

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 3 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TRUSTEES OF THE CONSTRUCTION
INDUSTRY AND LABORERS HEALTH
AND WELFARE TRUST; et al.,

Plaintiffs-counter-defendants-
Appellees,

v.

SHERYL ARCHIE, an individual; JAMES
McKINNEY, an individual,

Defendants-counter-claimants-
Appellants.

No. 14-16034

D.C. No. 2:12-cv-00225-JCM-
VCF

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Submitted November 27, 2018**

Before: CANBY, TASHIMA, and FRIEDLAND, Circuit Judges.

This appeal has been held in abeyance since June 9, 2017, pending

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

resolution of *Glazing Health & Welfare Fund v. Lamek*, 896 F.3d 908 (9th Cir. 2018). The stay is lifted.

Sheryl Archie and James McKinney appeal pro se from the district court's summary judgment in plaintiffs' Employee Retirement Income Security Act ("ERISA") action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We vacate and remand.

The district court granted summary judgment for plaintiffs after finding that the relevant agreements and policies established that unpaid employer contributions allegedly controlled by Archie and McKinney qualified as plan assets, and that Archie and McKinney were liable as ERISA fiduciaries. However, after the district court entered judgment, this court in *Bos v. Board of Trustees*, 795 F.3d 1006 (9th Cir. 2015), declined to recognize an exception to the general rule that unpaid contributions by employers to employee benefit funds are not plan assets. *See id.* at 1010-11; *see also Glazing Health & Welfare Fund*, 896 F.3d at 910-12 (concluding that this court's decision in *Bos* foreclosed employee benefit trust funds' lawsuit seeking unpaid contributions from individual owners as ERISA fiduciaries). Because the district court did not have the benefit of the decisions in

Bos and *Glazing Health & Welfare Fund* when it entered its judgment, we vacate and remand for further proceedings in light of this intervening authority.

In light of our disposition, we do not consider Archie and McKinney's challenges to the district court's orders denying their motions for sanctions, to compel discovery, to join parties, to amend counterclaims, or for reconsideration.

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We reject as unsupported by the record Archie and McKinney's contentions concerning judicial bias.

The parties shall bear their own costs on appeal.

VACATED and REMANDED.