UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TRUSTEES OF THE COLORADO LABORERS HEALTH & WELFARE TRUST FUND, et al.,

Plaintiffs-Appellants,

vs.

DENVER DRYWALL COMPANY, a Colorado corporation,

Defendant-Appellee,

No. 89-1258
(D.C. No. 87-C-1321)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLLOWAY**, Chief Judge, **SEYMOUR**, Circuit Judge, and **BRATTON**, District Judge**.

This suit was brought under §301 of the Labor Management Relations Act, 29 U.S.C. §185 and §§502 and 515 of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1132 and 1145. The plaintiff seeks herein to compel the payment of fringe benefit contributions as allegedly required by a collective bargaining agreement and federal labor law.

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**The Honorable Howard C. Bratton, Senior United States District Judge for the District of New Mexico, sitting by designation.

The lower court granted defendant's motion for summary judgment finding that there existed no express or implied-in-fact agreement obligating the defendant to continue fringe benefit payments. The lower court also denied plaintiff's cross-motion for partial summary judgment. We affirm.

In reviewing a grant of summary judgment, we utilize the same standard that the district court employed. Merrick v. Northern Natural Gas Co., No. 89-5012, slip op. at 4-5 (10th Cir. Aug. 23, 1990). If there exists no genuine issue of material fact, summary judgment is appropriate. Fed. R. Civ. P. 56(c). This standard is met only if "'there exists sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" Id., citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

We agree with the district court that no genuine issue of material fact exists as to the continuing obligation to pay fringe benefit payments. The terms of the parties' 1981-1984 collective bargaining agreement originally mandated the payments. The Union, however, served timely "notice of intent to terminate" the agreement. This notice was sent by letter to employers similarly situated to the defendant, and the defendant claims to have received the notice. A Union official admits there is no reason that the defendant would not have been sent the termination notice. Consequently, we agree with the district court that the union's letter, by its express language, terminated the existing agreement and, with it, the obligation to continue fringe benefit payments.

We are in further accord with the lower court's decision that the defendant did not become bound to make fringe benefit payments by its continuing course of conduct. We have reviewed the conduct of the defendant and agree that it is insufficient to find the existence of a contract by implication. See NLRB v. J. D. Industrial Insulation Co., 615 F.2d 1289 (10th Cir. 1980). Accordingly, we AFFIRM the decision of the lower court.