

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - November 10, 2008

PETER B. SKELOS, J.P.
ROBERT A. LIFSON
FRED T. SANTUCCI
RUTH C. BALKIN, JJ.

2008-02158

DECISION & ORDER

David Smith, plaintiff-respondent, v Pathmark
Stores, Inc., f/k/a Supermarkets General Corporation,
defendant-respondent, Estate of Margaret O'Neill by
Tom O'Neill, Executor, appellant.

(Index No. 29092/06)

William R. Garbarino, Sayville, N.Y. (Donald R. Hamill of counsel), for appellant.

Benjamin J. Klemanowicz, Jr., P.C., Mineola, N.Y. (Richard J. Vande Stouwe of
counsel), for plaintiff-respondent.

In an action, inter alia, for a judgment declaring that the plaintiff is the primary beneficiary under a certain Pathmark 401k Savings Plan, the defendant Estate of Margaret O'Neill by Tom O'Neill, Executor, appeals, as limited by its brief, from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Weber, J.), dated February 28, 2008, as granted the plaintiff's motion for summary judgment, dismissed its counterclaims, declared that the plaintiff is the primary beneficiary under the Plan, and directed the defendant Pathmark Stores, Inc., f/k/a Supermarkets General Corporation, to deliver the corpus of the account to the plaintiff.

ORDERED that the order and judgment is affirmed insofar as appealed from, with costs.

The plaintiff met his burden in moving for summary judgment by establishing, prima facie, that he was the designated beneficiary under a Pathmark 401k Savings Plan (hereinafter the Plan) maintained by his former wife, now deceased (hereinafter the decedent), as an employee of the

defendant Pathmark Stores, Inc., f/k/a Supermarkets General Corporation (hereinafter Pathmark) (*see Storozynski v Storozynski*, 10 AD3d 419). In opposition, the appellant, the estate of the decedent (hereinafter the Estate), failed to raise a triable issue of fact.

Contrary to the Estate's contention, the stipulation entered into by the plaintiff and the decedent prior to her death did not constitute a waiver of the plaintiff's interest in the Plan. The stipulation did not expressly reference the Plan, and the general release language contained therein was insufficient to effectuate a valid waiver (*see Eredics v Chase Manhattan Bank*, 100 NY2d 106, 112-113; *Storozynski v Storozynski*, 10 AD3d 419; *cf. Silber v Silber*, 99 NY2d 395, 404, *cert denied* 540 US 817; *Valentin v New York City Police Pension Fund*, 16 AD3d 145).

Accordingly, the Supreme Court properly granted the plaintiff's motion for summary judgment, dismissed the counterclaims asserted by the Estate, declared that the plaintiff is the primary beneficiary under the Plan, and directed Pathmark to deliver the corpus of the Plan to the plaintiff.

The Estate's remaining contention is without merit.

SKELOS, J.P., LIFSON, SANTUCCI and BALKIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court