

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD COLLINS,

UNPUBLISHED
May 27, 1997

Plaintiff-Appellant,

v

No. 191661
Oakland Circuit Court

H. FRED CAMPBELL, H.F. CAMPBELL
COMPANY, and CAMPBELL DEVELOPMENT
COMPANY,

LC No. 95-490669

Defendants-Appellees.

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Plaintiff appeals the circuit court's grant of summary disposition in favor of all defendants, pursuant to MCR 2.116(C)(8) and (C)(10), in this case alleging breach of employment contract, violation of the Polygraph Protection Act (PPA), MCL 37.203; MSA 17.65(3), and retaliatory discharge under the Michigan Civil Rights Act (CRA), MCL 37.2701(a); MSA 3.458(701)(a). We affirm in part and reverse in part.

Plaintiff filed suit after H. Fred Campbell, president and sole shareholder of Campbell Development Company (CDC), terminated plaintiff's employment with CDC in November 1994.

I

Plaintiff first argues that the circuit court improperly granted summary disposition and improperly denied his motion for summary disposition on his breach of contract claim.

When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff argues that Campbell and H. Fred Campbell Company (HFCC) should not have been dismissed because there was a complete breakdown of corporate formalities which justifies piercing of the corporate veil. Plaintiff's claim fails because he has not shown that the corporate entity was used to commit a fraud or wrong. *SCD Chemical Distributors, Inc, v Medley*, 203 Mich App 374, 381-382; 512 NW2d 86 (1994).

However, the circuit court's grant of summary disposition to CDC was improper. Plaintiff and Campbell, on CDC's behalf, executed a valid employment agreement in which CDC agreed to pay plaintiff, as part compensation, thirty percent (30%) of all gross profits of the company. The agreement also stated that CDC would pay plaintiff commissions on a real estate development called Monterey Estates in the amount of thirty percent (30%) of all profits over \$600,000.00. Campbell argues that he was not aware that the agreement provided for commissions on gross profits, and that he was under the impression that the agreement specified net profits, because he never reviewed the contract prior to signing it. A party who has not read the contents of a contract before signing it may not claim that his intention was different from that stated in the writing. *Pritts v JI Case Co*, 108 Mich App 22, 31; 310 NW2d 261 (1981).

Campbell also argues that he and plaintiff orally agreed to modify plaintiff's original employment agreement to provide for commissions on net, and not gross, profits of the company. A written contract may be modified orally through the consent of both parties. *Rasch v National Steel Corp*, 22 Mich App 257, 260; 177 NW2d 428 (1970). The burden of proving the modification rests on the party alleging it. *Id.* Plaintiff testified that he knew the company had not realized a net profit in the recent past, so he would never have agreed to such a modification. It is undisputed that plaintiff never signed CDC's proposed amended employment agreement, which incorporated such a modification. Thus, a genuine issue of material fact remained whether an oral modification was agreed on.

Defendants argue that plaintiff was terminated for cause and that plaintiff was thus not entitled to commissions because the written employment agreement stated that in the event plaintiff is terminated "without cause" commissions would be paid as described above. Plaintiff's employment agreement listed six "causes for termination": stealing, representing the company to prospective clients and other entities in a dishonest or unethical [sic] manner, drunkenness [sic] or use of drugs while on company business, misappropriating authority, misrepresenting the company and/or its ability to execute certain work, and failure to fulfill the responsibilities listed above. The employment agreement listed six "responsibilities": to represent CDC in an honest, ethical and confident manner; to market the Campbell Thermo Modular System (CTMS) for new and retrofit construction; to pursue all development opportunities for CDC and advise the company as to the practical and favorable prospects; to oversee the day-to-day operation of the company, and to be involved in all decisions regarding the company's marketing, sales, future developments and major financial disbursements.

Defendants contend that their main reason for discharging plaintiff was that plat approval of Monterey Estates was seriously delayed due to plaintiff's mismanagement of the property. The Wayne County Department of Public Services sent a notice to CDC in September 1994, indicating that eighteen of twenty items necessary for plat approval were either incomplete or completed

unsatisfactorily. Although plaintiff agrees that approval for Monterey Estates was delayed, he contends that CDC did not have sufficient funds for the project to progress on schedule. Plaintiff contends that the company's financial status prevented him from obtaining necessary permits and performing necessary tasks for plat approval. Thus, a genuine issue of fact remained whether the delay in the project's progress was attributable to plaintiff and, if so, whether this was a true reason for plaintiff's termination. See ICLE, *Michigan Wrongful Discharge and Employment Discrimination Law*, § 5.38, pp 5-24 - 5-25.

Defendants also argue that they terminated plaintiff for cause because plaintiff removed a package addressed to a former employee from the company office. The addressee was a former secretary who had been convicted of embezzling money from CDC, and plaintiff admits knowledge of this fact. Plaintiff argues that the package was from a mail-order music store and contained compact discs or cassette tapes, and that he intended to confront the new secretary with the package in order to determine whether she had ordered the tapes in the prior secretary's name. Defendants contend that plaintiff's action constituted stealing or unethical conduct for which plaintiff could be terminated for cause.

Our review of the record reveals that Campbell admitted he would not have fired plaintiff for such an action standing alone. A reasonable juror could conclude that plaintiff was fulfilling his responsibility of overseeing the day-to-day operations of the company, as he was required to do, when he took the package. Therefore a question of fact remained whether plaintiff's taking the package was unethical conduct which would constitute cause to terminate, and whether this was a true reason for plaintiff's termination.

Defendants' arguments that that plaintiff was terminated because he conducted telephone conversations from the company office with a former employee entangled in litigation with the company, removed several personnel files from the office, and may have been involved in the disappearance of a security camera, find inadequate support in the record. Summary disposition under these circumstances was inappropriate.

We conclude that a genuine issue of material fact remained regarding whether plaintiff was terminated for cause and, therefore, whether plaintiff was entitled to commissions as specified in his written employment agreement. A genuine issue of material fact also remained whether plaintiff and Campbell agreed to orally modify plaintiff's written agreement. Summary disposition of plaintiff's breach of contract claim was improperly granted as to CDC.

II

Plaintiff also argues that he is entitled to commissions in the amount of \$300,000 on the sale of airport property owned by CDC. Plaintiff contends that Campbell promised to pay him these commissions and that that agreement is evidenced by a map drawn on a cocktail napkin.

The Statute of Frauds provides that an agreement to pay a commission for or upon the sale of an interest in real estate is void unless that agreement is in writing and signed with an authorized signature

by the party to be charged. MCL 566.132(5); MSA 26.922(5). A memorandum of an agreement to pay a commission for or upon the sale of any interest in real estate must also sufficiently disclose the terms of the agreement in order to satisfy the Statute of Frauds. *Craib v Committee on Nat'l Missions of Presbytery of Detroit*, 62 Mich App 617, 621; 233 NW2d 674 (1975).

The cocktail napkin does not satisfy the Statute of Frauds because it is not signed by Campbell and it does not contain the essential terms of the parties' alleged agreement. Nor does it sufficiently appear to be an addendum to the contract.

III

Plaintiff also argues that the circuit court erred in granting summary disposition in favor of all defendants on his claims of violation of the PPA. We disagree.

The PPA, MCL 37.201 *et seq.*; MSA 17.65(1) *et seq.*, provides in pertinent part:

Sec. 3. (1) Except as provided in this section, an employer or employment agency shall not as a condition of employment, promotion, or change in status of employment, or as an express or implied condition of a benefit or privilege of employment, do any of the following:

(a) Request or require that an employee or applicant for employment take or submit to a polygraph examination.

(b) Administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an employee or applicant for employment. [MCL 37.203(1); MSA 17.65(3).]

* * *

Sec. 7. (1) A person alleging a violation of this act may bring an action for injunctive relief or damages, or both.

(2) For purposes of this act, damages include damages for injury or loss caused by each violation of this act and reasonable attorney's fees.

(3) If an employee is discharged in violation of this act, damages for which the employer is liable under this section shall include double the wages lost. [MCL 37.207; MSA 17.65(7).]

Plaintiff was terminated verbally from CDC's employ on November 15, 1994, and in writing by letter dated November 29, 1994. Plaintiff's complaint stated that Campbell demanded that plaintiff submit to a polygraph exam on December 8, 1994. However, plaintiff's response to defendants' motion for summary disposition stated that the polygraph exam was raised on November 15, 1994, after Campbell verbally terminated plaintiff. Plaintiff argued that later on that day, he and Campbell

verbally negotiated that plaintiff would receive \$1,000 per week until he received \$150,000 or until the Monterey Estates lots were sold, and that sometime later, still on November 15, Campbell's secretary told him during a phone call that "our attorney is going to make you take a lie detector test."

Because the record clearly shows that plaintiff was not in defendants' employ at the time of the alleged demands that plaintiff submit to a polygraph, summary disposition of plaintiff's PPA claim was appropriate.

IV

Plaintiff also alleged retaliatory discharge under the CRA, MCL 37.2701(a); MSA 3.458(701)(a). To establish a prima facie case of unlawful retaliation, a plaintiff must establish that he opposed a violation of the CRA or participated in activities protected by it, and that his opposition or participation was a significant factor in an adverse employment decision. *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1310 (CA 6, 1989).

We conclude that plaintiff established a prima facie case of retaliation against Campbell and CDC. Plaintiff testified that on several occasions, Campbell indicated to plaintiff that he did not want lots in Monterey Estates sold to African-American persons. Plaintiff testified that Campbell terminated his employment after Campbell learned that plaintiff had accepted a purchase offer from an African-American person. Under these circumstances, Campbell and CDC were improperly dismissed.¹ See *Jenkins v Southeastern Chapter American Red Cross*, 141 Mich App 785, 799-800; 369 NW2d 223 (1985); *Yedla v Electronic Data Systems*, 764 F Supp 90, 91-92 (ED Mich 1991).

We affirm the circuit court's grant of summary disposition to HFCC on all plaintiff's claims, and also affirm the dismissal of plaintiff's PPA claim. We reverse the circuit court's grant of summary disposition to CDC on plaintiff's breach of contract claim and also reverse the grant of summary disposition to CDC and Campbell on plaintiff's CRA claim. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

¹ The fact that plaintiff was not a broker and could not have actually executed the sale is irrelevant.