

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN J. McNABOE,)
)
 Plaintiff/Appellee,)
)
 v.) C.A. No. 97-558-SLR
)
 NVF COMPANY, BRENDA NESTOR)
 CASTELLANO, and EVANS TEMPCON,)
)
 Defendants/Appellants.)

MEMORANDUM ORDER

I. INTRODUCTION

On October 9, 1997, plaintiff John J. McNaboe brought this action against defendants NVF Company ("NVF"), Evans Tempcon ("Evans"), and Brenda Nestor Castellano ("Castellano"). (D.I. 1) As set forth in his second amended complaint, plaintiff asserted claims for: (1) breach of employment contract against NVF and Evans; (2) breach of the covenant of good faith and fair dealing against NVF and Evans; (3) violations the Delaware Wage Payment and Collection Act ("WPCA") against NVF and Evans; (4) age discrimination under the ADEA against NVF and Castellano; (5) violation of ERISA against NVF; and (6) tortious interference with contractual relations against Castellano. (D.I. 31) On August 14, 1998, defendants answered denying all allegations and asserted counterclaims for breach of fiduciary duty and violations of the obligations of good faith and fair dealing. (D.I. 81)

This court held a jury trial from February 1, 1999 to February 12, 1999. At trial, plaintiff voluntarily withdrew his ERISA claim. (D.I. 266 at 200) After plaintiff rested, the court granted defendants' motion for judgment as a matter of law ("JMOL") with respect to plaintiff's tortious interference claim against Castellano and plaintiff's claims against NVF under the Deferred Retirement Income Security Plan ("DRISP"). (D.I. 264 at 162-63)

On February 16, 1999, the jury returned its verdict finding that defendants NVF and Evans had breached their respective employment contracts with plaintiff, had violated the covenant of good faith and fair dealing, and had failed to pay plaintiff wages owed to him without reasonable grounds. (D.I. 256) However, the jury found that NVF had not violated the ADEA when it terminated plaintiff. (Id.) With respect to defendants' counterclaims, the jury found for the plaintiff on all counts. Id. Plaintiff was awarded damages against NVF and Evans in the amount of \$458,800 and the court entered judgment on the verdict on February 17, 1999. (Id.)

On post-trial motions, the court granted defendants' renewed motion for JMOL (D.I. 270) on the breach of employment contract claim, but denied its motion with respect to the breach of covenant of good faith and fair dealing claim. (D.I. 298); see McNaboe v. NVF Co. et al., 2000 U.S. Dist. LEXIS 4418 (D. Del.

March 20, 2000). The court also granted defendants' motion for JMOL on the WPCA claim with respect to NVF but denied it with respect to Evans. (Id.) On August 2, 2000, the court entered its amended final judgment in favor of plaintiff and against NVF in the amount of \$518,208 and against Evans in the amount of \$9,874. After judgment was entered, defendants filed a notice of appeal with the United States Court of Appeals for the Third Circuit (D.I. 333) and plaintiff cross-appealed (D.I. 337).

On January 8, 2001, this court granted defendants' motion to stay execution of the judgment and required defendants to deposit \$575,000 in lieu of a supersedeas bond pending appeal to the Third Circuit. (D.I. 338) Subsequently, defendants deposited the \$575,000 with the Clerk of the Court.

On appeal, the Third Circuit ruled that the judgment in favor of NVF on the breach of contract claim was reversed, and the judgment on that count in favor of plaintiff was to be reinstated. McNaboe v. NVF Co. et al., 276 F.3d 578 (3d Cir. 2001). The Third Circuit also ruled that the judgment in favor of plaintiff on the covenant of good faith was vacated and judgment would be entered in favor of defendants on that count. Id. Finally, the Third Circuit remanded the court's calculation of prejudgment interest for recalculation and affirmed on all other issues. (Id.)

Presently before this court are various motions on remand

and the recalculation of prejudgment interest. Plaintiff now moves to lift the stay of execution and disburse the funds deposited by defendants in lieu of a bond (D.I. 361) to him. Conversely, defendants move for return of funds deposited with the Clerk of the Court in lieu of a bond (D.I. 364) to them. Finally, plaintiff moves to revise, alter, or amend the judgment and for award of attorney fees and expenses under the Delaware Wage Payment and Collection Act. (D.I. 372)

II. DISCUSSION

A. Funds deposited in lieu of supersedeas bond

On January 8, 2001, this court entered an order staying execution of the judgment and requiring defendants to deposit \$575,000 in lieu of a bond to provide security and protection for plaintiff opposing the appeal. (D.I. 338) The order stated:

4. Any party other than Defendant may, following the appeal, collect any moneys owed under the terms of the judgment or the judgment as modified on appeal, from the amount deposited by Defendants if Defendants do not otherwise pay those sums promptly. Collection may be accomplished by means of a motion, served and filed in this Court.

5. If the judgment is reversed, or if Defendants fully satisfy and obtain a satisfaction of judgment from the parties to this action, the sums deposited, together with any interest earned, shall be returned to Defendants.

(Order granting D.I. 338-1)

On November 30, 2001, the Third Circuit issued its opinion

on defendants' appeal and plaintiff's cross appeal. The Third Circuit reversed defendants' judgment on the breach of contract claim and reinstated the jury verdict. The Third Circuit also vacated plaintiff's judgment on the breach of covenant of good faith and fair dealing and entered judgment on this count in favor of defendants, holding that this claim and the breach of contract claim were mutually exclusive.

Plaintiff now contends that since its cross appeal and defendants' appeal are now resolved and plaintiff is entitled to his recovery, albeit now on the breach of contract claim instead of the covenant of good faith and fair dealing claim, the stay should be lifted and the money should be disbursed to him under this court's order. (D.I. 361) Defendants argue that the money it deposited was to secure NVF's appeal on the breach of covenant claim and Evans' WCPA claim, and since the Third Circuit reversed plaintiff's judgment on the NVF breach of covenant claim, NVF is entitled to its money back securing the breach of covenant claim under the order. (D.I. 365) This argument is without merit.

First, nowhere in this court's order does it say the money deposited by defendants was for the purpose of securing any specific claims. In fact, the order states that, "the Court finds that a cash deposit ... is sufficient to provide adequate security and protection for the parties opposing appeal." (Order granting D.I. 338-1 at 1) Thus, the purpose of the deposit was

to protect plaintiff's entitlement to an award, regardless of the grounds, not to secure any specific claim as argued by defendants.

Second, NVF fails to read paragraph five of the order in light of paragraph four which states, "Any party other than Defendant may, following the appeal, collect any moneys owed under the terms of the judgment or the judgment as modified on appeal, from the amount deposited by Defendants...." Thus, even after the Third Circuit modified the judgment under which plaintiff was entitled to recover, he was still entitled to recover. Therefore, plaintiff is still entitled to recover under the modified judgment language of paragraph four, and the judgment against NVF in favor of plaintiff (regardless of the claim supporting the judgment) was not reversed as properly interpreted under paragraph five.

As such, plaintiff's motion to lift the stay of execution and disburse funds deposited in lieu of supersedeas bond (D.I. 361) is granted. Accordingly, defendants' motion for return of money deposited with the clerk of the court in lieu of supersedeas bond (D.I. 364) is denied.

B. Recalculation of prejudgment interest

The parties agree that after subtracting the sum of \$16,915 (which the jury awarded for insurance premiums, travel expenses, and lost salary from Evans) from the total jury verdict of

\$458,800, the amount of lost salary attributable to NVF is \$441,885. (D.I. 365, D.I. 369) The parties also agree that plaintiff's first missed pay period was on October 10, 1997. (D.I. 361, D.I. 365) After this, however, the parties' prejudgment interest calculations diverge.

Plaintiff divides his annual salary by 26, calculating his biweekly pay amount at \$14,630.77. He then divides the total amount of lost salary determined by the jury, \$441,885, by \$14,630.77 to arrive at the conclusion that had his contract not been terminated, he would have received 30 biweekly paychecks from October 10, 1997 and every second Friday thereafter, and a final payment of \$2,926.15 on December 4, 1998. (D.I. 361 at 4)

Defendants divide the total amount of lost salary, \$441,885, by the number of pay periods left on plaintiff's contract (41) that was set to expire April 25, 1999. (D.I. 365 at 5) Thus, defendants contend that plaintiff would have received 41 biweekly paychecks of \$10,777.68 had the contract not been terminated. Id. Defendants also point out that plaintiff is not entitled to receive prejudgment interest on the last five paychecks since they would have occurred after February 17, 1999, the date judgment was entered in this suit. Id. The effect of this method of calculation is to spread the mitigating effect of plaintiff's Sunbeam earnings across the entire period.

Defendants, however, fail to take into account that: (1)

this suit and the Sunbeam mitigation would not have existed had the contract not been terminated; and (2) the Third Circuit stated in its opinion "that the right to interest accrues as of the time the payments would have been made absent the termination." McNaboe, 2001 U.S. App. LEXIS 26578, *19. Absent the termination, plaintiff's actual biweekly pay amount would in fact be \$14,630.77.

Thus, calculating interest on each of those \$14,630.77 payments at the rate of 10% per annum until February 17, 1999 yields a total interest amount of \$36,817.24 on NVF back salary. Additionally, plaintiff is entitled to prejudgment interest on the \$12,300 in insurance premiums and travel reimbursement from September 26, 1997 to February 17, 1999. At 10% per annum, that amount is calculated at \$1,610.79. The total amount of prejudgment interest added to the jury verdict is \$38,428.03. Adding that amount to the total amount awarded to plaintiff against NVF, \$454,185, yields a total of \$492,613. The Third Circuit also affirmed the \$9,874 judgment for plaintiff against Evans. Thus, the total award, including prejudgment interest against defendants is \$502,487.

The parties agree that plaintiff is also entitled to post-judgment interest pursuant to 28 U.S.C. § 1961, at a rate of 4.584% compounded annually. (D.I. 361 at 5, D.I. 365 at 6) Performing this calculation yields the following results:

February 18, 1999 through February 17, 2000 = $\$502,487 * 4.584\% = \$525,521$; February 18, 2000 through February 17, 2001 = $\$525,521 * 4.584\% = \$549,610$; and February 18, 2001 through February 17, 2002 = $\$549,610 * 4.584\% = \$574,805$. The total due to plaintiff is $\$574,805$ plus $\$72.19$ for each day after February 17, 2002, until plaintiff is paid.

For the foregoing reasons, this court concludes that the Clerk of the Court is to disburse to plaintiff, from the cash deposit made by defendants, the sum of $\$574,805$ plus $\$72.19$ for each day after February 17, 2002, until the date the funds are disbursed. The remaining amount, if any, in the account is to be disbursed to defendants.

C. Motion to revise, alter, or amend the judgment and for award of attorney fees and expenses under the WPCA

Plaintiff has filed a motion to amend the judgment in his favor with respect to his claim against NVF under the WPCA (D.I. 372) and is seeking liquidated damages, attorney fees and costs pursuant to the Act. Plaintiff argues that the court declared his WPCA claim moot when it granted defendants' post-trial motion for JMOL on the breach of contract claim. (D.I. 270) Now that the Third Circuit has reversed the court's decision with respect to the breach of contract claim, plaintiff contends that his WPCA claim is no longer moot and he is entitled to judgment in his favor.

Defendants raise a number of arguments as to why plaintiff is not entitled to recover under the WPCA: (1) plaintiff waived his WPCA claim by not raising it on appeal; (2) plaintiff's motion to amend judgment is untimely; and (3) plaintiff is not entitled to recover against NVF under the WPCA on the merits. (D.I. 379 at 4-5) For the reasons that follow, the court shall deny plaintiff's motion to amend judgment.

1. Waiver of the WPCA claim

Plaintiff argues that he was not required to raise his WPCA claim on appeal and, in fact, "could not" raise the WPCA claim on appeal because the court's grant of JMOL on the breach of contract claim rendered the WPCA claim moot. (D.I. 381 at 2) In support of this argument, plaintiff cites a reversed case from the Court of Appeals for the Federal Circuit, Laitram Corp. v. NEC Corp., 115 F.3d 947 (Fed. Cir. 1997); rev'd, 163 F.3d 1342 (Fed. Cir. 1998). Plaintiff contends that the Federal Circuit's holding in Laitram that an appellee's failure to raise an issue on appeal held moot by the district court is instructive and should be applied here. (D.I. 381 at 5) This argument is without merit.

Setting aside the fact that the Laitram case cited by plaintiff was subsequently reversed, its holding is also distinguishable from the facts in this case. In Laitram, a jury held that defendant NEC had willfully infringed a patent owned by

plaintiff Laitram. The district court granted defendant's post-trial motion for JMOL of non-infringement. See Laitram, 115 F.3d 947. Based on this finding, the district court determined that Laitram's claim of willful infringement and claim identity were moot. Id. at 949. Laitram appealed the district court's grant of JMOL of non-infringement to the Federal Circuit. Neither party briefed or addressed the issues of willful infringement or claim identity on appeal. The Federal Circuit reversed the district court's grant of JMOL and ordered that the jury verdict be reinstated. See Id. On remand, NEC argued that the willfulness and claim identity issues, timely raised in its initial JMOL motions, were no longer moot and must be decided. Laitram argued that NEC waived these issues by not raising them on appeal. The district court agreed with Laitram and NEC appealed the waiver issue to the Federal Circuit.

On appeal for the second time, the Federal Circuit held that NEC did not waive its willfulness and claim identity claims because NEC was the appellee on appeal. Id. The Federal Circuit concluded that as appellees, NEC did not decide which issues to appeal and could not rightfully cross-appeal an alternative basis for a favorable judgment. Therefore, the Federal Circuit concluded that

full application of the waiver rule to an appellee puts it in a dilemma between procedural disadvantage and improper use of the cross-appeal. That dilemma, together with the potential judicial diseconomies of

forcing appellees to multiply the number of arguments presented, justifies a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals.

Id. at 954.

In this case, plaintiff did have the opportunity to cross-appeal the court's judgment and was not in the position of arguing an alternative basis for a favorable judgment. (D.I. 337) Plaintiff cross-appealed the breach of contract claim yet failed to raise the underlying WPCA claims. As the Third Circuit has recognized, determination of whether or not a claim is moot is a proper ground for appeal. See OSHA Data/CIH, Inc. v. United States DOL, 220 F.3d 153 (3d Cir. 2000); Ruocchio v. United Transp. Union, Local 60, 181 F.3d 376 (3d Cir. 1999). As such, plaintiff's failure to raise his WPCA claims on appeal constitutes a waiver.

2. Future wages under the WPCA

Even if plaintiff's failure to raise his WPCA claims on appeal were not considered a waiver, the court concludes on the merits that plaintiff is not entitled to compensation against NVF under the WPCA. Plaintiff argues that § 1113 of the WPCA provides for liquidated damages and attorneys fees for violations of the Act. (D.I. 373 at 6) He also argues that his award against NVF on the breach of contract claim constitutes "benefits and wage supplements" under § 1109 of the Act, thus entitling him to double damages on that amount. Id. at 6-7.

Defendant NVF argues that the jury's award to plaintiff was neither for "benefits and wage supplements" nor for any unpaid earnings or benefits denied plaintiff during his tenure at NVF. NVF contends that the jury awarded plaintiff future wages arising after his termination at NVF; therefore, his claim is not cognizable under the WPCA. The court agrees.

Section 1113 of the WPCA states in relevant part:

(a) A civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction.

(c) Any judgment entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorney's fees, all to be paid by the defendant.

19 Del. C. § 1113.

Section 1101 defines "wages" as "compensation for labor or services **rendered** by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation." 19 Del. C. § 1101 (emphasis added). As the damages awarded by the jury were for services not yet rendered by plaintiff, neither party argues that plaintiff's damage award constitutes wages.

Plaintiff instead argues that the award constitutes "benefits and wage supplements" under § 1109, which states in relevant part:

(a) Any employer who is party to an agreement to pay or provide benefits or wage supplements to any employee

shall pay the amount or amounts necessary to provide such benefits or furnish such supplements within 30 days after such payments are required to be made

(b) As used herein, "benefits or wage supplements" means compensation for employment other than wages, including but not limited to, reimbursement for expenses, health, welfare or retirement benefits, and vacation, separation or holiday pay

19 Del. C. § 1109.

Plaintiff contends that the jury's award for the unexpired term of his employment contract is "severance" or "separation pay." (D.I. 381 at 13) However, plaintiff fails to cite any cases, nor has the court found any cases in this jurisdiction or any other jurisdiction, that hold that unearned future wages are "severance" or "separation pay" cognizable under the WPCA.

NVF asserts that the jury award was not for severance or separation pay, but rather breach of contract damages. (D.I. 379 at 15) This is evidenced by the fact that the jury mitigated plaintiff's award by the amount he earned working at Sunbeam after his termination from NVF. Id. NVF argues if the jury had awarded plaintiff separation or severance pay, it would not have taken into account his subsequent earnings at Sunbeam. Bolstering this argument, NVF also points to the Third Circuit's decision on appeal that prejudgment interest must be calculated on a periodic basis. Id. at 21. If the award was for severance pay or separation pay, the entire amount of the award would be accelerated up to the day plaintiff was terminated and he would

be entitled to prejudgment interest on the entire sum, not on hypothetical periodic pay periods.

NVF next argues that even if plaintiff's award were considered "benefits or wage supplements," he is not entitled to liquidated damages on that amount under the WPCA. Id. at 16.

NVF cites WPCA § 1103(b) which states:

If an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in addition, be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages ... or an amount equal to the unpaid wages, whichever is smaller....

19 Del. C. § 1103(b). Thus, NVF argues that on the face of the statute, liquidated damages are allowable only on an employer's failure to pay wages, not on its failure to pay "benefits or wage supplements." (D.I. 379 at 16) Since neither party asserts that the jury's award was for wages, NVF asserts that plaintiff cannot recover liquidated damages on the amount awarded against NVF.

Plaintiff responds that NVF's argument is misplaced. He argues that he is not relying on § 1103, but on §§ 1109 and 1113. (D.I. 381 at 16) Section 1113(a) states that "a civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction." Plaintiff asserts that while § 1113 refers specifically to wages, the Delaware Superior Court's decision in Department of Labor ex rel. Commons v. Green Giant Co., 394 A.2d 753 (Del. Super. 1978), holds that the term

"wages" under § 1113 should be interpreted broadly enough to include "benefits and wage supplements" under § 1109. (D.I. 381 at 16) Therefore, under the "liquidated damages" language of § 1113, and § 1109's inclusion of "benefits and wage supplements" under § 1113, plaintiff is entitled to liquidated damages on its award.

Plaintiff's argument fails for two reasons. First, the Superior Court in Green Giant did not hold that a plaintiff could recover liquidated damages under § 1109, only that the plaintiff could proceed under § 1109 of the WPCA for unpaid accrued severance. Green Giant, 394 A.2d at 758. Plaintiff has failed to cite, and the court has not found, any cases allowing liquidated damages for severance pay under the WPCA. Second, as a matter of policy, it would be counterintuitive to allow plaintiff to recover liquidated damages on the jury award.

As NVF argued in its oral argument on the issue, allowing plaintiff to recover liquidated damages on unearned breach of contract damages would eviscerate his motivation to mitigate the damages. (D.I. 387 at 18) If plaintiff could expect double damages on his award, it would make no sense for him to mitigate. For every dollar he made in post-termination salary, he would be giving up two dollars in liquidated damages. Thus, given the public policy in favor of mitigating breach of contract damages, the legislature could not have intended the WPCA to allow for

liquidated damages on this type of claim.

After hearing the parties' arguments, the court concludes that as a matter of law, plaintiff's award for unearned, post-termination pay is not "benefits or wage supplements" under § 1109 of the WPCA. Furthermore, even if plaintiff's award were severance pay, liquidated damages and attorney fees under § 1113 are not available for claims under § 1109.

III. CONCLUSION

At Wilmington this 25th day of October, 2002, having heard oral argument and having reviewed papers submitted in connection therewith, for the reasons stated;

IT IS ORDERED that:

1. Plaintiff's motion to lift stay of execution and disburse funds deposited in lieu of supersedeas bond (D.I. 361) is granted. The Clerk of the Court shall disburse to plaintiff John J. McNaboe, from the cash deposit made by defendants in this case, the sum of \$574,805 plus \$72.19 for each day after February 17, 2002, until the date the funds are disbursed. The remaining amount, if any, in the account is to be disbursed to defendants.

2. Defendants' motion for return of money deposited with the clerk of the court in lieu of supersedeas bond (D.I. 364) is denied.

3. Plaintiff's motion to revise, alter, or amend the

judgment and for award of attorney fees and expenses under the Delaware Wage Payment and Collection Act (D.I. 372) is denied.

Sue L. Robinson
United States District Judge