D9243 - R5

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

MARLA MAUST,	:	
Plaintiff,	:	
vs.	:	Case No. 08CVC-07-9415
BRESSLER & SCHAEFFER, INC., *et al.*,	:	JUDGE MCINTOSH
Defendants.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE UNTIMELY MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Marla Maust respectfully requests that the Court deny Defendants leave to file their untimely Motions for Summary Judgment for the reasons detailed in the accompanying Memorandum.

Respectfully submitted,

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Attorneys for Plaintiff

MEMORANDUM IN SUPPORT OF OPPOSITION

This case is now six weeks from trial. The original case scheduling order directed the parties to file all dispositive motions by April 7, 2009. Maust filed her lone summary judgment motion on her breach of contract claim by the date directed. Defendants filed no timely dispositive motions at that time. A full month later and less than 60 days from the scheduled trial date of June 30, 2009, Defendants filed five (5) Motions for Judgment on the Pleadings and four Motions *in Limine* (two of which Defendants later asked the Court to consider as dispositive motions). During a status conference held on June 2, 2009, the Court agreed to extend the dispositive motion deadline to July 20, 2009. Neither party filed any further dispositive motions by that deadline.

Now, a month after the second dispositive motion deadline has passed, and only six weeks from trial, Defendants are again filing untimely dispositive motions seeking summary judgment on four separate claims. Defendants point to no new evidence but instead represent to the Court that a recent Tenth District decision, *Fennessey v. Mount Carmel Health Sys.* (July 30, 2009), 10th Dist. No. 08AP-983, 2009-Ohio-3750, "creates binding precedent that will require this Court to direct a verdict in Defendants' favor * * *." *Fennessey*, however, doesn't create any *new* precedent that didn't exist prior to its issuance. And the issues addressed therein have either already been fully briefed before this Court or could have been, *and should have been*, according to the Court's two dispositive motion deadlines.

The breach of contract and promissory estoppel claims that were the subject of *Fennessey* concerned a termination of employment, unlike in this case where Maust's claims allege that her employer failed to pay her certain fringe benefits. *Fennessey* merely reaffirms that an employee manual, absent a specific promise of continued employment, cannot form the basis of an

employment contract limiting the employer's right to terminate an employee at will. Thus, the "at-will" nature of the employment relationship was dispositive in that case. *Fennessey's* ruling on the impact that written progressive discipline policies have upon the employment at will relationship derives from the same case law and rationale upon which countless termination cases before have been decided. As the Tenth District has pointed out, however, Maust's status as an at-will employee is not dispositive of whether or not Defendants are liable to pay her LTD benefits under either a contract or promissory estoppel theory. See *Hameroff/Milenthal/Spence, Inc. v. Grigg* (Oct. 15, 1996), 10th Dist. No. 96APE03-289, unreported:

> **An at-will employment relationship signifies that there is no fixed duration to the employment relationship and that the employee is free to seek work elsewhere and the employer may, at anytime, terminate the employment relationship for any reason not contrary to law. The term 'at will employment' describes a *prima facie* employment relationship. It intimates nothing about subsidiary contractual arrangements *** to which an employer may legally obligate himself by adding to that relationship new terms and conditions. *** " *Hameroff/Milenthal/Spence, Inc. (attached hereto)* (citing *Helle v. Landmark, Inc. (1984), 15 Ohio App. 3d 1, at 8, 472 N.E.2d 76).***

Furthermore, *Fennessey* was clearly decided on its facts, facts which are not identical to the facts in Maust's case. For instance, *Fennessey* found it dispositive that the employee manual in that case did not contain any language, which could be read as a promise of employment for any specific duration:

> **Although we appreciate appellant's point that the manual's appeal process seems contradictory to at-will employment, there simply exists no language in the appeal provisions that guarantees continued employment, which is vital to a promissory estoppel claim.**

The logical import of this language is that a specific promise of continued employment is necessary to overcome the presumption of an at will employment relationship. By contrast, however, Defendants' Employee Manual does make a specific promise of LTD benefits. And

there is no similar logical necessity that a "promise of continued employment" support the promise of an LTD benefit. Indeed, Defendants admitted they intentionally placed the LTD provision in the Employee Manual because they did provide LTD benefits to their employees at one time. F. Bressler Dep. 130 to 135, 125-126. And Defendants also admitted that the failure to remove the LTD provision could create confusion among Defendants' employees as to the benefit's availability. F. Bressler Dep. 128-130; Chenault Dep. II at 197-199. It is important to remember that Defendants refused to pay Maust the LTD benefit described in their Employee Manual *before* she was terminated. Thus, Defendants' attempted use of *Fennessey's* rationale concerning the absence of a "promise of continued employment" is simply a red herring because it has no logical application to Maust's claims.

That *Fennessey* is distinguishable from Maust's case on the facts, simply underscores this Court's earlier ruling regarding Maust's motion for summary judgment on her breach of contract claim. In denying Maust's motion, this Court held that "genuine issues of material fact remain on the issue of whether defendants actually manifested an intent to bargain in the handbook and whether defendants received any consideration or forebearance from plaintiff in return for her "acceptance." Summarizing, the Court held, "[g]enuine issues of material fact remain as to the issues of whether there was a meeting of the minds and consideration given." Accordingly, the Court ruled that "summary judgment is not appropriate on this issue."

Defendants have introduced absolutely no new evidence nor any new precedent in their most recent untimely motion, which should change the Court's earlier ruling. Clearly, Defendants could have easily filed a cross-motion for summary judgment on Maust's breach of contract claim based on identical existing case law, in compliance with the Court's two earlier deadlines. They did not. Plaintiff respectfully requests that the Court deny Defendants leave to

file their late motions so that the parties can devote their time and energies to the arduous task of preparing for the trial of this matter, which is only weeks away, instead of spending that time further briefing this issue. Defendants will not be prejudiced by the Court's refusal to consider their late motions because, as they plainly state, they may make motions for directed verdict at the close of Plaintiff's case as they see fit. Furthermore, even if the Court were to consider Defendants' motions and ultimately grant same, judicial economy will not be served because Plaintiff still has six other claims pending. The Court has already ruled that Plaintiff's claim of Wrongful Termination in violation of the Public Policy Protecting Access to the Courts states a recognized cause of action; thus, that claim should proceed to trial notwithstanding Defendants' pending Motion for Judgment on the Pleadings. And at least one of Maust's other claims, Fraud, has not been the subject of any dispositive motion to date. Thus, a trial in this case is a near certainty.

If the Court chooses to grant Defendants leave to file their late dispositive motions, then Plaintiff similarly requests leave to file a cross-motion for summary judgment on her claim for Promissory Estoppel, along with her responses opposing Defendants' motions.

Respectfully submitted,

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE UNTIMELY MOTIONS FOR SUMMARY JUDGMENT has been served upon Gregory H. Melick and Frederick M. Luper, LUPER NEIDENTHAL & LOGAN, 1200 LeVeque Tower, 50 West Broad Street, Columbus, Ohio 43215-3374 by regular U.S. and electronic mail this 25th day of August 2009.

Danny L. Caudill

1 of 1 DOCUMENT

Hameroff/Milenthal/Spence, Inc., Plaintiff-Appellee, v. Ted Grigg, Defendant-Appellant.

No. 96APE03-289

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1996 Ohio App. LEXIS 4598

October 15, 1996, Rendered

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment reversed and remanded for further proceedings.

COUNSEL: Baker & Hostetler, and Eugene R. Butler, for appellee.

Bricker & Eckler, and Richard D. Rogovin, for appellant.

JUDGES: STRAUSBAUGH, J., CLOSE and LAZARUS, JJ., concur. STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: STRAUSBAUGH

OPINION

(REGULAR CALENDAR)

DECISION

STRAUSBAUGH, J.

Defendant-appellant, Ted Grigg, appeals from a decision of the Franklin County Court of Common Pleas sustaining the summary judgment motion of plaintiff-appellee, Hameroff/Milenthal/Spence, Inc. ("HMS, Inc."). Appellee brought an action for money had and received against appellant demanding repayment of a $ 15,000 loan. Appellant counterclaimed for unpaid salary and business expenses, and severance. Appellant also sought a declaratory judgment that the $ 15,000 loan was interest free and for a three-year term from the date of his employment with appellee. Appellee [*2] moved for, and was granted, summary judgment on its claim for repayment of the loan and against appellant on his claim for severance pay. Appellant appeals the decision of the common pleas court and asserts the following two assignments of error:

"First Assignment of Error

"The trial court erred in holding that the loan made by Plaintiff to Defendant was due upon termination of employment.

"Second Assignment of Error

"The trial court erred in granting a summary judgment dismissing Defendant's claim for severance benefits."

Appellee, a Columbus-based advertising agency, planned to create a new corporation to house its direct-marketing efforts. Appellee entered into negotiations with appellant, who was living and working in Atlanta, Georgia, for him to be hired as president of the new corporate entity at its inception. On August 31, 1994, following extensive on-going negotiations, appellee wrote to appellant offering him employment as president of HMS-Direct Marketing, Inc., the yet-to-be created corporation.

Attached to the August 31, 1994 letter, was a document identified as "H/M/S, INC., OFFER TO TED GRIGG" which contained a [*3] section entitled "Economics of HMS's offer." This section included provisions for employment benefits of a $ 15,000 interest-free loan for a three-year period from appellee to appellant, which loan would be forgiven on the third anniversary of appellant's employment; an annual salary of $ 120,000, and a nine-month severance pay requirement in the event appellant were to be terminated "without cause." This section also contained terms which contemplated organization of a new corporation and addressed such matters as appellant's equity in the new corporation, the structure of the new corporation, and a buy-sell agreement. Appellant counteroffered on September 10, 1994, and the parties continued negotiating.

While the parties were still negotiating the terms of the deal for appellant to become president of the new corporation, appellant and Bruce Lazear, the executive vice-president for appellee, entered into an oral agreement for appellant to work for appellee until an agreement was reached and the new company established. Appellant started working for appellee on October 1, 1994. Appellant's interim employment salary from appellee was $ 10,000 a month.

On October 13, 1994, appellant [*4] signed an "Employee Acknowledgement Form" stating his understanding that appellee's employee handbook created no contractual rights and that his employment could be terminated with or without cause and with or without notice at anytime by either appellee or himself. On October 21, 1994, appellant signed appellee's confidentiality and noncompetition agreement.

On November 21, 1994, Rick Milenthal, president of appellee, sent the $ 15,000 loan to appellant in Atlanta, Georgia.

On December 5, 1994, HMS-Direct Marketing, Inc., was incorporated. After creating the new corporation, appellee submitted to appellant a close corporation agreement, an executive employment agreement, and a buy-sell agreement. Appellant wanted to have an attorney review the documents and did not immediately execute them.

Based on revised financial projections which appellant submitted to appellee, it was determined that the new corporation was not financially feasible and appellee revoked the offer of appellant's employment with the new corporation on December 16, 1994.

Appellee then proposed a new arrangement which would employ appellant as vice president of HMS Direct, an already existing opera-

tion. A December [*5] 16, 1994 memorandum from Jeff Coopersmith, the president of HMS Direct, to appellant outlined the terms of the proposition. Appellant did not accept this offer and submitted a counteroffer on December 27, 1994.

On or about January 4, 1995, appellee sent appellant a promissory note regarding the $ 15,000 loan. Appellant never executed this promissory note.

On January 13, 1995, Rick Milenthal wrote to appellant. Citing to the parties' inability to agree on matters pertaining to any relationship between appellee and appellant which would result in the creation of the contemplated new business and to recent cash projections, appellant was informed that "HMS will no longer be utilizing your services effective immediately." The letter also stated "since HMS has advanced you the $ 15,000 interest-free loan, we anticipate the prompt repayment of that loan." On the same day, appellee brought its action for money had and received to collect the $ 15,000 loan.

To grant a summary judgment motion, a court must find that:

> """(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from [*6] the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.""" (Citations omitted.) *State ex rel. Morley v. Lordi (1995), 72 Ohio St. 3d 510, at 512, 651 N.E.2d 937; Civ.R. 56(C).*

In his first assignment of error, appellant asserts that genuine issues of material fact remain and preclude summary judgment on appellee's claim for immediate repayment of the $ 15,000 loan.

To collect the $ 15,000 loan, appellee brought an action for money had and received; this is an equitable common law action for unjust enrichment. *Hummel v. Hummel (1938), 133 Ohio St. 520, 14 N.E.2d 923; Natl. City Bank, Norwalk v. Stang (1992), 84 Ohio App. 3d 764, 618 N.E.2d 241.* A cause of action for money had and received lies when one receives money from another without valuable consideration given on the receiver's part. *Hummel.* Thus, to succeed on its claim for money had and received, appellee must establish that it received no valuable consideration from appellant for the $ 15,000 loan.

Appellee argues that the $ 15,000 [*7] loan was made as part of the negotiations for the employment of appellant as president of the new corporation. If the $ 15,000 loan was indeed made to appellant as part of the offer for his employment with HMS-Direct Marketing, Inc., then because the parties never entered into this agreement, appellee did not receive valuable consideration from appellant for the $ 15,000 loan.

However, appellant has asserted that the $ 15,000 loan was made to him as a term of his interim employment agreement with appellee. Appellant did in fact work as an interim employee for appellee for a period of over three months. If the $ 15,000 loan was a term of appellant's interim employment then appellant provided valuable consideration for the $ 15,000 loan.

Appellant's counterclaim asserts that the parties agreed that pending the organization of the new corporation, appellant would become an employee of appellee and that all terms of the August 31, 1994 offer other than those

which contemplated the organization of a new corporation would apply to appellant's interim employment. Appellant also submitted an affidavit averring that he and Lazear had agreed that the terms of his interim employment were as [*8] described in the August 31, 1994 letter and included a $ 15,000 interest free loan for a three year term, a salary of $ 120,000 per year, health insurance, severance pay for nine months if terminated without cause, and a non-competition agreement.

Appellee provided no evidence in support of its summary judgment motion which expressly supported its claim that the loan was made in the context of negotiations to create a new corporation and employ appellant as president of the new corporation.

In his affidavit, appellant asserted that, when he negotiated the terms of his interim employment with appellee, it was agreed that the employment benefit terms as set forth in the August 31, 1994 offer to appellant were to become terms of his interim employment with appellee. Appellant has not claimed that all of the terms of the August 31, 1994 offer were incorporated into the interim employment agreement. It is undisputed that the parties did not agree to the terms which concerned the anticipated creation of the new corporation. However, these latter terms have no logical application to the interim employment arrangement. Appellant has argued that the general employment benefit terms; including [*9] salary, the loan, and the severance package; were excerpted from the August 31, 1994 offer and made part of the interim employment agreement. Appellant has not argued that the parties adopted the August 31, 1994 offer of employment as his interim employment contract.

This court finds that there is a genuine issue of material fact as to whether the $ 15,000 loan was part of appellant's interim employment arrangement with appellee or was part of the on-going negotiations for appellant's future employment with the new corporate entity, HMS-Direct Marketing, Inc. Of special significance to this court, is the following deposition testimony of Bruce Lazear:

> " *** The only term and condition of [appellant's] employment that was different than standard was he had this loan. *** " (Lazear deposition at 70-71.)

Lazear is testifying about appellant's interim employment arrangement with appellee, and "this loan" refers to the $ 15,000 loan. Because a genuine issue of material fact exists regarding why appellee loaned appellant $ 15,000, an award of summary judgment on appellee's claim for money had and received is improper.

Appellee additionally argues that the $ 15,000 loan [*10] was expressly conditioned upon the execution of a promissory note, that appellant refused to execute the note, and that this precludes his claim that he is entitled to keep the $ 15,000 loan for the three-year term set forth in the note.

Appellant does not rely on the language of the note to support his claim that he does not need to repay the loan for three years. Nor does this argument address the issue of whether there was unjust enrichment.

Appellant's first assignment of error is sustained.

In his second assignment of error, appellant asserts that summary judgment against his claim that he is entitled to severance payments is improper because there is a genuine issue of material fact as to whether his interim employment agreement with appellee included severance benefits.

Included in the August 31, 1994 offer to appellant, was a severance provision that appellant would receive nine months of salary in the event he were terminated "without cause." Appellant has averred that his interim employ-

ment agreement included this severance benefit. Appellant counterclaimed that he was terminated without cause and was entitled to the nine months of severance pay.

Appellee claims that [*11] no evidence supports appellant's contention that appellee offered him severance as part of his interim employment agreement.

In support of his claim, appellant has asserted in his affidavit that, when he discussed with appellee the terms of his interim employment, it included the understanding that he was relying on the benefits negotiated in the August 31, 1994 offer including the severance package. As further support of his claim, appellant refers to the December 16, 1994 memorandum from Jeff Coopersmith to him. This memo provides in pertinent part as follows:

> "This will confirm our conversation earlier this week.
>
> " ***
>
> "Ted Grigg will continue to be paid $ 120,000 per year plus standard HMS benefits. Ted will be eligible for a bonus program, whose details are to be worked out. *** *Ted's extended severance agreement will have a two year life.* By that time, Ted and the company will have had sufficient time to determine their compatibility with each other. Subsequent to the two year time frame, Ted will have the standard severance agreement with the company." (Emphasis added.)

Appellee claims that the quoted language was meant to [*12] compare the offer being made by appellee to the August offer and that it does not imply an existence of an extended severance benefit. When this memo was written, appellant was an interim employee, and appellee had decided to discontinue its plan to form a new corporate entity and was pursuing the possibility of employing appellant in HMS Direct under Jeff Coopersmith. While this memo does not irrefutably establish either claim, construed in appellant's favor, it provides some support for his position. The reference to "Ted's extended severance agreement" may be construed as referring to a benefit which Ted had at the time of the memo.

Appellee has also argued that appellant's claim that his interim employment terms included severance benefits conflicts with his at-will interim employment position. Appellee argues that, when a person is employed at-will, the employee may not make a claim which is based on a contractual theory of employment and which is contrary to the at-will employment status of the employee. Appellee contends that a severance agreement is contrary to an at-will employment relationship.

This court does not accept appellee's position that severance benefits are [*13] contrary to at-will employment. An at-will employment relationship signifies that there is no fixed duration to the employment relationship and that the employee is free to seek work elsewhere and the employer may, at anytime, terminate the employment relationship for any reason not contrary to law. *Sowards v. Norbar, Inc. (1992), 78 Ohio App. 3d 545, 605 N.E.2d 468.* The term "at will employment" describes a *prima facie* employment relationship. "It intimates nothing about subsidiary contractual arrangements *** to which an employer may legally obligate himself by adding to that relationship new terms and conditions. *** " *Helle v. Landmark, Inc. (1984), 15 Ohio App. 3d 1, at 8, 472 N.E.2d 765.*

An agreement between an employer and an employee that employment will be at-will is not

contrary to the parties agreeing that, should the employee be terminated without cause, the employer would provide severance payments as agreed upon by the parties. Such an agreement does not affect that employer's ability to terminate the employment relationship at-will and without cause. In fact, the following language of the August 31, 1994 offer indicates that it contemplated at-will employment [*14] yet included a severance agreement:

> " *** The Employment Agreement will contain a severance pay requirement that provides Ted nine months of salary in the event that he is terminated 'without cause.' *** "

Appellant has established that there is a genuine issue of material fact as to whether or not he is entitled to present a claim for these severance benefits in light of his assertion that his termination was without cause.

Appellant's second assignment of error is sustained.

Appellant's first and second assignments of error are sustained. The decision of the trial court is reversed and remanded for proceedings consistent with this decision.

Judgment reversed and remanded for further proceedings.

CLOSE and LAZARUS, JJ., concur.

STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution.*