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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

WILLIAM BERNARD, Plaintiff and Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY et al., Defendants and Respondents.	C052566 (Super. Ct. No. 03AS07132)

APPEAL from a judgment of the Superior Court of Sacramento County, Loren E. McMaster, Judge. Affirmed.

Britt & Perkins and Ryan F. Perkins; and William P. Tedards, Jr., for Plaintiff and Appellant.

Orrick, Herrington & Sutcliffe and George A. Yuhas for Defendants and Respondents.

Plaintiff William Bernard (Bernard) had a longstanding insurance agency, representing the group of defendant State Farm insurance companies. He claims that two of his State Farm

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Part 2 of the Discussion.

supervisors misrepresented the job requirements for a sales program to which he was assigned, requirements that he physically could not carry out following injuries sustained in a car collision. As a result, Bernard alleges that he was forced to resign.

Bernard sued State Farm and the two supervisors (collectively, State Farm) for intentional misrepresentation, negligent misrepresentation, and breach of the contractual covenant of good faith and fair dealing, all directed to the supervisors' misrepresentations that resulted in his constructive (forced) termination.[1] The trial court granted summary judgment for State Farm.

In the unpublished portion of this opinion, we conclude that the result of the alleged misrepresentations was indistinguishable from an ordinary constructive wrongful termination, thereby precluding a tort-based cause of action for misrepresentation. (*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174 (*Hunter*); see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631 (*Lazar*).)

In the published portion of this opinion, we conclude that the agency agreement between State Farm and Bernard could be terminated at will, thereby precluding a contract-based cause of

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[1] A fourth cause of action for unfair and deceptive business practices (Bus. & Prof. Code, § 17200 et seq.) was summarily adjudicated. Bernard does not challenge this ruling.

action for breach. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384 (*Dore*).)

DISCUSSION

1. *Standard of Review*

We review the trial court's summary judgment decision independently, "considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Dore, supra,* 39 Cal.4th at p. 389.)

We will incorporate the summary judgment evidence in our discussion of the two issues on appeal: (1) the misrepresentations and constructive termination (*Hunter/Lazar*); and (2) the at-will agency agreement (*Dore*).

2. *The Misrepresentations and Constructive Termination (Hunter/Lazar)*

Bernard operated as a State Farm insurance agent from 1974 until 1998, when he claims he was forced to resign. He signed his most recent State Farm agency agreement in 1991 after incorporating his agency.

In March 1995, Bernard was the victim of a serious car accident. The accident left Bernard with recurring pain in his back and legs and made it difficult for him to sit at the computer for lengthy periods.

In April 1996, Bernard was placed in State Farm's "High Priority Program" (HPP program). (Under the terms of the State

Farm agency agreement that State Farm had with its agents, including Bernard, State Farm had the right to prescribe the rules relating to the acceptance of insurance policies.) Among the features of the HPP program was the requirement that the agent, rather than the agent's staff, "personally produce" all new and reinstated insurance applications. The purpose of the HPP program was to provide a better assessment of which risks to insure.

Bernard claims that his supervisor, Dorothy Nash, who was a State Farm agency field executive, and Nash's supervisor, Karl Richter, who was a State Farm agency vice president, misrepresented the requirements of the HPP program so as to force Bernard to go on disability retirement and give up his agency. Specifically, Nash and Richter informed Bernard that he could not use his agency staff to take photos, input application information into the computer, or transmit applications electronically to State Farm. Bernard presented evidence that Sandy Burnett, State Farm's national HPP coordinator, had issued internal guidelines in 1996 (of which Bernard was then unaware) that allowed agency staff to perform these tasks.

In May 1996, Bernard applied to the Social Security Administration (SSA) for disability benefits. Bernard claims he did so because of Nash's and Richter's misrepresentations involving the HPP program, and he thought by doing so he would be excepted from that program. In the SSA process, Bernard presented medical evidence that he could not engage in sedentary

activity; could not sit, stand or walk but for short periods; and could not sit, stand, lift or communicate as needed for his business.

In February 1997, State Farm's in-house counsel wrote to Bernard's counsel, stating: "If it is true that Mr. Bernard is unable to perform the essential duties of his occupation because of injury or sickness, we respectfully suggest that the solution to Mr. Bernard's dilemma is the termination of the State Farm Agent's Agreement. Upon termination of the Agent's Agreement due to disability, we will be more than happy to advise the Social Security Administration that the value of Mr. Bernard's services to State Farm is nil. [¶] . . . [¶] . . . Mr. Bernard's continued inability to perform the essential duties of his occupation (regardless of the cause) will leave us no choice but to exercise our right to terminate the Agent's Agreement." Copies of this letter were sent to Richter as well as three other State Farm executives: its regional vice president, its agency operations vice president, and its divisional vice president for agency services.

Bernard's counsel responded to this letter from State Farm's in-house counsel, noting: "At this point in time, Mr. Bernard cannot terminate the Agent's Agreement, and it has been his understanding from his conversation with representatives of State Farm that they will wait until after he has concluded his Social Security Administration hearing process before he will be terminated by State Farm. This apparently is the custom and practice of State Farm in that

they will allow their agent to go through that process before a termination is put into effect. We assume that State Farm will honor its obligation based upon its representations to my client."

In March 1998, the SSA awarded Bernard disability benefits retroactive to May 1996.

On March 30, 1998, Bernard notified State Farm that he was terminating his agency agreement effective April 30, 1998. He stated that he "no longer wish[ed] to continue subjecting [him]self to the pain and trauma that [he] [had] had since [his] back injury." Bernard alleges in his complaint that he resigned "because State Farm gave him no choice: either he resigned or he would be terminated."

That is the summary judgment evidence providing the background for this issue. We now turn to the law. Two state Supreme Court decisions are pivotal: *Hunter, supra,* 6 Cal.4th 1174; and *Lazar, supra,* 12 Cal.4th 631.

Hunter held that an employee who was forced to resign--by his employer's misrepresentation that his position was being eliminated--could not establish the element of detrimental reliance required for a fraud cause of action where the employer simply could have terminated the employee directly. (*Hunter, supra,* 6 Cal.4th at pp. 1179, 1184.) *Hunter* relied on *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, in which the state high court concluded that the employer-employee relationship is "fundamentally contractual." (*Hunter, supra,* 6 Cal.4th at p. 1180; *Foley, supra,* 47 Cal.3d at p. 696.) Said *Hunter*: "[The

employer] simply employed a falsehood to do what it otherwise could have accomplished directly. It cannot be said that [employee] relied to his detriment on the misrepresentation in suffering constructive dismissal." (*Id.* at p. 1184.) *Hunter* closed with the observation that "[a]lthough tort damages are unavailable . . . , [the employee, who contractually could be terminated only for good cause,] . . . established his claim to contractual damages for constructive wrongful termination . . . ." (*Id.* at p. 1186.)

As relevant here, *Lazar* clarified *Hunter*'s "core rationale" by emphasizing that since the employer in *Hunter* "had both the power and intention of discharging [the employee] in any event, [the employee] was no worse off [for tort purposes] for being induced by [the employer's] misrepresentation to resign." (12 Cal.4th at pp. 642-643; see *id.* at p. 639.) *Lazar* did uphold a tort cause of action for fraudulent inducement to enter into an employment contract because there the employee's reliance on the employer's misrepresentations about the job "was truly detrimental" (e.g., the employee gave up a secure lucrative position, uprooted his family, moved across the country and purchased a California home to take the misrepresented position). (*Id.* at pp. 635, 639, 642-643.)

To craft his argument on appeal, Bernard seizes upon *Lazar*'s clarification that the employer in *Hunter* had the "intention" of discharging the *Hunter* employee in any event. (*Lazar, supra,* 12 Cal.4th at p. 642.) Bernard argues that here, by contrast, he "was induced to resign from a contract he had

with State Farm by the misrepresentations of two lower level company employees [i.e., Nash and Richter] who had no authority to terminate his contract and who would not have been able to persuade higher management to terminate the contract unilaterally [because State Farm's internal guidelines on the HPP program allowed Bernard's staff to perform the tasks that he physically was unable to perform--taking photos, inputting application information into the computer, transmitting applications electronically]." Following up on this argument, Bernard frames the "question on appeal" as "whether a misrepresentation by one party to a contract which induces the other party to resign from the contract is actionable where the misrepresenting party *would not have terminated the contract* if the other party had refused to resign." (Italics added.)

There are at least three problems with this quoted argument and follow-up "question on appeal" from Bernard.

First, Bernard tries to have it both ways in this respect. While Bernard's just-quoted argument distinguishes between Nash and Richter on the one hand and State Farm on the other, his just-quoted question on appeal proceeds to lump them all together as the "party" that made the misrepresentation. If State Farm made the misrepresentation in terminating Bernard, then it simply employed a falsehood to do what it otherwise could have accomplished directly: unilaterally terminate Bernard's agency agreement. Under *Hunter*, then, Bernard cannot be said to have relied to his detriment on State Farm's misrepresentation; therefore, Bernard cannot maintain a tort-

based cause of action for misrepresentation against State Farm. (*Hunter, supra,* 6 Cal.4th at p. 1184.)

Second, the distinction that Bernard attempts to draw here is actually a distinction that works against him for tort purposes. Essentially, Bernard's argument and follow-up question on appeal assert that State Farm made a mistake in terminating him by relying on Nash's and Richter's misrepresentations that Bernard physically could not perform his job. Again, though, this does not establish the required element of detrimental reliance on Bernard's part to sustain a tort-based cause of action for misrepresentation against State Farm. State Farm had the power to terminate Bernard and in fact did so, although the termination was a mistake under this view. In the end, Bernard's position posits an untenable incongruity between the employer in *Hunter* and the employer here, State Farm. In *Hunter*, the employer terminated Hunter by actually misrepresenting to him that his job was being eliminated; yet the employer in *Hunter* could not be held liable for a tort-based misrepresentation. Here, State Farm did not terminate Bernard by making a misrepresentation but merely by making a less culpable mistake; yet Bernard seeks to hold State Farm liable for a tort-based misrepresentation. If the employer in *Hunter* could not be held liable for a tort-based misrepresentation, State Farm surely cannot be.

Third, and finally, the summary judgment evidence indisputably shows (1) that Nash's and Richter's misrepresentations were made in their capacities as State

Farm supervisors of Bernard "in the course of" Bernard's termination; (2) that State Farm itself, through its in-house counsel's letter to Bernard's counsel, had suggested termination; and (3) that Bernard himself admitted in his own complaint (that he never sought to amend) that "Nash, Richter and State Farm . . . made [their] representations with the intention to defraud and deceive Bernard and to induce Bernard to act in reliance on these representations . . . with the expectation that Bernard would so act by giving up his agency." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 870-871 [for purposes of summary judgment, a party may be bound by its own allegations]; see also *Fireman's Fund Ins. Co. v. Davis* (1995) 37 Cal.App.4th 1432, 1440-1441.) Consequently, the result of Nash's and Richter's misrepresentations on behalf of State Farm "is indistinguishable from an ordinary constructive wrongful termination," and therefore Bernard cannot establish a tort-based cause of action for intentional or negligent misrepresentation against Nash, Richter or State Farm. (*Hunter, supra,* 6 Cal.4th at p. 1184; see *Lazar, supra,* 12 Cal.4th at p. 642.)

That leaves only Bernard's cause of action for breach of the covenant of good faith and fair dealing, to which we turn now.

3. *The At-Will Agency Agreement (Dore)*

Bernard has also sued State Farm for breach of the covenant of good faith and fair dealing based on the misrepresentations of his two supervisors. The covenant of good faith and fair

dealing is implied in every contract to ensure that the benefits expressed in the contract are achieved. (*Foley, supra,* 47 Cal.3d at pp. 683-684.)

Bernard's remedy for his two supervisors' misrepresentations is, at most, in light of the causes of action alleged in his complaint and the proper summary adjudication of his tort-based misrepresentation actions, a contract-based cause of action for constructive wrongful termination. (See *Hunter, supra,* 6 Cal.4th at pp. 1184, 1186.) But even this remedy is foreclosed if State Farm may terminate at will its contract (agency agreement) with Bernard. This is because generally an at-will employment may be ended by either party at any time without cause, for any or no reason. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335 & fn. 8; see Lab. Code, § 2922 [setting forth a presumption that an "employment, having no specified term, may be terminated at the will of either party on notice to the other"]; compare with *Hunter, supra,* 6 Cal.4th at pp. 1184, 1186 [the employee in *Hunter* contractually could be terminated only for good cause, and therefore could establish a contract-based cause of action for constructive wrongful termination based on misrepresentation in the course of the termination].)

As we shall explain, State Farm could terminate at will its agency agreement with Bernard. Consequently, Bernard cannot maintain his cause of action for breach of the covenant of good faith and fair dealing based on his two supervisors' misrepresentations.

The agency agreement between State Farm and Bernard states as pertinent regarding termination:

"III A. You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address.

"III B. In the event we terminate this Agreement, you are entitled upon request to a review in accordance with the termination review procedures approved by the Board of Directors of the Companies, as amended from time to time."

In *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33 (*Pacific Gas*), the state Supreme Court established rules governing the use of parol evidence to determine the meaning of contractual language where the contract appears clear and unambiguous and is "integrated" (a contract is integrated if it constitutes the final expression of the agreement or of a particular subject in the agreement; the State Farm agency agreement is integrated). (See *Dore, supra,* 39 Cal.4th at p. 391; see also *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1364 (*Bionghi*).)

Under *Pacific Gas*, "[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether [the instrument] appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas, supra,* 69 Cal.2d at p. 37; accord, *Dore, supra,* 39 Cal.4th at p. 391.) A contractual ambiguity arises when the contract's

language is reasonably susceptible of more than one application to material facts. (See *Dore, supra,* 39 Cal.4th at p. 391; *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 177 Cal.App.3d 855, 859, fn. 1.) *Pacific Gas* makes clear, though, that "extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written [integrated] contract," but only to interpret the terms in the contract. (*Pacific Gas, supra,* 69 Cal.2d at p. 39; see *Appling v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003) 340 F.3d 769, 777 (*Appling*).)

In its recent decision in *Dore*, the California Supreme Court resolved a conflict in the Courts of Appeal "over whether a provision in an employment contract providing for termination . . . upon specified notice is, without more, reasonably susceptible to an interpretation allowing for the existence of an implied-in-fact agreement that termination will occur only for cause." (*Dore, supra,* 39 Cal.4th at p. 389.) For our purposes, the Court of Appeal conflict featured in *Dore* pitted the decision in *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, which concluded that such a termination-notice provision is reasonably susceptible to this interpretation, against the decision in *Bionghi, supra,* 70 Cal.App.4th 1358, which concluded it is not. *Dore* sided with *Bionghi* and disapproved *Wallis*, which spells trouble for Bernard here. (*Dore, supra,* 39 Cal.4th at p. 394, fn. 2.)

In *Wallis*, similar to here, an insurance agent and the insurance company she represented had an agreement providing

that her agency could be "'terminated by either the Agent or [the insurance company] on three (3) months written notice.'" (*Wallis, supra,* 220 Cal.App.3d at p. 730; see *Dore, supra,* 39 Cal.4th at p. 390.) *Wallis* found that the agency agreement was integrated on the subject of termination (i.e., provided the complete expression on that subject). (*Wallis, supra,* at p. 730.) But *Wallis* concluded that since the termination provision was silent as to whether good cause was required, the language of the provision was reasonably susceptible to meaning either that good cause was required or that it was not. Therefore, extrinsic evidence was admissible to determine the meaning of the termination provision. (*Wallis, supra,* 220 Cal.App.3d at pp. 730-731; see *Dore, supra,* 39 Cal.4th at p. 390.) The extrinsic evidence in *Wallis* showed that the insurance company had modified the termination provision to omit "without cause" language, had provided a termination review process, and had stated that termination would not occur without cause. (*Wallis, supra,* 220 Cal.App.3d at pp. 731-732.) (Bernard seeks to introduce almost identical extrinsic evidence here: State Farm omitted "with or without cause" language from its termination provision; provided a termination review process; and stated in its company magazine in 1977 that termination would not occur without a serious breach.) As noted, *Dore* disapproved *Wallis.* (*Dore, supra,* 39 Cal.4th at p. 394, fn. 2.)

But *Dore* found favor with the way the *Bionghi* court read the termination provision before it. The termination provision

in *Bionghi* stated that the agreement "may be terminated by [the employer] . . . 30 days after notice in writing . . . ." (*Bionghi, supra,* 70 Cal.App.4th at p. 1361; see *Dore, supra,* 39 Cal.4th at p. 390.) As characterized by *Dore*, *Bionghi* concluded that the plain language of this provision was not reasonably susceptible to an interpretation requiring the employer to have good cause for termination. (*Bionghi, supra,* 70 Cal.App.4th at p. 1361; see *Dore, supra,* 39 Cal.4th at pp. 390-391.) *Bionghi* found that *Wallis*'s approach erroneously permitted extrinsic evidence to be introduced to *add* a "good cause" term to an integrated contract, contrary to *Pacific Gas* and its progeny. (*Id.* at pp. 1368-1369; see also *Appling, supra,* 340 F.3d at p. 778 [concluding that the State Farm agents there erroneously sought to introduce extrinsic evidence to add a "good cause" term to the termination provision in the State Farm agency agreement, rather than to properly interpret the words of that provision].) *Pacific Gas*, said *Bionghi*, is "not a cloak under which a party can smuggle extrinsic evidence to add a term to an integrated contract, in defeat of the parol evidence rule." (*Bionghi, supra,* at p. 1365.)

Under *Dore*, then, the termination provision here stating in full that "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address" is not reasonably susceptible to an interpretation requiring good cause for termination. (See *Dore, supra,* 39 Cal.4th at p. 393, quoting *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847 ["'When a

dispute arises over the meaning of contract language, the first question to be decided is whether the language is "reasonably susceptible" to the interpretation urged by the party. If it is not, the case is over'"].)

We do need to consider an additional issue from *Dore*, however. As noted, *Dore* framed the *Wallis-Bionghi* conflict as "whether a provision in an employment contract providing for termination . . . upon specified notice is, *without more*, reasonably susceptible to an interpretation" allowing termination only for cause. (*Dore, supra,* 39 Cal.4th at p. 389, italics added.) This raises the issue: Does the termination-review provision in the State Farm agency agreement provide for this "more" contemplated by *Dore*, i.e., more than simply termination upon specified notice? We think not.

The termination-review provision in the State Farm agency agreement, which is placed just after the termination-notice provision, specifies that "In the event we [i.e., State Farm] terminate this Agreement, you are entitled upon request to a review in accordance with the termination review procedures approved by the Board of Directors of the [State Farm] Companies, as amended from time to time."

For three reasons, we do not think that this termination-review provision provides the "more" contemplated in *Dore.*

First, the insurance agency agreement in *Wallis* on the subject of termination nearly mirrors the State Farm agency agreement at issue here, providing termination upon written notice in one provision while in the very next provision setting

forth a procedure by which an agent can request review of a termination. (*Wallis, supra,* 220 Cal.App.3d at pp. 726, fn. 4, 730; see *Dore, supra,* 39 Cal.4th at p. 390.) Yet *Dore*, in discussing *Wallis*, focused simply on the termination-notice provision and did not mention the termination-review provision as providing something "more" to the termination-notice provision. (See *Dore, supra,* 39 Cal.4th at pp. 389-390.)

Second, we agree with decisions that have characterized the State Farm termination-review provision as merely providing an internal forum, primarily for State Farm's benefit, for reconsidering a decision to end an agency agreement (for e.g., where a good agent has been terminated merely because of a personality conflict with an immediate supervisor). As these decisions have stated, the "'ultimate decision on whether or not to terminate the agency still resides within the discretion of [either contracting party]'"; the termination-review procedure does not substantively transform termination upon notice from being at-will termination. (*Ex Parte Gardner* (Ala. 2001) 822 So.2d 1211, 1218-1219, quoting *Kaldi v. Farmers Insurance Exchange* (2001) 117 Nev. 273 [21 P.3d 16, 21].)

And finally, every published decision we have found concludes that the termination-notice and termination-review provisions in the State Farm agency agreements create an at-will contract between State Farm and its agents. (*Appling, supra,* 340 F.3d at p. 778; *Gardner, supra,* 822 So.2d at pp. 1217-1219; *Olander v. State Farm Mut. Auto. Ins. Co.* (8th Cir. 2003) 317 F.3d 807, 811-812 (en banc); *Mooney v. State Farm Ins. Cos.*

(D.N.H. 1972) 344 F.Supp. 697, 699-700; *Melnick v. State Farm Mut. Auto. Ins. Co.* (N.M. 1988) 749 P.2d 1105, 1110-1111.)

We conclude that State Farm may terminate at will its agency agreement with Bernard. Consequently, Bernard cannot maintain his cause of action for breach of the covenant of good faith and fair dealing based on his two supervisors' misrepresentations that were made in the course of that termination.

The trial court properly granted summary judgment to the two supervisors and State Farm.

DISPOSITION

The judgment is affirmed. State Farm shall recover its costs on appeal. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

DAVIS, Acting P.J.

We concur:

MORRISON, J.

HULL, J.