

This action was commenced on December 7, 1998, by means of a complaint filed by Plaintiff, Ronald T. Tomasko against Defendants, Ira H. Weinstock, P.C. and Ira H. Weinstock. On December 30, 1998, Tomasko filed his first amended complaint setting forth a claim under the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 P.S. § 260.1, et seq., and claims under Section 502(a)(1)(B) and 502(a)(2) of the Employee Retirement Income Security Act of 1974 as amended ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(2). Tomasko filed a second amended complaint by stipulation pursuant to Fed.R.Civ.P. 15(a).

A non-jury trial was held, and in an Order dated December 18, 2001, judgment was entered in favor of Tomasko and against Defendant, Ira H. Weinstock, P.C. directing Defendant to "make appropriate contributions" into Tomasko's pension plan for \$6,100.00 in additional compensation earned by Plaintiff in 1996.

The parties filed timely cross-motions for reconsideration/amendment of the judgment. By Order dated August 15, 2002, this Court granted, in part, Tomasko's motion for reconsideration/amendment of judgment, and entered judgment in Tomasko's favor and against Ira H. Weinstock, P.C. and Weinstock as to Count III of the amended complaint (a claim for breach of fiduciary duty under Section 404 of ERISA). This Court further denied the motion for reconsideration filed by Defendants, Ira H. Weinstock, P.C. and Weinstock.

As of this date, Defendant, Ira H. Weinstock, P.C. has not made any contributions to Tomasko's pension plan for \$6,100.00 in additional

compensation earned by him in 1996. Additionally, Defendant, Ira H. Weinstock, P.C., has neither sought nor been granted a stay of the Order dated December 18, 2001.

On March 25, 2003, Tomasko filed a motion for contempt against Defendant, Ira H. Weinstock, P.C. The matter was fully briefed and oral argument was held August 6, 2003.

DISCUSSION

“To hold a party in civil contempt, the complainant must establish three elements by clear and convincing evidence: (a) that a valid court order existed; (b) that the [alleged contemnor] had knowledge of the order; and (c) that the [alleged contemnor] disobeyed the order.” *Roe v. Operation Rescue*, 919 F.2d 857, 871 (3d Cir. 1990); see *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 974 (3d Cir. 1982). “[W]here there is some reasonable basis upon which to doubt the wrongfulness of [contemnors’] conduct, they should not be adjudged in contempt.” *Robin Woods, Inc. v. Woods*, 815 F.Supp. 856, 868 (W.D. Pa. 1992) (citing *American Greetings Corp. v. Dan-Dee Imports*, 807 F.2d 1136, 1140 (3d Cir. 1986), and *Quinter*, 676 F.2d at 974).

The Plaintiff has established by clear and convincing evidence that the three elements necessary to establish contempt are present. There is no dispute that the Order issued by this Court on December 18, 2001, is valid, that Defendant Ira H. Weinstock, P.C., has knowledge of the Order, and that it did not make “appropriate contributions “ to Tomasko’s pension accounts.

The Defendant argues it did not disobey the December 18, 2001 Order. Defendant asserts that since I denied the Plaintiff's motion for reconsideration seeking an order requiring the Defendant to determine the appropriate amount of the pension contributions, Defendant did not have to do so. Indeed the Defendant argues that no where did the Court order the Defendant to calculate the amount due. This argument is without merit. I ordered appropriate contributions be made by Defendant. The Defendant made appropriate contributions for all the participants who worked for it. Mr. Tomasko was no different. Implicit in the order to make appropriate contributions is to do what Defendant normally did, viz determine the amount and pay it.

The Defendant also argues compliance is impossible because the Money Purchase Plan and the Profit Sharing Plan have merged. While there is no record of this, even if I assume it is so, it is clear the merger occurred after the December 18, 2001 Order, and after the withdrawal of Mr. Tomasko from the plans in January, 1998. Therefore, any merger has no impact on the December 18, 2001 Order.

I find by clear and convincing evidence that Defendant is in contempt, and I will require that the appropriate contributions, together with the allowable percentage increment during 1997, be made directly to Plaintiff, since he withdrew in 1998,¹ and the payment of \$1200.00 in counsel fees to Plaintiff for

¹ Whether or not interest was waived during the course of trial is irrelevant. Waiver, if any, did not countenance non payment of the award. Moreover, I deem it part of the remedy for the contempt.

pursuing this contempt motion.² I will deny the Plaintiff's request for a fine and the removal of Mr. Weinstock as a fiduciary.

An appropriate order follows.

Date: August 29, 2003

A. Richard Caputo
A. Richard Caputo
United States District Judge

² At oral argument counsel indicated he had spent 15 hours on the motion and brief. Because I believe this matter could have been resolved by reason and common sense on both sides, I will not assess the full amount of fees requested.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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|--------------------------------|---|-------------------------------|
| RONALD T. TOMASKO, | : | |
| | : | CIVIL ACTION NO. 3:98-CV-1978 |
| Plaintiff, | : | |
| | : | |
| vs. | : | (JUDGE CAPUTO) |
| | : | |
| IRA H. WEINSTOCK, P.C., ET AL. | : | |
| | : | |
| Defendants. | : | |

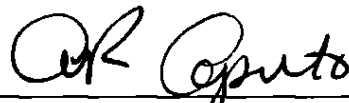
FILED
SCRANTON
AUG 29 2003

PER Km
DEPUTY CLERK

ORDER

NOW, this 29th day of August, 2003, IT IS HEREBY ORDERED that:

1. Defendant, Ira H. Weinstock, P.C., is in contempt of court for failure to comply with this Court's Order of December 18, 2001 in failing to make the ordered pension contributions on behalf of Plaintiff.
2. Defendant shall make the ordered contributions directly to Plaintiff together with the proportionate increment, if any, gained during the calendar year 1997.
3. Defendant shall pay counsel fees in the amount of \$1200.00 to Plaintiff.
4. The request for all other relief is denied.



A. Richard Caputo
United States District Judge