

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS F. MEEKER,

Plaintiff-Appellant,

v

COMERICA, INC.,

Defendant-Appellee.

UNPUBLISHED

April 22, 1997

No. 187120

Wayne Circuit Court

LC No. 94400168 CK

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burrell,* JJ.

PER CURIAM.

In this breach of contract and misrepresentation case, plaintiff appeals as of right from a grant of summary disposition for defendant pursuant to MCR 2.116(C)(10). On appeal, he argues that there were genuine issues of fact precluding summary disposition. We affirm.

I

On December 8, 1989, following defendant's acquisition of the Alliance Financial Corporation, plaintiff terminated his employment with Alliance and signed a consulting agreement with defendant. The agreement contained the following provision regarding retirement welfare benefits:

The Consulting Employee will accumulate Comerica pension service credits until June 18, 1993 and will be subject to the provisions of the Comerica Incorporated Retirement Plan and any retirement policies or procedures in effect at that time. Upon the termination date of this Agreement, the Consulting Employee will be considered eligible to participate in any applicable health and life insurance programs offered to employees who retire from Comerica and which are in effect at the date on which the Consulting Employee retires.

The agreement also contained the following provision regarding the duration of the contract:

* Circuit judge, sitting on the Court of Appeals by assignment.

This Agreement and all relationships between [plaintiff] and [defendant] shall terminate on June 18, 1993, *provided, however*, that in the event that the Consulting Employee dies or becomes permanently disabled . . . prior to June 18, 1993, this Agreement and all relationships between the parties shall be terminated upon the date of the Consulting Employee's death or the expiration of the six month period of continuous disability, whichever is appropriate. (emphasis in original).

In December, 1992, defendant decided to reduce its retiree insurance benefits effective January 1, 1993. Employees who had ten years of service and were eligible for retiree benefits were notified of the change and given the opportunity to retire before the reduction of benefits. Because plaintiff did not have ten years of service, he was not notified or given the opportunity to retire.

Plaintiff brought this action claiming that defendant breached the contract by failing to provide him with the opportunity to retire before the reduction of benefits. Plaintiff also alleged that defendant was liable for fraud and misrepresentation, as it had falsely led plaintiff to believe that he would not be subject to defendant's standard vesting requirements in order to be eligible for retirement benefits.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no question of fact that the consulting agreement unambiguously gave it the authority to modify retirement benefits. Defendant asserted that plaintiff was entitled to receive only those benefits available at the time of his retirement. Finally, it argued that plaintiff could not prove damages from the misrepresentation because he had had no retiree insurance benefits while employed with Alliance. Consequently, he could not have lost benefits by signing the consulting agreement.

Plaintiff argued that there was evidentiary support for his claims, precluding summary disposition for defendant. According to plaintiff, in August, 1989, Robert Eppler, defendant's director of human resources, contacted plaintiff regarding renegotiation of plaintiff's contract. In the course of negotiations, Eppler confirmed the content of their discussions in a written memorandum entitled "Contract Discussions." Plaintiff claimed that these documents showed that it was understood between Eppler and plaintiff that defendant would provide plaintiff with retiree health and life insurance benefits as part of his new contract, without regard to defendant's ten-year eligibility requirement. Plaintiff cited the following paragraph from the Contract Discussion memorandum:

You may continue in a Basic Health Care Plan (hospitalization only) on the same basis as prior to retirement if you retire after age 55 and are receiving a monthly benefit check from the Comerica Retirement Plan.

At plaintiff's request, John Cerretani, defendant's in-house counsel, agreed to add this provision to the consulting agreement. Cerretani never informed plaintiff that eligibility would be contingent upon a minimum number of years of credited service. Plaintiff claimed that, before signing the agreement on January 5, 1990, he asked Cerretani whether he would be eligible for retiree benefits if he retired that day. Cerretani replied affirmatively. Plaintiff claimed that defendant enticed him into signing the agreement by fraudulently inducing him to believe that he would qualify for the benefits without ten years of service.

At the motion hearing, defendant's counsel stated that, although plaintiff did not need ten years of service in order to qualify for retirement benefits, plaintiff would not become eligible for the benefits until June 18, 1993, when the consulting agreement expired. In an effort to clarify its position, defendant stated that plaintiff would be eligible at the time of his retirement to receive whatever benefits were offered to retirees at the date of his retirement. Defendant denied that it had ever taken the position that plaintiff would not be eligible for benefits until he met the retirement plan's ten-year vesting provision.

The trial court granted defendant's motion for summary disposition on the breach of contract claim, finding that the contract unequivocally stated that plaintiff could not retire before June 18, 1993, unless due to death or disability. It concluded that Cerratani's statement was a misstatement of present fact and, therefore, not a fraudulent misrepresentation. The trial court also granted summary disposition as to the misrepresentation claim because plaintiff had not given the trial court more than "bare conclusory statements concerning damages."

Plaintiff argues that the trial court erred in granting summary disposition where plaintiff raised a material question of fact regarding defendant's obligation to offer plaintiff the opportunity to retire early and avoid the reduced retirement benefits.

II

As a preliminary matter, we must determine whether plaintiff's claim was preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). 29 USC 1001 *et seq.* Under ERISA, state laws that "relate to" an employee benefit plan are expressly preempted. 29 USC 1144a; *Hill v Ford Motor Co*, 183 Mich App 208, 213; 454 NW2d 125 (1989). A state law is preempted if it "relates to" an employee benefit plan by

1) altering the level of benefits which would be paid out under a given plan from state to state, 2) altering the terms of the plan such as requirements for eligibility, or 3) subjecting the fiduciaries of a plan to claims other than those provided in the ERISA itself. [*Teper v Park West Galleries, Inc*, 431 Mich 202; 221; 427 NW2d 535 (1988).]

Moreover, preemption exists only where there is a real, if only indirect, relationship between the challenged state law and an employee benefit plan. *Id.* at 220.

As in *Hill*, we find that plaintiff's claim of misrepresentation does not "relate to" the plan. The claim is premised upon a representation made by defendant's employee regarding the time plaintiff became eligible for participation in the plan. Plaintiff is seeking damages for alleged misrepresentation not from the plan itself, but from defendant. *Hill, supra*. Therefore, as the claim will not alter the benefits paid out of the plan from state to state, and will not alter the plan's terms, it is not preempted by ERISA. *Teper, supra, Hill, supra*.

However, as in *Hill*, we find that plaintiff's breach of contract claim "relates to" the plan and is preempted by ERISA. *Hill, supra* at 214-215. If plaintiff's claim is successful, he would recover more

benefits than he would otherwise be entitled to under the plan. Therefore, plaintiff's claim "relates to" defendant's employee benefit plan and is preempted. *Id.* at 215.¹

III

With respect to the merits of defendant's misrepresentation claim, plaintiff argues that the trial court improperly granted summary disposition where there were issues of material fact to be decided by the jury. To constitute actionable fraud, a plaintiff must establish that:

(1) defendant made a material misrepresentation; (2) it was false; (3) when it was made defendant knew that it was false or made it recklessly, without knowledge of its truth and as a positive assertion; (4) defendant made it with the intent that it should be acted upon by plaintiff; (5) plaintiff did act in reliance upon it; and (6) plaintiff thereby suffered injury. [*Webb v First of Michigan Corporation*, 195 Mich App 470, 473; 491 NW2d 851 (1992).]

Plaintiff alleged that he asked Cerretani before signing the agreement whether he would be eligible for retirement benefits if he retired that day, and Cerretani responded affirmatively. Plaintiff claims that Cerretani's statement satisfied the first four elements of misrepresentation: (1) he made the statement, (2) it was false, (3) he knew it was false, (4) he made it to induce plaintiff to sign the contract. However, this Court has held that there can be no fraud where the means of acquiring knowledge of the truthfulness of the representation are available to the plaintiff. *Webb, supra* at 474.

Here, the contract clearly stated that plaintiff would be eligible for retirement benefits at the expiration of the contract, June 18, 1993. Therefore, the means of acquiring knowledge regarding the truthfulness of the representation was available to plaintiff. Plaintiff has not alleged that defendant prevented him from examining the contract or from seeking the advice of counsel regarding the provision in the contract. The trial court could have granted summary disposition on this basis.

However, it granted summary disposition on the ground the plaintiff failed to establish damages. Michigan law has recognized that actionable fraud does not require monetary loss to the plaintiff. The injury may be considered the plaintiff's unfulfilled expectations. *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 183; 341 NW2d 268 (1983). We believe that a factual question was presented on this issue. However, because the trial court could have properly granted summary disposition on the ground that there is no basis for fraud when the truth of the statement is readily ascertainable by plaintiff, summary disposition is still proper. We will not reverse a trial court when it reaches the correct result for the wrong reason. *People v Beckley*, 161 Mich App 120, 131; 409 NW2d 759 (1987), *aff'd*, 434 Mich 691 (1990).

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer

/s/ Marilyn Kelly

/s/ Daniel A. Burress

¹ It has come to our attention that federal courts have interpreted the issue of preemption in a different manner than *Teper or Hill*. See *Cefalu v BF Goodrich Company*, 871 F2d 1290 (CA 5, 1989); *Degan v Ford Motor Company*, 869 F2d 889 (CA 5, 1989); *Fisher v Combustion Engineering, Inc*, 976 F2d 293 (CA 6, 1992). We urge the Michigan Supreme Court to take another look at this issue.