57 A.D.3d 1359
Supreme Court, Appellate Division,
Fourth Department, New York.

Sidney D. HOLBROOK, Plaintiff–Respondent–Appellant,
v.
NATIONAL FUEL GAS DISTRIBUTION CORPORATION, National Fuel Gas Company, Compensation Committee of Board of Directors of National Fuel Gas Company, National Fuel Gas Company Deferred Compensation Plan, and National Fuel Gas Company Executive Retirement Plan, Defendants–Appellants–Respondents.

Dec. 31, 2008.

Synopsis
Background: Former employee brought action against employer, alleging that employer wrongfully denied him benefits to which he was entitled pursuant to a separation agreement. The Supreme Court, Erie County, Eugene M. Fahey, J., granted employee's motion for summary judgment and denied employer's cross-motion for summary judgment. Employer appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] language of separation agreement was unambiguous in its reservation of top hat pension benefits;

[2] trial court erred in sua sponte granting partial summary judgment against nonparty "plan administrator";

[3] genuine issue of material fact existed as to whether stock options were available to employee; and

[4] employee was not entitled to specific performance.

Affirmed as modified.

West Headnotes (4)

[1] **Labor and Employment**
Pension and Retirement Plans

Language in separation agreement with respect to reservation of employee's entitlement to top hat pension benefits as part of deferred compensation program was unambiguous, and, therefore, deferred compensation committee erred in rejecting employee's claim for top-hat benefits based on committee's interpretation of agreement.

Cases that cite this headnote

[2] **Judgment**
Motion or Other Application

Trial court erred in sua sponte granting summary judgment against nonparty "plan administrator," presumably former employer's deferred compensation committee, in former employee's action for wrongful denial of benefits under separation agreement.

Cases that cite this headnote

[3] **Judgment**
Employees, cases involving

Genuine issue of material fact existed as to whether stock options were available to former employee in accordance with release provision of separation agreement, precluding summary judgment in employee's action for wrongful denial of benefits under separation agreement.

Cases that cite this headnote

[4] **Labor and Employment**
Equitable relief; injunction

Former employee was not entitled to specific performance with respect to former employer's alleged wrongful denial of top hat pension benefits and stock options under separation agreement; exceptional circumstances in which specific performance

would be allowed were not present, and remedies available to employee at law were not inadequate to accomplish substantial justice.

Cases that cite this headnote

Attorneys and Law Firms

**544 Phillips Lytle LLP, Buffalo (John G. Schmidt, Jr., of Counsel), for Defendants–Appellants–Respondents.

Zdarsky, Sawicki & Agostinelli LLP, Buffalo (Gerald T. Walsh of Counsel), for Plaintiff–Respondent–Appellant.

PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, AND GORSKI, JJ.

Opinion

MEMORANDUM:

*1360 Plaintiff, a former employee of defendant National Fuel Gas Distribution Corporation, commenced this action alleging that defendants wrongfully denied him benefits to which he was entitled pursuant to a " Separation Agreement" ending the employment relationship. On a prior appeal, we affirmed an order that, inter alia, denied those parts of defendants' motion to dismiss the first cause of action as time-barred and to dismiss the second cause of action for failure to state a cause of action and lack of subject matter jurisdiction (*Holbrook v. National Fuel Gas Distrib. Corp.*, 11 A.D.3d 1040, 782 N.Y.S.2d 305). Plaintiff thereafter filed an amended complaint and moved for, inter alia, partial summary judgment on the second cause of action, seeking the value of certain "top hat" pension benefits, and defendants cross-moved for summary judgment dismissing the amended complaint and for summary judgment on their counterclaims.

[1] [2] Defendants contend that Supreme Court should have denied in its entirety that part of plaintiff's motion with respect to the second cause of action. We reject that contention. We agree with the court that the language of the Separation Agreement is unambiguous in its reservation of plaintiff's entitlement to top hat pension benefits as part of the deferred compensation program (*see generally Lipari v. Maines Paper & Food Serv.*, 245 A.D.2d 1085, 667 N.Y.S.2d 548). We thus conclude that the Deferred Compensation Plan Committee (Committee) erred in rejecting plaintiff's claim for top hat benefits based on its interpretation of the Separation Agreement, whether we review the determination of the Committee either de novo or under an arbitrary and capricious standard (*see generally Miller v. United Welfare Fund*, 72 F.3d 1066, 1070–1071). We conclude, however, *1361 that the court erred in sua sponte granting partial summary judgment with respect to the second cause of action against the nonparty "Plan Administrator," presumably the Committee (*see generally Hartloff v. Hartloff*, 296 A.D.2d 849, 745 N.Y.S.2d 363), and we therefore modify the order accordingly.

[3] [4] We reject the further contention of defendants that the court erred in denying that part of their cross motion for summary judgment dismissing the first cause of action, seeking stock options in accordance with the Separation Agreement. The broad terms of the release provision in the Separation Agreement appear to encompass plaintiff's claims for stock options available to plaintiff as an employee. The subsequent exceptions to the release provision, however, render the release ambiguous with respect to the parties' **545 intentions concerning those stock options. Although extrinsic evidence is admissible (*see generally W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162–163, 565 N.Y.S.2d 440, 566 N.E.2d 639), the conflicting extrinsic evidence submitted by the parties creates an issue of fact that precludes summary judgment (*see Syracuse Orthopedic Specialists, P.C. v. Hootnick*, 42 A.D.3d 890, 891, 839 N.Y.S.2d 897; *see generally Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). The court erred, however, in denying that part of defendants' cross motion for summary judgment dismissing the claim for specific performance, and we therefore further modify the order accordingly. We conclude on the record before us that the "exceptional instances in which ... specific performance [would be] allowed" are not present in this case (*Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145, 320 N.Y.S.2d 225, 269 N.E.2d 21), and it cannot be said that the remedies available to plaintiff at law are "inadequate to accomplish substantial justice" (*Lucente v. International Bus. Mach. Corp.*, 310 F.3d 243, 262).

We further conclude that the court properly denied that part of defendants' cross motion for summary judgment dismissing the third cause of action, seeking matching

contributions to plaintiff's 401(k) plan, inasmuch as defendants failed to meet their burden of establishing their entitlement to that relief as a matter of law (*see generally Zuckerman*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Finally, we conclude that the court properly denied that part of plaintiff's motion for partial summary judgment dismissing the counterclaims and that part of defendants' motion for summary judgment on the counterclaims inasmuch as there are triable issues of fact that preclude summary judgment (*see generally id.*).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part granting partial summary judgment against the Plan Administrator and by granting that part of the cross motion for summary judgment dismissing the claim for specific performance and dismissing that claim and as modified the order is affirmed without costs.

All Citations

57 A.D.3d 1359, 871 N.Y.S.2d 543, 2008 N.Y. Slip Op. 10251

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