

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5558

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MARTYN C. GLEN,

Plaintiff-Appellant-  
Cross Appellee,

versus

CHARLES NOBLE, JR., ET AL,

Defendants-Appellees,  
Cross Appellants.

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Appeal from the United States District Court for  
the Western District of Texas  
(SA 90 CA 286)

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(December 16, 1992)

Before REAVLEY, SMITH and DEMOSS, Circuit Judges.

PER CURIAM:\*

The Order of the district court of March 5, 1992 disposed of all parties and claims. The Rule 58 judgment of the clerk, entered pursuant to the court's Order on the same date, is a final judgment. Notice of appeal was properly given, and this court has jurisdiction.

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The judgment must be reversed in part for the reason that Glen's claim that he was entitled to be paid his total benefits in a lump sum upon termination was an unresolved issue under the summary judgment record. The parties agree. We therefore hold:

1. The claim of Glen that the profit sharing and pension plans were violated because of the failure to contribute 25% of Glen's salary each year was properly dismissed on the merits. The plans do not provide for contribution of 25% of salary and could be modified only by written instrument. Williams v. Bridgestone/Firestone, Inc., 954 F.2d 1070, 1072 (5th Cir. 1992). An oral promise to discuss the contribution, claimed by Glen, would be ineffectual. This part of the judgment, only, is affirmed.

2. The claim for lump sum "cash out" could not be resolved on the summary judgment record. The cause is remanded for this purpose.

3. The claim for the "cash out" would lie against Charles Noble, Jr. in his capacity as trustee of the plans. Glen should be allowed to amend to sue the trustee in that capacity.

4. The state claims are reinstated with the reversal of the judgment. They remain in the federal court pendent to the ERISA claim for cash out rights.

AFFIRMED IN PART, REVERSED IN PART; CAUSE REMANDED.