

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARTY LANDRY,)
)
Plaintiff,)
)
v.) C.A. No. N11C-09-146-PLA
)
MABEY BRIDGE & SHORE, INC.,)
)
Defendant.)

Submitted: October 31, 2012
Decided: November 26, 2012

UPON DEFENDANT MABEY BRIDGE & SHORE, INC.'S
MOTION FOR SUMMARY JUDGMENT
DENIED

Sidney S. Liebesman, Esquire, LIEBESMAN LAW, LLC, Wilmington,
Delaware, Attorney for Plaintiff.

Kelly A. Costello, Esquire, MORGAN LEWIS & BOCKIUS, Wilmington,
Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

This is defendant Mabey Bridge & Shore, Inc.'s Motion for Summary Judgment on the Plaintiff's claim that Defendant breached the Covenant of Good Faith and Fair Dealing (the implied covenant claim) in this employment dispute. Defendant contends that it is entitled to judgment as a matter of law since there are no genuine issues of material fact. Since the Court concludes that there are quite clearly issues of material fact in dispute, the Motion for Summary Judgment must be denied.

This is an employment dispute wherein Plaintiff Landry alleges that his former employer, Defendant Mabey Bridge & Shore, Inc. ("Mabey" or "MBSI") breached their employment contract by failing to pay him the severance benefits to which he was entitled under the agreement, and breached the implied covenant by falsely claiming that Landry was terminated for cause.

Plaintiff Landry filed this suit on September 19, 2011 after he was terminated from his employment as Senior Vice President for Sales and Marketing with Defendant MBSI. Defendant has refused to tender the contractual amount of severance pay to which Plaintiff is entitled in the event that his termination was not "for cause." The central issue in this case is therefore whether Landry was terminated for reasons that would constitute "cause," as that term is defined in the employment contract.

Factual and Procedural Background

In October 2010, a recruiter contacted Landry about applying for the position of Chief Executive Officer at MBSI. Although Landry was not ultimately offered that particular position, MBSI instead offered Landry a newly created position as Senior Vice President for Sales and Marketing, with responsibility for overhauling MBSI's sales and marketing efforts. Landry would also be a member of the Board of Directors and was to report directly to Robert Aylward, MBSI's newly appointed Chief Executive Officer who had successfully secured the position for which Landry originally interviewed.

On November 11, 2010, Landry entered into an Employment Agreement ("the Agreement") with MBSI that contained a provision for twelve months of severance benefits in the event that Landry was terminated in the first year of his employment without cause. Under the Agreement, Landry could be terminated for cause, making him ineligible for severance benefits, only if the following specified circumstances existed:

- a. Employee willfully refused to comply with the policies, standards, and regulations of the company; or
- b. Employee fails or with notice refuses to faithfully or diligently perform under the provisions of this Agreement or fails to faithfully or diligently perform the usual and

- customary duties which have been assigned to Employee from time to time; or
- c. Employee engages in fraudulent or dishonest acts or other acts of misconduct in the rendering of services for or on behalf of the Company; or
 - d. Employee transfers confidential business information concerning the Company to a competitor of Company or otherwise violates [the Agreement].

Landry began working for MBSI in November 2010. By August of the following year he was informed that he was being terminated effective immediately. There was no explanation given by the CEO for the termination other than that the Company had chosen to head in a new direction and the sales force had “lost faith” in Landry. During the course of his employment with MBSI, Landry alleges that he made several efforts to discover the basis for his job loss. The day after he was terminated, he spoke by telephone with an MBSI representative, who expressed dismay that he was not advised of the reason for his termination.

By Order, dated November 7, 2011, this Court denied MBSI’s Motion to Dismiss Count I of the Complaint which alleges that Mabey breached the implied covenant of good faith and fair dealing. In its Order, the Court recognized that an implied covenant arises when an employer has used its superior bargaining power to deprive an employee of clearly identifiable compensation related to past service. The severance benefits in this case are

subject to that covenant. The Court concluded that it would be premature to dismiss Landry's breach of the implied covenant claim before allowing discovery into the facts of his termination. The Court did strike Landry's claim for punitive damages as there was no conduct alleged in the Complaint that would amount independently to a tort.

Standard of Review

When considering a Motion for Summary Judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.¹ Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.² If the proponent properly supports its claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."³ Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, no material factual disputes exist and judgment as a matter of law is appropriate.⁴

¹ Super. Ct. Civ. R. 56(c).

² *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

³ *Id.* 880.

⁴ *Id.* at 879-80.

Decision

By its Motion for Summary Judgment, Mabey now seeks dismissal on the basis that Landry has failed to adduce any evidence of bad faith or ill will by MBSI or its CEO Aylward. Mabey argues that Landry's claim, based upon his own unsupported "belief" that there was a conflict between him and Mr. Aylward is purely speculative and therefore cannot survive a motion for summary judgment. This Court plainly disagrees.

Landry has essentially alleged that MBSI fired him to eliminate the conflict between the two men and then falsely gave reasons to establish "cause" to avoid paying the contractual severance benefits to which he would otherwise be entitled. It is true that discovery has not uncovered any "smoking gun" evidence to support this theory, but common sense suggests that it is unlikely that any such evidence exists. Nowhere in any Answers to Interrogatories, deposition testimony, requests for admissions, or documents is there likely to be a statement that "Mr. Landry should be terminated and we will decide after he is gone how to define the reasons for his dismissal so as to avoid paying severance benefits even though he was not actually dismissed for cause." Nowhere in the record would the Court expect there to be an acknowledgement by the defendant that Landry was mistreated in any way or that his termination was anything but entirely justified. The jury

will have to decide whether to believe Mabey or Landry as the reasons for Landry's dismissal may be far more subtle and nuanced than either party is willing to acknowledge. Landry's claim is based entirely on circumstantial evidence and his subjective viewpoints, which are quintessential issues for the jury.

Indeed, there is in this case clear evidence of a factual dispute concerning the reasons for plaintiff's termination. The affidavit of Robert A. Aylward describes Landry's duties and responsibilities as Senior Vice President of Sales and Marketing and purports to explain why Landry's management style, demeanor, and actions had "a significant impact on employee morale" and that he observed Landry to be "overly aggressive, hostile, demeaning and difficult to work with." He further states that Landry "created and implemented policies within the sales department that caused resentment and alienated much of the sales force," that the sales department "experienced unusually high turnover" and sales declined "by more than 34% from the previous year." Mr. Aylward's affidavit elaborates on his "belief" that the decline in sales and turnover in personnel was attributable to Landry's mismanagement and alienation of the sales department. He describes Landry's job performance as having a "profoundly negative impact." In his affidavit, Mr. Aylward swears that he met with Landry,

“explained his concerns to him and terminated his employment, effective immediately.” He then determined that Landry had failed “to faithfully or diligently perform the usual and customary duties” of his position, thereby satisfying the contractual requirement that a termination “for cause” would not trigger payment of severance benefits.

In contrast to Aylward’s wholly subjective and potentially self-serving explanation of the reasons for Landry’s dismissal, Mr. Landry’s affidavit explains his job performance, work ethic, management style, and efforts to restructure the company’s sales and marketing force in equally subjective and self-serving terms. He describes the long hours he worked, including evenings and weekends, his loyalty, and his diligent efforts to inspire every subordinate involved in sales and marketing to work harder for the benefit of the company’s “bottom line.” He disagrees that he was terminated for cause or that he was ever advised by Aylward that he was being terminated for cause.

The two affidavits just described establish distinctly why summary judgment cannot be granted in this case. They present two very different, diametrically opposed viewpoints concerning Landry’s job performance. It is precisely this type of factual dispute that requires a trial and the findings of a trier of fact. Whether Landry was terminated for cause or not will

require a jury to assess the credibility of the witnesses, including the two individuals whose affidavits were discussed above, and to determine which version of the facts is more likely true than not. It is the function of the jury, as the trier of fact, to apply reason and common sense, from all of the evidence and the inferences to be drawn from that evidence, to reconcile the inconsistencies that are apparent from the affidavits. This classic question of fact is not susceptible to determination by the Court on summary judgment.

One final point is worthy of mention. Motions such as this, in a case where the ultimate issue is distinctly one of fact, unfairly tax the Court's limited resources and require it to spend unnecessary time and attention that could be devoted to more legitimate claims. A motion for summary judgment when there exists a quintessential issue of fact requiring determination by a jury does nothing to move this litigation towards resolution and has been wasteful of the Court's and counsel's time. Counsel should in the future be far more circumspect before filing a dispositive motion when resolution of the case depends entirely and specifically on the determination of a question of fact.

For all of the reasons described above, summary judgment is plainly inappropriate in this case. Accordingly, Mabey's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: All counsel via File & Serve