

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 **SUMMARY ORDER**

4 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED
5 AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND
6 FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT
7 CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION
8 MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)."
9 UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE
10 WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE
11 PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER
12 WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE
13 AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT
14 DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

15 At a stated term of the United States Court of Appeals for the
16 Second Circuit, held at the Daniel Patrick Moynihan United States
17 Courthouse, 500 Pearl Street, in the City of New York, on the
18 2nd day of April, two thousand nine.

19 PRESENT:

20 HON. AMALYA L. KEARSE,
21 HON. ROBERT D. SACK,
22 HON. PAUL J. KELLY, JR.,*

23 Circuit Judges.

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25 JOSEPH V. FISHER,

26 Plaintiff-Appellant,

27 - v -

No. 07-1100-cv

28 THE PENN TRAFFIC COMPANY, BYRONE E.
29 ALLUMBAUGH, RICHARD P. BRENNAN,
30 KEVIN P. COLLINS, JAMES A. DEMME,
31 MATTHEW GLASS, ROBERT HOCKETT,
32 RICHARD D. HOLIHAN JR., PETER L.
33 ZURKOW, JOHN DOES, NOS 1-5,
34 BERNADETTE RANDALL-BARBER, JANE
35 ROES, NOS. 1-5,

36 Defendants-Appellees.

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*The Honorable Paul J. Kelly, Jr., of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

1 Appearing for Appellant: David S. Preminger, Rosen Preminger
2 & Bloom LLP, New York, NY.

3 Appearing for Appellee: William H. O'Brien, Cooley Godward
4 Kronish LLP (Jeffrey W. Lang, of
5 counsel), New York, NY.

6 Appeal from a judgment of the United States District Court
7 for the Southern District of New York (Harold Baer, Jr., Judge).

8 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND
9 DECREED that the judgment of the District Court be, and it hereby
10 is, AFFIRMED.

11 Plaintiff Joseph Fisher appeals from a judgment of the
12 United States District Court for the Southern District of New
13 York based on its order of February 16, 2007, granting the
14 defendants' motion to dismiss the case pursuant to Federal Rule
15 of Civil Procedure 12(b)(6). We assume the parties' familiarity
16 with the facts and procedural history of the case, and the issues
17 on appeal.

18 This litigation arises from the denial of the request of the
19 plaintiff, a participant in a cash balance retirement plan, to
20 receive his benefits in a lump sum. The plaintiff contends that
21 the defendants breached their fiduciary duties under the Employee
22 Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.
23 § 1001 et seq. He therefore seeks equitable or remedial relief
24 under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and equitable
25 relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

26 The district court correctly concluded that the plaintiff
27 failed to state a claim under section 502(a)(2), which allows
28 parties to seek relief under ERISA § 409, 29 U.S.C. § 1109. The
29 Supreme Court has held that "Congress did not intend [section
30 409] to authorize any relief except for the plan itself."
31 Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144
32 (1985); see also Coan v. Kaufman, 457 F.3d 250, 257 (2d Cir.
33 2006). Because Fisher seeks relief for himself as an individual,
34 rather than on behalf of all or any part of the plan, he cannot
35 bring a claim under section 502(a)(2). "[Section] 502(a)(2) does
36 not provide a remedy for individual injuries distinct from plan
37 injuries." LaRue v. DeWolff, Boberg & Associates, Inc., 128 S.
38 Ct. 1020, 1026 (2008). Fisher argues that the Supreme Court's
39 decision in LaRue nonetheless clarified the scope of relief
40 available under section 502(a)(2) and that in light of LaRue's
41 holding, we should reconsider the interpretation we gave that
42 section in Coan v. Kaufman. We conclude that LaRue is inapposite
43 here. LaRue explained that a participant in a defined

1 contribution plan may maintain a claim for relief under section
2 502(a)(2) if a fiduciary breach impaired the value of plan assets
3 in the participant's individual account. See LaRue, 128 S. Ct.
4 at 1026. Such harms are of the type contemplated by the
5 statute's draftsmen, because they affect the plan. See id. at
6 1025. Here, however, the plan was a cash balance plan that did
7 not involve individual accounts of the type at issue in LaRue.
8 It is now defunct. Fisher seeks a lump sum payment for himself.
9 Fisher's claim therefore cannot be construed as benefitting the
10 plan.

11 The district court also correctly dismissed the plaintiff's
12 claim under section 502(a)(3), which provides for equitable
13 relief. Fisher seeks monetary damages, but contends that his
14 claim is an equitable one because it involves a suit against a
15 fiduciary, and such suits were, historically, within the
16 exclusive jurisdiction of the courts of equity. Section
17 502(a)(3) requires that both "the basis for the claim and the
18 nature of the recovery sought be equitable." Coan, 457 F.3d at
19 264 (alteration and internal quotation marks omitted; emphasis in
20 original). The plaintiff must therefore seek "a category of
21 relief that was typically available in equity." Id. (alterations
22 and internal quotation marks omitted). Monetary damages are not
23 such a category. See Great-West Life & Annuity Insurance Co. v.
24 Knudson, 534 U.S. 204, 221 (2002) ("[L]egal relief - the
25 imposition of personal liability . . . for a contractual
26 obligation to pay money" is not recoverable under section
27 502(a)(3).).

28 For the foregoing reasons, the judgment of the District
29 Court is hereby AFFIRMED.

30 FOR THE COURT:
31 Catherine O'Hagan Wolfe, Clerk of the Court

32 By: _____
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