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IN THE
COURT OF APPEALS OF INDIANA

ALAN SHIRKEY, Appellant-Plaintiff, vs. FUTURE ENTERPRISES, INC., D/B/A LANGHAM, Appellee-Plaintiff.	)	No. 49A05-0909-CV-501

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald Zore, Judge
Cause No. 49D07-0701-CT-596

January 19, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Alan Shirkey appeals the trial court's grant of summary judgment to Future Enterprises, Inc., d/b/a Langham Logistics, Inc. ("Langham"). We affirm.

Issues

Shirkey raises three issues, which we restate as:

I. whether the trial court properly granted Langham's motion for summary judgment on Shirkey's breach of oral contract claim;

II. whether the trial court properly granted Langham's motion for summary judgment on Shirkey's promissory estoppel claim; and

III. whether the trial court properly granted Langham's motion for summary judgment on Shirkey's unjust enrichment claim.

Facts[1]

Langham offers logistics services, and Cathy Langham, John Langham, and Margaret Langham are the shareholders in Langham. Shirkey operated SKS Fulfillment, LLC ("SKS"), a product fulfillment business, in Indianapolis. SKS began operations in early 2003, and in November 2004, Langham engaged SKS as a consultant to assist

[1] Langham argues that Shirkey's affidavit, which was submitted in opposition to Langham's motion for summary judgment, is inconsistent with his deposition testimony. "It has long been the law in Indiana and many other jurisdictions that 'contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant.'" Crawfordsville Square, LLC. v. Monroe Guar. Ins. Co., 906 N.E.2d 934, 939 (Ind. Ct. App. 2009) (quoting Gaboury v. Ireland Rd. Grace Brethren, Inc., 446 N.E.2d 1310, 1314 (Ind. 1983)), trans. denied. To the extent Shirkey's affidavit conflicts with his prior deposition testimony, we do not consider it in this appeal.

Langham with a fulfillment project. SKS billed Langham $75 per hour for the consulting work.

Beginning in early 2005, John and Shirkey began discussing future fulfillment business collaborations, including a "partnering concept." App. p. 102. SKS's attorney proposed that the parties execute a Letter of Agreement and "[w]ork toward execution of a Master Services Agreement by the initiation date of the first project." Id. at 105. However, Langham and SKS never entered into a Letter of Agreement or Master Services Agreement.

In April 2005, John and Shirkey met, and John asked Shirkey "what it would take to get [him] working full time with the Langhams on . . . fulfillment." Id. at 60. Shirkey said that he would need a 25% ownership stake, authority to run the business, and a salary of $75,000. Shirkey also said that he was not in a position to make a capital contribution. John said that he needed to talk to Cathy and Margaret and research the proposed salary.

John and Shirkey met again in June 2005. John agreed with the proposed $75,000 salary and an approximately 25% ownership to Shirkey. They "toyed around with the name of Langham Fulfillment, LLC" and discussed that legal documents would be drafted by Langham's counsel and circulated to the potential parties for review. Id. at 63. On June 15, 2005, John provided Shirkey with a draft "Operating Agreement." Id. at 107-47. Shirkey did not agree with the draft because he wanted clarification on the percentage of ownership, his status as president of the new company, and "a number of other points." Id. at 68.

On June 15, 2005, Shirkey also emailed an SKS invoice to John for Shirkey's consulting services. John suggested that they change the hourly consulting rate during the "transition period" to what Shirkey would make "if [he] were on [the] Langham payroll." Id. at 148. Shirkey agreed, and SKS continued to bill Langham for Shirkey's work at the new hourly rate.

John met with an Advisory Board for Langham in September 2005. The Advisory Board recommended against giving Shirkey an ownership interest in the fulfillment business. John and Shirkey discussed the Advisory Board's recommendation, and they decided to have the attorneys determine the appropriate business structure. In October 2005, John sent Shirkey a draft of a "Phantom Stock Bonus Plan" as a proposed business agreement. Id. at 153. Shirkey did not understand the document and expressed concerns to John.

During this time period, SKS was still operating, and Shirkey was spending time at both SKS and Langham. SKS had an ongoing project for the Dana Corporation and smaller, intermittent customers. SKS was having problems winding down the Dana Corporation account, and in November 2005, Shirkey asked John if he was interested in moving the Dana Corporation fulfillment operations to Langham's facility. They agreed to do so, and after relocating to Langham's facility, Langham performed the work for Dana Corporation, but SKS continued to invoice Dana Corporation. SKS and Langham set up an invoicing structure that resulted in SKS being reimbursed for its costs and Langham receiving the remainder of Dana Corporation's payments. At the end of December 2005, SKS sold its equipment to Langham, and SKS closed its physical operations. The Dana Corporation project ultimately ended in approximately March 2006. In late 2005 and early 2006, SKS also transferred one of its business opportunities with Wild Sales, LLC, to Langham.

In January 2006, John emailed several draft documents to Shirkey, including an operating agreement of Langham Fulfillment, LLC, an employment agreement between Shirkey and Langham Fulfillment, a confidentiality, assignment of work product, non-competition and non-solicitation agreement between Shirkey and Langham Fulfillment, a phantom unit bonus plan agreement, and proposed articles of organization. John, Shirkey, and their attorneys continued to negotiate the terms of the agreements for many months, but they were unable to come to an agreement regarding the documents.

In July 2006, Shirkey requested that he be put on Langham's payroll so that he could stop invoicing Langham through SKS. Langham agreed and paid Shirkey a salary of $90,000 per year for 2006. Shirkey signed an employment agreement, which provided that Shirkey was an at-will employee of Langham.

In August 2006, revised agreements were circulated between the parties. Shirkey thought that the agreements still did not "encapsulate[] [their] verbal agreement points." Id. at 91. Shirkey hired new counsel and, in November 2006, sent Langham a letter detailing that he saw "no option but to terminate his relationship with the Langhams" effectively immediately. Id. at 301. Shirkey requested $95,000 in lost income, $30,000 in lost profits from the Dana Corporation project, and $7,000 in attorney fees.

In December 2006, Shirkey filed a complaint against Langham for breach of oral contract, promissory estoppel, and unjust enrichment. Langham filed a motion for summary judgment arguing that: (1) Shirkey's breach of oral contract claim failed because the parties did not establish the essential terms of the alleged contract; (2) Shirkey's promissory estoppel claim failed because he could not establish reasonable reliance; and (3) Shirkey's unjust enrichment claim failed because he was employed as an at-will employee and was paid for those services. In response, Shirkey argued that genuine issues of material fact existed regarding each of his claims. After a hearing, the trial court entered a general judgment granting Langham's motion for summary judgment.

Analysis

The issue is whether the trial court properly granted Langham's motion for summary judgment. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974.

I. Breach of Contract

Shirkey first argues that the trial court erred by granting summary judgment to Langham on his breach of contract claim. Shirkey contends that the parties had an enforceable oral contract rather than an agreement to agree and that he sustained recoverable damages as a result of Langham's breach. Langham responds by arguing that no valid contract was formed, that they had not agreed to the essential terms, and that Shirkey could not sustain recoverable damages.

"Contracts are formed when parties exchange an offer and acceptance." Kelly v. Levandoski, 825 N.E.2d 850, 857 (Ind. Ct. App. 2005), trans. denied. "For an oral contract to exist, parties have to agree to all terms of the contract." Id. "If a party cannot demonstrate agreement on one essential term of the contract, then there is no mutual assent and no contract is formed." Id. "A meeting of the minds of the contracting parties, having the same intent, is essential to the formation of a contract." Id. "Whether a set of facts establishes a contract is a question of law." Id.

A mere agreement to agree at some future time is not enforceable. Wolvos v. Meyer, 668 N.E.2d 671, 674 (Ind. 1996). Our supreme court observed in Wolvos that:

> It is quite possible for parties to make an enforceable contract binding them to prepare and execute a subsequent final agreement. In order that such may be the effect, it is necessary that agreement shall have been expressed on all essential terms that are to be incorporated in the document. That document is understood to be a mere memorial of the agreement already reached. If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no contract has yet been made; the so-called "contract to make a contract" is not a contract at all.

Id. at 674-75 (quoting 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.8 at 133-34 (rev. ed. 1993)). The question of whether an agreement is an enforceable contract or merely an agreement to agree involves "intent to be bound and definiteness of terms." Id. at 675 (citing 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.8 at 131 (rev. ed. 1993)).

Our supreme court examined a similar issue in Coca-Cola Co. v. Babyback's Int'l, Inc., 841 N.E.2d 557 (Ind. 2006). There, Babyback's and Coca-Cola sought to "co-market" their products. Coca-Cola, 841 N.E.2d at 560-61. After a meeting, Coca-Cola sent a fax to Babyback's detailing the discussions that occurred at the meeting. Babyback's later claimed that the faxed memo was a contract that Coca-Cola breached. The trial court denied Coca-Cola's motion for summary judgment, in which Coca-Cola argued that the alleged agreement was unenforceable under the statute of frauds because it failed to contain the essential terms of a contract and because no agreement was reached. On appeal, our supreme court held that the memo only reflected preliminary discussions. "[N]otwithstanding the memorialization of numerous details, the memo also specifies various other preliminary details remaining to be resolved. More importantly, the specific language and overall tenor of the memo unequivocally establish that no final agreement had been reached between [Coca-Cola] and Babyback's." Id. at 563. Our supreme court held that "[c]onsidering the totality of the faxed memo and its attachments, . . . the parties were still in the process of negotiating and had not yet reached a final agreement." Id. at 565. Consequently, the memo did not satisfy the statute of frauds requirements.

Similarly, here, in April 2005, John asked Shirkey "what it would take to get [him] working full time with the Langhams on . . . fulfillment." App. p. 60. Shirkey said that he would need a 25% ownership stake, authority to run the business, and a salary of

$75,000. Shirkey also said that he was not in a position to make a capital contribution. John said that he needed to talk to Cathy and Margaret and research the proposed salary. John and Shirkey met again in June 2005. John agreed with the proposed $75,000 salary and an approximately 25% ownership to Shirkey. They "toyed around with the name of Langham Fulfillment, LLC" and discussed that legal documents would be drafted by Langham's counsel and circulated to the potential parties for review. Id. at 63.

The designated evidence makes it clear that the parties intended to execute legal documents, but they were simply never able to agree about the content of those documents. Over the next eighteen months, the parties negotiated several different legal documents. A main source of contention was how the business would be structured to give Shirkey the approximately twenty-five percent ownership. The parties were never able to come to an agreement on that point, which is clearly an essential term. As in Coca-Cola, we conclude that the parties were still in the process of negotiating and had not yet reached a final agreement. Thus, the trial court properly granted summary judgment to Langham on Shirkey's breach of contract claim.

II. Promissory Estoppel

Next, Shirkey argues that the trial court erred when it granted summary judgment to Langham on Shirkey's promissory estoppel claim. A party asserting promissory estoppel must establish five elements: "(1) a promise by the promissor (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promisee (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise." Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 581

(Ind. 2007) (quoting First Nat'l Bank of Logansport v. Logan Mfg. Co., Inc., 577 N.E.2d 949, 954 (Ind. 1991)).

The parties dispute, in part, whether Shirkey's reliance on Langham's alleged promise to create Langham Fulfillment with Shirkey was reasonable. In Coca-Cola, our supreme court also addressed Babyback's promissory estoppel claim. The court held that Babyback's promissory estoppel claim failed because its reliance on the alleged promise was not reasonable. The court noted:

> On the day following [Coca-Cola's] November 17, 1997, faxed memo, the president of Babyback's faxed a letter to [Coca-Cola] declaring that Babyback's was "taking pride in having reached an agreement with Coca-Cola Enterprises," and to which was attached a "new revised agreement which has been modified with all the changes that we all have agreed." Appellants' Joint App'x at 330-336. But [Coca-Cola] immediately replied the same day with a fax to Babyback's that explicitly stated, "We . . . feel compelled to remind you that contrary to your cover letter, we have not reached an agreement with your company." Id. at 337 (emphasis in original). The [Coca-Cola] reply fax proceeded to identify various issues still in dispute, and then stated that [Coca-Cola] would treat Babyback's "proposal with high priority, but unfortunately we will be unable to finalize an agreement with you in the timeframe you have outlined." Id.

Coca-Cola, 841 N.E.2d at 570. The court determined that "[i]n light of [Coca-Cola's] immediate and unequivocal denial of the national agreement sought by Babyback's, it clearly was not reasonable for Babyback's to take any actions in reliance upon its belief that [Coca-Cola] had promised to perform the alleged national agreement." Id. Thus, the court held that Coca-Cola was entitled to summary judgment because "one of the essential elements of the doctrine of promissory estoppel [was] absent as a matter of law." Id.

Here, Langham's alleged promise was made in June 2005. Shirkey immediately agreed to a reduction in his consulting fee. By September 2005, Shirkey was aware that the Advisory Board had recommended against giving him an ownership interest in the new business. In fact, John and Shirkey discussed the Advisory Board's recommendation, and they decided to have the attorneys determine the appropriate business structure. In October 2005, John sent Shirkey a draft of a "Phantom Stock Bonus Plan," about which Shirkey expressed concerns. The parties then continued negotiating various business documents for the next year.

Despite the ongoing negotiations and Shirkey's concerns over the business structure, he lowered his consulting rate, transferred the Dana Corporation account to Langham, closed down SKS's physical operation, sold his equipment to Langham, and referred a prospective SKS client to Langham. Given the ongoing negotiations and Shirkey's knowledge of the Advisory Board's recommendations, we conclude that Shirkey's reliance on John's alleged promise was unreasonable as a matter of law. The trial court properly granted summary judgment to Langham on this claim.

III. Unjust Enrichment

Next, Shirkey argues that the trial court erred by granting summary judgment to Langham on his unjust enrichment claim. "Even if there is no express contract, a plaintiff may sometimes recover under the theory of unjust enrichment, which is also called quantum meruit, contract implied-in-law, constructive contract, or quasi-contract."

Bergerson v. Bergerson, 895 N.E.2d 705, 714 (Ind. Ct. App. 2008). A claim for unjust enrichment "is a legal fiction invented by the common law courts in order to permit a recovery . . . where the circumstances are such that under the law of natural and immutable justice there should be a recovery . . . ." Zoeller v. East Chicago Second Century, Inc., 904 N.E.2d 213, 220 (Ind. 2009) (quoting Bayh v. Sonnenburg, 573 N.E.2d 398, 408 (Ind. 1991)). "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Id. (quoting RESTATEMENT OF RESTITUTION § 1 (1937)). "To prevail on a claim of unjust enrichment, a claimant must establish that a measurable benefit has been conferred on the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." Id.

According to Shirkey, Langham was unjustly enriched by paying Shirkey's reduced consulting rate and receiving profits from SKS's former clients. As for Shirkey's consulting fees, from June 2005 until July 2006, SKS billed Langham for Shirkey's consulting services at a reduced rate. In July 2006, Shirkey signed an employment contract with Langham as an at-will employee and was paid a salary of $90,000 per year. It is unclear how Langham was unjustly enriched at the expense of Shirkey when from June 2005 to July 2006, Langham was paying SKS, not Shirkey. Further, beginning in July 2006, Shirkey's relationship with Langham was governed by an employment contract. Our supreme court has held that, when the rights of parties are controlled by an express contract, recovery cannot be based on a theory of unjust enrichment. Zoeller, 904 N.E.2d at 221.

As for profits from SKS's former clients, SKS transferred its Dana Corporation project to Langham in late 2005. After relocating to Langham's facility, Langham performed the work for Dana Corporation but SKS continued to invoice Dana Corporation. SKS and Langham set up an invoicing structure that resulted in SKS being reimbursed for its costs and Langham receiving the remainder of Dana Corporation's payments. The Dana Corporation project ultimately ended in approximately March 2006. In late 2005 and early 2006, SKS also transferred one of its business opportunities with Wild Sales, LLC, to Langham.

Again, it is unclear how Langham was unjustly enriched at the expense of Shirkey due to profits that it received from SKS's former clients. We conclude that, as a matter of law, Shirkey's unjust enrichment claim fails. The trial court properly granted summary judgment to Langham on this claim.

Conclusion

The trial court properly granted summary judgment to Langham on Shirkey's breach of contract, promissory estoppel, and unjust enrichment claims. We affirm the trial court's grant of summary judgment.

Affirmed.

MATHIAS, J., and BROWN, J., concur.