

05-0609_{cv}

United States Court of Appeals
for the
Second Circuit

**CARMINE A. LOPRESTI, Individually, and in his fiduciary capacity
under the Employee Retirement Income Security Act of 1974, under
the Lutheran Medical Center § 403(b)Tax Sheltered Annuity Plan,**
Plaintiff-Appellant,

-against-

**Citigroup Inc., Wendy Z. Goldstein, Miles H. Kucker, Allen Schechter,
Howard Smith, William D. Myhre, Don Goldstein, State Street Corp.,
Citistreet Associates, LLC, Citistreet Equities, LLC, Citistreet Financial
Services, LLC, Travelers Insurance Company, Buck Consultants, Buck
Consultants, Inc. Lutheran Medical Center, Mayda Casado, Jean Desjardins,
Jim Wilson, Smith Barney Corporate Trust Company, Individually, and in
their fiduciary capacities under the Employee Retirement Income Security
Act of 1974, David A. Spina, Sanford I. Weill, Salomon Smith Barney, Inc.,
Citistreet, LLC.,**

Defendants-Appellees,

CITISTREET, COPELAND ASSOCIATES, INC.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR PLAINTIFF-APPELLANT
TO THE BUCK OPPOSITION**

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Plaintiff-Appellant, Carmine A. LoPresti, (hereinafter "LoPresti"), submits his reply to the brief of Defendants-Appellees Buck Consultants and Buck Consultants, Inc (hereinafter "Buck").

Buck submitted its brief timely, in accordance with this Court's scheduling order #4. The remainder of the Defendants-Appellees, have elected not to serve their briefs in accordance with the scheduling order.

Buck Failed to Properly Address the Issues LoPresti Presented in ¶¶ 1, 2, 3, 4, 7, 9, and 10 of his Brief.

Buck failed to address the core issue raised by LoPresti in this appeal. This concerns the errors the District Court committed, in granting the motions to dismiss, based upon its making findings of contested material facts in favor of Buck. The District Court committed reversible error in making findings of material and contested fact to support its dismissal of LoPresti's complaint under F.R.C.P. 12(b)(6).

The findings of fact were made in Buck's favor without any discovery whatsoever, a hearing, a trial, or even oral argument on the motions being appealed. This case was never conferenced by Judge Johnson.

**Buck's Argument That "The Complaint Failed To
Allege That Buck Assumed Fiduciary Responsibilities
To Any Plan" Is Erroneous. (BB-12)**

Whether or not an entity or person is a fiduciary under ERISA is a question of law. ERISA imposes fiduciary status upon on an entity that performs the acts set forth under 29 U.S.C. § 1002(21)(A). ('BB' refers to the Buck Brief). (See BB-12 for the text of the statute.) Contrary to Buck's assertion, the issue is not one of an entity *assuming* fiduciary status as Buck alleges. Fiduciary status is one that ERISA imposes under the statute, depending on the facts of each situation.

It is only after the material questions of fact have been resolved by the trier of the facts that the law can be applied regarding fiduciary status.

The District Court made its own findings of material facts about the fiduciary status of the LoPresti and the nature of two (2) alleged § 403(b) plans all to the LoPresti's prejudice, which resulted in the wrongful dismissal of his action.

**Contrary To Buck's Assertions, Buck Is
Named As A Participating Defendant In The
Complaint**

Buck asserts that none of the counts in the complaint are referable "specifically" to Buck. Contrary to this assertion, it is to be noted that in the complaint at paragraph thirty-six, (36) it is specifically stated that subject to

the proof to be established at trial, certain of the defendants are fiduciaries as defined in Title 1 of ERISA.

The dismissal of the complaint under FRCP § 12(b)(6) precluded LoPresti from establishing his proof on the issue of his and Buck's status of being a fiduciaries. The case thus was not disposed of on the merits.

Buck's specific involvement in this case is clearly set forth in paragraph sixty-one (61) of the Second Amended Complaint (hereafter SAC)(A-121)

At time of trial, LoPresti would have been in a position to submit his proof on the Buck role in the preparation of the pension information packages authored or co-authored by Buck. The SAC states they were misleading, incomplete and erroneous. Said misleading packages are attached to the SAC as Exhibits E-1 through E-15 (A-213 through A-227).

As stated in paragraph sixty-two (62) of the SAC (A-121) the materials prepared by Buck were the basis for the allegations of failing to make proper disclosures to the plan participants at Lutheran Medical Center, (hereinafter "LMC"), as stated in paragraph sixty-three (63) of the SAC.

Accordingly the statements made by Buck about not being specifically mentioned in the SAC are clearly contrary to paragraphs sixty-

one through sixty-three (61-63) of the SAC and the exhibits attached thereto, which were authored or co-authored by Buck.

Buck knew that they were providing the actuarial and mathematical projections which would be used by the co-defendants herein to convince the Lutheran employees to go along with the co-defendants and discontinue the voluntary § 403(b) contributions into the annuities and mutual funds sold by LoPresti, and enrolling in the annuities and mutual funds being mandated by the co-defendants.

Unless Buck provided the co-defendants with the incomplete and misleading comparisons between the existing § 403(b) plan and the modified plans being offered by the co-defendants, LoPresti and the LMC employees would not have suffered the financial losses and set backs referred to in the SAC. The allegations of the nature of the incomplete comparisons prepared by Buck are set forth in the SAC are all subject to proof. Proof has been eliminated by virtue of the dismissal of the SAC. The issue will not be decided on its merits.

Paragraph thirty-seven (37) of the SAC, specifically refers to Buck as being included whenever the complaint refers to a non LMC defendant and includes Buck in the complaint collectively as being included when referring to the Citigroup defendants.

The Buck defendants are two (2), of twenty-six (26) co-defendants. Their brief seems to imply that they are entitled to something in the nature of answers to interrogatories in lieu of the complaint. Contrary to their assertion however, the complaint states that Buck is included anywhere the Citigroup defendants are mentioned in the complaint.

Buck Meets the Definition of a Fiduciary Under the Second (ii) Section of 29 U.S.C. § 1002(21)(A).

Both the Buck brief, and the District Court in its decision (A-79), relied on the first and third sections of paragraph 29 U.S.C. § 1002(21)(A) in asserting that Buck is not a fiduciary. The District Court and Buck however ignored the fact that Buck is a fiduciary under Section (ii) of the statute. Buck was rendering investment advice for a fee with respect to the moneys of the Lutheran Plan. Buck authored the actuarial projections that were used by LMC to convince its employees to stop depositing their voluntary § 403(b) salary reductions into the annuities and mutual funds sold by LoPresti. This made Buck a fiduciary under ERISA.

The Meaning of the Words the "Same Plan"

The meaning or the definition of the phrase the "same plan" is subject to construction and it depends on the circumstances surrounding the "same plan". This was a finding of fact made in error by the District Court. LoPresti should have been permitted to submit his proof regarding the

existence of the § 403(b) plan at Lutheran Medical Center as being the "same plan" under ERISA.

The District Court Abused its Discretion in Refusing to Allow Submission of an Amended Complaint, and in Refusing to Exercise Supplemental Jurisdiction.

The District Court's abused its discretion in not permitting LoPresti to submit an amended complaint before granting the Buck motion to dismiss under F.R.C.P. 12(b)(1) and 12(B)(6). *Foman v. Davis* 371 U.S. 178, 182, 83 S.Ct. 227, 230; 9 L.Ed.2d 222 (1962).

LoPresti had requested that leave to replead be granted if the District Court granted the motion to dismiss. This was requested in the conclusion to LoPresti's papers in opposition to the Buck motion to dismiss. Leave was denied and amendment rendered impossible due to the order directing the Clerk of the District Court to enter a final judgment of dismissal. (A-83).

In refusing to exercise its supplemental jurisdiction, it is respectfully submitted that the District Court abused its discretion. The federal courts have exclusive jurisdiction over cases such as this that sound in ERISA. The dismissal has left LoPresti without a remedy or forum.

It is to be noted that LoPresti originally filed this action in the New York State Supreme Court on August 28, 2002. It bore index number

34229/02. Due to its ERISA components however, LoPresti withdrew the State action and brought it in the Federal District Court.

Buck states that LoPresti was involved in a suit he filed in the New York State Supreme Court for similar to this action. It is as irrelevant to this appeal, as are the many cases filed in the United States involving Buck.

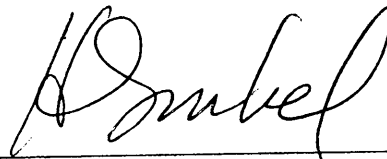
The amended complaint in this action was served as a matter of right under the Federal Rules and the second amended complaint was served only after receiving the consent and stipulation therefore from all counsel herein. The third amended complaint was the first complaint that was offered on motion to the Court. It addressed the true status of the defaulted defendant Citistreet, as being a joint venture between Citigroup, Inc. and State Street Corp.

CONCLUSION

For the reasons set forth herein and in LoPresti's brief, the decisions of the District Court should be reversed and the Complaint be reinstated so that this case can be decided on the merits.

Dated: Freeport, New York
January 3, 2006

Respectfully Submitted,



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