

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA A. DOPP,

Plaintiff-Appellee,

v

CAPITOL BANCORP, LTD., and
OAKLAND COMMERCE BANK,

Defendants-Appellants.

UNPUBLISHED

February 7, 1997

No. 173001

Oakland Circuit Court

LC No. 93 451910

Before: Gribbs, P.J., and Marilyn Kelly and White, JJ.

PER CURIAM.

We concur in Judge White's discussions of issues I, II, III and the result in issue V. We particularly agree with her finding that defendants' brief on appeal was disingenuous. However, we affirm the trial court's judgment in its entirety.

The trial court properly granted plaintiff summary disposition and denied defendants' motion for summary disposition at a hearing held on October 20, 1993, rejecting defendants' argument that the agreement was unenforceable and that the damages clause was an unreasonable penalty. At the motion hearing, defendants presented absolutely no evidence to dispute plaintiff's detailed affidavit of various triggering events. Several weeks *after* the decision, defendants signed a conclusionary affidavit stating, *for the first time*, that a trigger event did not occur and that questions of fact therefore existed. Defendants' affidavit was subsequently submitted with defendants' motion for reconsideration. The motion was denied. The court's well-written opinion states in its entirety:

Plaintiff sues for termination benefits under a termination agreement. Defendant moves for summary disposition arguing that the agreement was unenforceable. Plaintiff sought summary disposition as the non-moving party pursuant to MCR 2.116(I)(2) arguing that the agreement was enforceable and had been breached by defendant. Defendant did not respond to plaintiff's request for summary disposition under MCR 2.116(I)(2). This

Court denied defendant's motion and granted summary disposition for plaintiff. Defendant now seeks reconsideration.

A motion for reconsideration is denied without oral arguments and response briefs, unless the Court orders otherwise. MCR 2.119(F)(2). The moving party must demonstrate a palpable error and show that correction of the error would lead to a different result. MCR 2.119(F)(3).

In support of the motion for summary disposition the parties submitted a copy of the termination agreement. The agreement provided that in the event of a "trigger event" plaintiff would be entitled to certain "benefits," as those terms were defined in the agreement. Plaintiff submitted her affidavit detailing the changes in her job responsibilities following the corporate take-over. She swore that she had been eliminated from three management committees, eliminated from the board of a mortgage finance company, and had experienced reductions in responsibilities. She also swore to reductions in various benefits. At oral argument defendant did not contest that it had reduced plaintiff's benefits and responsibilities during the takeover. Rather it argued that it intended to restore plaintiff to her former position once the takeover was complete, and that plaintiff should have given it more time.

In its motion for reconsideration defendant now seeks to contradict its earlier position to argue that plaintiff's compensation, benefits and job responsibilities were not reduced. Defendant submits a conclusory affidavit drafted in the language of the termination agreement stating that a trigger event did not occur. It is not palpable error for this Court to fail to anticipate that defendant might adopt a position diametrically opposite to the position it argued on the original consideration of its motion. Brown v Libbey-Owens Ford Co, 166 Mich App 213, 216-217 (1987). Defendants' efforts to reshape the facts in this case by belatedly submitted a conclusory affidavit do not merit reconsideration.

The motion for reconsideration is denied.[Emphasis added.]

We agree with the trial court's determination that, in their motion for reconsideration, defendants attempted to adopt a position diametrically opposite to their original position. As such, defendants' argument did not warrant reconsideration.

We affirm the circuit court's denial of defendants' motion for summary disposition and affirm its grant of summary disposition and damages to plaintiff.

/s/ Roman S. Gribbs

/s/ Marilyn Kelly