**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| **William C. LYONS, Jr.** | : | |
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| **v.** | : | **No. 3:01cv1355 (JBA)** |
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| **FAIRFAX PROPERTIES, INC., et al.** | : | |

**MEMORANDUM OF DECISION**
**ON MOTIONS TO DISMISS [## 31, 34]**

This case arises out of the spin-off of Fairfax Properties, Inc. ("Fairfax") from the BILCO Company ("BILCO"), a closely-held corporation controlled by various members of plaintiff's family. Plaintiff William C. Lyons, Jr., a former Fairfax employee, claims that Fairfax, BILCO and William C. Lyons, Sr. failed to take steps necessary to permit the transfer of plaintiff's BILCO pension funds to either a qualified defined benefit plan or a roll-over IRA after the spin-off, allegedly in violation of ERISA, 29 U.S.C. § 1132, et seq.

Defendants Fairfax Properties and William C. Lyons, Sr. have moved to dismiss the claims against them, arguing that Count One fails to state a claim because the terms of plaintiff's employment contract with Fairfax do not provide the relief that plaintiff claims is owed him. For the reasons discussed below, Fairfax and Lyons, Sr.'s motions are GRANTED.

## I. Factual background

Before the spin-off on June 21, 1999, plaintiff was employed by Fairfax, BILCO's wholly-owned subsidiary. Although plaintiff was a Fairfax employee, his executive agreement with Fairfax permitted him to participate in BILCO's group pension plan - the BILCO Company Defined Benefit Pension Plan (the "BILCO Plan").

Following disagreement among the BILCO shareholders, the decision was made to spin-off Fairfax. The settlement agreement formalizing the spin-off, together with collateral documentation, deeds and contracts, provided that:

> Prior to or promptly following the execution of this Agreement, Bilco shall have notified the actuary of its defined benefit plan that a divisive reorganization is taking place and authorized and directed such actuary to take all steps necessary to distribute on the Closing Date the full amount of vested benefits to Bill, Jr. to a rollover IRA established by Bill, Jr. for the receipt of such benefits, provided, however, that there will be no requirement to complete the foregoing if, in the opinion of the actuary, it would: (x) not be possible under applicable law; (y) require any amendment to the plan; or (z) require any cost to Bilco beyond the cost of inquiry to the actuary and the normal cost of calculating the amounts owed to any participant and paying amounts out to any participant in connection with the defined benefit plan.

Settlement Agreement, Ex. E to Pl. Supp. Opp., at ¶ 8(c). Additionally, as part of the settlement, Fairfax assumed all of Bilco's obligations under the executive agreement between Bilco and plaintiff. Assignment and Assumption Agreement, Ex. H to Pl. Supp. Opp., at ¶ 2.

While plaintiff's funds were not transferred before the

closing, plaintiff claims he was assured by defendant Mario Zangari, who represented various Fairfax employees including plaintiff in conjunction with the spinoff, that there was no impediment to a transfer to a qualified plan promptly following the closing on June 21, 1999. Based upon these assurances, plaintiff executed the settlement agreement and Fairfax ceased to be a wholly-owned subsidiary of BILCO and became owned by the settling shareholders, including plaintiff.

Unfortunately for plaintiff, since the dissolution, Fairfax has refused to create a qualified defined benefit plan to receive plaintiff's pension funds. On June 30, 1999, the Fairfax Board of Directors adopted a profit sharing plan intended to receive plaintiff's BILCO pension funds, based on Zangari's advice that such a plan would be tax qualified and at no cost to the corporation except legal fees. See Minutes of Special Meeting of Board of Directors of Fairfax Properties, Inc., Ex. J. to Pl. Supp. Opp., at 8. However, subsequent to that meeting, Zangari discovered that a profit sharing plan was not a tax qualified plan, and that plaintiff's funds could be transferred without adverse tax consequences only if Fairfax created a defined benefit plan. See October 5, 2000 Memorandum, Ex. L to Pl. Supp. Opp., at ¶ 13. Because creating a defined benefit plan was estimated to cost from $5,000 to $8,000 for actuarial work, Lyons, Sr. determined that Fairfax did not need such a plan, and refused to authorize the expenditure. Id. at ¶ 16. Moreover,

plaintiff alleges that Lyons Sr., as trustee of the putative plan, has maliciously and vindictively failed to "press BILCO to transfer the assets of the pension plan held for [plaintiff] to Fairfax." Amended Compl. ¶¶ 19, 24.

BILCO has never amended its Plan to allow for the funding of a like qualified defined benefit plan into which plaintiff's assets could be transferred or permitted plaintiff to roll over the funds into an individual IRA. As a result, plaintiff has been unable to transfer his funds out of the BILCO Plan and deposit them into either a Fairfax qualified defined benefit plan or a self-directed IRA or other qualified retirement vehicle.

## II. Standard

On a motion to dismiss for failure to state a claim, the Court's review is limited "'to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.'" Newman & Schwartz v. Asplundh Tree Expert Co., 102 F.3d 660, 662 (2d Cir. 1996) (quoting Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991)); accord Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000) ("For purposes of a motion to dismiss, we have deemed a complaint to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."). At oral argument, however, plaintiff contended that the pending

motions could not be resolved solely on the basis of the documents referenced in the amended complaint, and with the agreement of the parties, the motions to dismiss were deemed motions for summary judgment, pursuant to Fed. R. Civ. P. 12(c). The Court permitted supplemental briefing after the close of discovery, which now has been received, and accordingly, the Court's review is subject to the familiar standard for Rule 56 motions for summary judgment.

**III. Discussion**

Defendants Fairfax and Lyons Sr. argue that the written contracts do not support his claims that they are contractually obligated to create a qualified defined benefit plan, and that any claims based upon oral representations are unenforceable.[1]

First, defendants contend that while plaintiff alleges that under his original employment contract with Fairfax he had a right to participate in a BILCO defined benefit plan and that Fairfax assumed that obligation under the Assignment and Assumption Agreement, the contract with Fairfax provided only that plaintiff was entitled to participate in the BILCO defined benefit plan "to the extent that [he] may be eligible to do so."

[1]Plaintiff does not disagree that under Smith v. Dunham-Bush, Inc., 959 F.2d 6, 10 (2d Cir. 1992), claims that Fairfax and/or Lyons Sr. breached an oral agreement are insufficient to support a claim under ERISA where the terms of the written contracts do not provide for the benefits sought.

Exhibit A to Plaintiff's Amended Complaint, at ¶ 4(a). Defendants argue that this agreement creates no obligation on Fairfax to create a defined benefit plan but only required BILCO to permit plaintiff to participate in its existing Plan.

Next, defendants argue that the amended complaint erroneously alleges that the Settlement Agreement and Collateral Agreements "specifically provided for and obligated BILCO to amend the pension plan, if possible, to provide for the transfer of funds to a like defined benefit plan to be established by Fairfax to received said assets . . . ." Amended Compl. ¶ 13. The Settlement Agreement imposes no obligation on BILCO to amend its plan. Instead, BILCO is obligated to direct its actuary "to take all steps necessary to distribute on the Closing Date the full amount of all vested benefits of Bill, Jr. to a rollover IRA established by Bill, Jr. for the receipt of such benefits," unless "in the opinion of the actuary, it would: (x) not be possible under applicable law; (y) require any amendment to the plan; or (z) require any cost to Bilco beyond the cost of the inquiry to the actuary and the normal cost of calculating the amounts owed to any participant and paying amounts out to any participant in connection with the defined benefit plan." Settlement Agreement, ¶ 8(3).

In response to the motions to dismiss, plaintiff now argues that he has created an individual rollover IRA and he notes that the BILCO plan specifically permits the distribution of a former

employee's funds into an eligible retirement plan, defined as, inter alia, "an individual retirement account described in section 408(a) of the Code." BILCO Plan, Ex. A to Pl. Supp. Br., at ¶ 5.11. Accordingly, plaintiff contends that rollover of his funds would not require an amendment of the BILCO plan, and argues that even if it did, BILCO remains responsible for providing for the portability of his funds, regardless of the language of the Settlement Agreement absolving BILCO of any obligation to amend its plan.

Significantly, plaintiff also states that "[d]uring the pendency of this litigation, WCL, Jr. was terminated as an employee of Fairfax and hence has no standing to demand the creation of a like qualified DBP on the part of Fairfax into which his BILCO DBP funds could be transferred. They can be paid over to his "rollover" or self-directed IRA." Pl. Supp. Br. at 4. Thus, plaintiff appears now to be arguing only that he is entitled to relief against BILCO, which has not moved for dismissal. In light of plaintiff's admission and the lack of identification of any written document that could reasonably be interpreted as obligating Fairfax or Lyons, Sr. to create a defined benefit plan for plaintiff, the Court finds no basis remaining for the claims against either Fairfax or Lyons, Sr.

## IV. Conclusion

For the reasons set forth above, defendants Fairfax and Lyons Sr.'s motions to dismiss [# 31, 34] are GRANTED.

IT IS SO ORDERED.

/s/

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Janet Bond Arterton, U.S.D.J.

**Dated at New Haven, Connecticut, this _12th__ day of July, 2002.**