or an earlier notice describing the offset mechanism).

Unlike the *Miller* plaintiffs, who commenced their suit within months after they received their 1998 SPDs[3], Plaintiff received notice of the phantom account offset provision, as contained in the 1998 SPD, in 1998 but did not commence this action until January 1, 2010, *twelve years*

[3] Miller and Sudduth filed their Complaint on December 23, 1998. Allen filed his Complaint on March 12, 1999. *Miller,* 464 F.3d at 874.

later. (*See* Compl.¶¶ 75, 78). Similarly, the *Frommert* action was commenced in 1999, eleven years before Plaintiff commenced this suit. *Frommert I*, 433 F.3d at 261-62. As a result, this Court properly held that Plaintiff's claims for benefits under both the Plan and the SPD, pursuant to 29 U.S.C. § 1132(a)(1)(B), (the First and Second Claims) were untimely interposed and dismissed them. (Dkt. No. 44, at 5-7).

Similarly, with one exception discussed below, this Court also properly dismissed Plaintiff's claims for breach of fiduciary duty under ERISA § 413, 29 U.S.C. § 1113. The Court found that Plaintiff's claims based on any a breach of fiduciary duty theory were simply a recast of his claims for benefits under the Plan, which he could not do, as it was duplicative of his claim for benefits, and that they would be time-barred in any event for the reasons discussed in the Court's prior decision in *Kunsman v. Becker*, No. 08-CV-6080L, 2013 U.S. Dist. LEXIS 148998 (W.D.N.Y. Oct. 16, 2013), including that there were no new allegations of fraud or concealment occurring after 1998. (Dkt. No. 44, at 5-7). While this Court left open the possibility that Plaintiff had stated a facially valid claim for breach of fiduciary duty based on allegations that Plaintiff was entitled to an order compelling Defendants to comply with *Miller* and/or *Frommert* with respect to his benefits for purposes of surviving the motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court did not rule on the merits of the claim. (*Id*.).

As discussed in detail below, Plaintiff's claim must be dismissed. Plaintiff was not a party to either the *Frommert* or the *Miller* cases, and the language upon which he relies is *dicta* and not binding in subsequent cases. Defendants have a right to and can assert individualized defenses to a claim for benefits. A plan fiduciary does not breach his fiduciary duty by denying a time-barred claim.

A. The Statements Relied Upon by Plaintiff are Pure *Dicta* and Not Binding

Plaintiff's reliance on the Second Circuit's observation in *Frommert v. Conkright* ("*Frommert I*"), 433 F.2d at 263, that "the phantom account offset may not be applied to employees rehired prior to the issuance of the 1998 SPD" is misplaced. As this Court well knows, the *Frommert* case was never certified as a class action, and Plaintiff is not a party to the *Frommert* case. Thus, any judicial observation by the Second Circuit in *Frommert I* as to the application of the phantom account offset to other plan participants, not before the Court in *Frommert,* is pure *dicta,* which was not essential to the determination of the legal question before the Court, and as such, has no binding effect in subsequent proceedings as a matter of law. *McCord v. Agard (In re Bean),* 252 F.3d 113, 118 (2d Cir. 2001); *Merrimon v. Unum Life Ins*., 758 F.3d 46, 57 (1st Cir. 2014) (*citing Mun'y of San Juan v. Rullan*, 318 F.3d 26, 28 n.3 (1st Cir. 2003*); Tully Construction Co. v. Canam Steel Corp*., No. 13 Civ. 3037, 2015 U.S. Dist. LEXIS 25690 (S.D.N.Y. Mar. 2, 2015); *Nat'l Traffic Serv. v. Fiberweb, Inc.*, No. 1:08-CV-00262-BRW, 2012 U.S. Dist. LEXIS 125243 (W.D.N.Y. Sept. 4, 2012).

Indeed, as long-recognized by the courts, "[i]t is the general rule that issue preclusion attaches 'only when an issue of law or fact is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment.' " *Cyan Contracting Corp. v. New York State Dormitory Authority*, No. 09 Civ. 603 (LAK) (HBP), 2011 U.S. Dist. LEXIS 119371 *26-*27 (S.D.N.Y. July 11, 2011) (citations omitted).

This same reasoning applies to the Ninth Circuit's Decision and Order in *Miller,* 464 F.3d at 871. The *Miller* case involved only three named plaintiffs: Plaintiffs Miller, Sudduth and Denton. Miller and Sudduth commenced their action by filing a Complaint on December 23, 1998 and Denton commenced his action by filing his Complaint on March 12, 1999. The two actions were consolidated on January 4, 2002, and a trial consisting of closing arguments was

held on April 2, 2002. *Id.* at 874. The Ninth Circuit reversed the Decision and Order of the lower court, reasoning, among other things, that the "Employees [the Plaintiffs] – and all other plan participants subject to similar benefit adjustments – are entitled to a calculation of benefits that subtracts from their final Income Guarantee Plan benefit only the benefit actually attributable to the Profit Sharing Plan distributions." *Id*. That portion of the Court's judicial opinion that relates to "all other plan participants," however, is also *dicta*. That is because there were no other plan participants before the Court, the case was not certified as a class action and any determination as to other plan participants' rights was not essential to the Court's opinion. *McCord v. Agard (In re Bean),* 252 F.3d at 118.

B. The Courts of Appeal Never Intended to Preclude Valid Defenses to Claims

Subsequent decisions by the Courts in *Frommert* and *Miller* have made it abundantly clear that the Courts of Appeal never intended their observations about the potential rights of other plan participants to be an unswerving mandate that the Plan Administrator could not apply the offset provision to all employees rehired before the issuance of the 1998 SPD, regardless of any defenses the Plan may have to such benefit claims.[4]

Significantly, the Second Circuit itself stated that the Plan Administrator *could apply the offset provision* of the Plan to eighteen of the *Frommert* plaintiffs, who were rehired prior to the issuance of the 1998 SPD, because they had waived their ERISA claims by signing enforceable releases, and there was no breach of fiduciary duty in doing so. *Frommert v. Conkright,* 535 F.3d 111, 122 (2d Cir. 2008) ("*Frommert II*").

[4] The Second Circuit subsequently explained its holding why the earlier SPDs did not contain sufficient notice of the offset provision until the issuance of the 1998 SPD, and the Court expressly stated that its holding in *Frommert I* was as follows: "We held that the 1998 SPD to be inapplicable *to Plaintiffs here* because it was untimely not because it was insufficiently comprehensive." *Frommert v. Conkright,* 738 F.3d 522, 533 n.12 (2d Cir. 2013) *("Frommert III")*. (emphasis added).

Similarly, on remand, the District Court in *Miller* considered whether two of the plaintiffs' claims, (Miller and Sudduth) were barred by releases. *Miller v. Becker*, Nos. CV 98-10389-GHK (CTx), CV 99-2589-GHK (CTx), 2010 U.S. Dist. LEXIS 144520 *10-*13 (C.D. Cal. Sept. 22, 2010). Such consideration by the District Court of these individualized defenses to the claims of the two *Miller* plaintiffs provides additional support to Defendants' position on this motion that the Plan Administrator acted properly in considering the statute of limitation defense when denying Testa's belatedly asserted claim for benefits under the RIGP. (*See* discussion at subsection C below).

The Second Circuit affirmed that individualized defenses barred the benefits claims of another plan participant and former rehired employee in *Anderson v. Xerox*, 614 F. App'x 38 (2d Cir. 2015). More recently, this Court also dismissed the claims asserted by another employee in *Clouthier v. Becker*, No. 08-cv-6441L, 2016 U.S. Dist. LEXIS 7196 (W.D.N.Y. Jan. 21, 2016). Clouthier, like Anderson and the *Frommert* plaintiffs, worked for Xerox for a period of time at the end of which he elected a lump-sum distribution of his then-accrued retirement benefits. Clouthier later returned to work for Xerox for a second period of time and again participated in the RIGP. At the end of this second period of employment, Clouthier signed a release that was substantially similar to the release signed by the plaintiffs in *Anderson* and *Frommert*. Clouthier commenced his lawsuit in 2008 asserting claims substantially identical to those alleged by Anderson and in *Frommert*. *Id.* at *3 - *5. This Court dismissed Clouthier's claims on the same bases as those in *Anderson*. More specifically, his claims, which accrued in 1998, were barred by the statute of limitations, and his release of claims was enforceable. *See id*.

C. The Plan Administrator Properly Denied Time-Barred Claims

Here, it is undisputed that Plaintiff received actual notice of the 1998 SPD no later than 1998. (Compl. ¶ 75), but unlike the *Frommert* plaintiffs, Plaintiff failed to commence a lawsuit

within the applicable time period to do so. It is also undisputed that the Plan Administrator denied Plaintiff's appeal by letter, dated August 4, 2009. (Compl. ¶ 83).

As explained by the Plan Administrator in his August 4, 2009 letter denying the appeal, (i) Testa was not a plaintiff in the *Miller* or the *Frommert* actions (and no final judgments had been entered in those cases) and he would not necessarily be entitled to the same relief as those plaintiffs; (ii) as stated in his initial denial letter, the SPD had fully described the Plan's offset provisions to all plan participants since 1998; and (iii) ERISA requires that the RIGP be administered strictly in accordance with its terms. (*See* Becker 2016 Decl., Ex. F).

Despite having actually identified the August 4, 2009 denial of the appeal letter in the Complaint itself, opposing counsel has neglected to place the August 4, 2009 denial letter into the record submitted to the Court on this motion. (*See* Pl. Motion for Summary Judgment, Dkt. No. 49). Moreover, opposing counsel selectively omits any and all reference to the August 4, 2009 denial letter in Plaintiff's Memorandum in support of his motion for summary judgment. (*Id.*). Rather than correctly citing to, and quoting from, the August 4, 2009 letter from Lawrence Becker as Plan Administrator in the Memorandum, Plaintiff claims that the Plan Administrator "rejected the appeal" solely on the grounds that Testa was not a party in the *Frommert* or the *Layaou* cases. (Pl. Mem. at 3 (*citing* Strain Decl. Ex. E)).[5]

Exhibit E to the Strain Declaration, however, is a June 2, 2009 letter from Arlyn Kaster, as Manager Pension and Life Insurance Benefits for the RIGP, initially denying Plaintiff's claim for benefits. Notably, Plaintiff neglects to quote from this letter correctly. The Kaster letter denied the claim for multiple reasons, including that: (i) Testa was not a plaintiff in *Layaou* and

[5] References to Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Entry of Summary Judgment, filed with Plaintiff's Motion for Entry of Summary Judgment on July 26, 2016 (Dkt. No. 49-1), are cited as "Pl. Mem. at [page number]."

Frommert; (ii) he was not entitled to the alternate calculation awarded to the plaintiffs in those cases because such an award was based on a notice deficiency; and (iii) he had been on notice since at least 1998 of that offset provision. Kaster then advised Plaintiff that he could appeal the denial. (Becker 2016 Decl., Ex. D). Notably, when he appealed the denial of his claim, Plaintiff did not dispute that he was on notice of the phantom account offset provision since 1998. (Becker 2016 Decl., ¶ 11, Ex. E).

Instead, and without citing any authority for such a proposition, Plaintiff contends that the denial of his appeal "by an ERISA fiduciary is reprehensible." (Pl. Mem. at 4). This is not the case. There is nothing in ERISA, or the Plan, that requires the Plan Administrator pay benefits on a time-barred claim (or which makes it reprehensible not to do so). That a Plan Administrator denies benefits to a plan participant, whose claim is untimely, is not a breach of fiduciary duty. This conclusion is supported by the Supreme Court's recent decision in *Heimeshoff v. Hartford Life & Casualty Co*., 134 S. Ct. 604 (2013), where the Court upheld the denial of benefits by a plan administrator based upon a plan's contractual limitations period, reasoning, among other things, that the administrator was fulfilling its duty under ERISA in denying the claim. *Id.* at 612.

This is because a plan administrator is required by ERISA to discharge his duties "in accordance with the documents and instruments governing the plan." *See* 29 U.S.C. § 1104(a)(1)(D). *See, e.g., Carey v. International Brotherhood of Electrical Workers ("Carey")*, 201 F.3d 44, 49 (2d Cir. 1999) (upholding a plan administrator decision to deny pension benefits as the claim was untimely reasoning that "we decline to construe § 1132(a)(1)(B) in a way that would render the limitation period a limit in name only"). *Accord Mazur v. Unum Ins. Co.,* 590 F. App'x 518 (6th Cir. Oct. 28, 2014) (affirming the dismissal of a claim for ERISA benefits as

time-barred)*; Christian v. Honeywell Retirement Benefit Plan*, 582 F. App'x 103 (4th Cir. Nov. 12, 2014) (affirming the granted of judgment dismissing time-barred ERISA claim, and reasoning that plaintiff failed to exercise reasonable diligence in pursuing claim); *Miller v. Fortis Benefits Ins. Co*., 475 F.3d 516 (3d Cir. 2007) (affirming as reasonable a plan administrator's decision not to pay a time-barred claim); *Moses v. Revlon Inc*. ("*Moses*"), No. 15-cv-4144 (RJS), 2016 U.S. Dist. LEXIS 106431 (S.D.N.Y. Aug. 11, 2016) (dismissing widow's claim for additional pension benefits as time-barred).

As explained by the Supreme Court, "the length of a limitations period for instituting suit in federal court 'invariably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Carey*, 201 F.3d at 47 (*quoting Johnson v. Railway Express Agency Inc*., 421 U.S. 454, 463-64 (1975). "Statutes of limitations serve several important policies, including rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses." *Id*. (*citing Wilson v. Garcia*, 471 U.S. 261, 271 (1985)). "For these reasons, statutes of limitations 'are not to be disregarded by courts out of a vague sympathy for particular litigants.'" *Wilson v. Garcia*, 471 U.S. at 271 (*quoting Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

These principles apply no less in ERISA benefits cases such as this one. *Carey*, 201 F.3d at 47; *Moses*, 2016 U.S. Dist. Lexis 106431 at *12. *See also Muehlgay v. Citigroup Inc. et al*, No. 15-2461-cv, 2016 U.S. App. LEXIS 9349 (2d Cir. May 23, 2016) (Summary Order) (affirming dismissing of breach of fiduciary duty claim under ERISA on statute of limitations grounds where the plaintiffs had actual knowledge of the alleged breach but failed to timely commence an action).

In a last ditch effort to revive his otherwise stale claim, Plaintiff contends that there is no way to predict what the Second Circuit will do if, and when, it is confronted with the same question as the Court faced in *Miller*. (Pl. Mem. at 6). He further argues that he is entitled to payments based on various legal arguments, such as whether or not he was properly denied the opportunity, back in 1985, to repay his benefits into the Plan upon being rehired. None of these arguments are relevant to the sole remaining claim in this case, which is whether the Plan Administrator breached his fiduciary duty by failing to pay a time-barred claim. Rather, these arguments relate solely to the denial of benefits claims that have already been dismissed by this Court as time-barred. They do not raise a genuine issue warranting a denial of this cross-motion.

Accordingly, Plaintiff's motion for summary judgment on the sole remaining claim in the Complaint should be denied, and Defendants' cross motion granted.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's motion for summary judgment, and grant Defendants' cross-motion for summary judgment dismissing the remaining claim in the Complaint, together with such other and further relief as the Court deems just and proper.

Date: September 27, 2016
Fairport, New York

/s/Margaret A. Clemens

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