STATE OF MICHIGAN

COURT OF APPEALS

CORA DAVIS, EVON GERLOFS, JAMES H. PAGE, DIEGO GARZA, GLENN BEARD, JAMES POWELL, BARBARA UTTER, and ROBERT R. FOSTER,

Plaintiff-Appellants,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED
January 18, 2000

No. 212297
Kalamazoo Circuit Court
LC No. 95-1539-CZ

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Plaintiffs are former employees of the General Motors Corporation (GM) who appeal as of right from a May 29, 1998, order granting summary disposition of their age discrimination action in favor of defendant GM. Plaintiffs contend that the court erred when it found they had failed to establish factual issues to support their allegations that they had been fraudulently induced into releasing such claim. We disagree.

Due to a decline in sales, loss of market share, and unprofitability in the late 1980's and early 1990's, GM determined that its metal stamping plant located in Kalamazoo would be closed. On December 3, 1992, Thomas Brady, manufacturing manager for the Cadillac Luxury Car Division Metal Centers, announced to the Kalamazoo workforce that GM would close the Kalamazoo stamping plant at the end of 1995. It is undisputed that at the time Brady made the announcement, he unequivocally indicated that the decision to close the plant was final and that GM would begin to phase out jobs almost immediately.

As an alternative to job transfer or layoff, GM offered qualified employees an opportunity to participate in what was known as the Special Accelerated Attrition Agreement (SAAA), an enhanced retirement offer collectively bargained for with the United Autoworkers Union (UAW), which was being made available to GM employees nationwide. Despite the proffered finality of the closing decision, in the months that followed the closing announcement, the UAW repeatedly requested that GM reconsider

its decision to close the Kalamazoo plant. As a result of national contract negotiations between GM and the international UAW in mid-September 1993, GM agreed to extend the life of the Kalamazoo facility to the end of the 1998 model year.

Plaintiffs allege that by indicating that the decision to close the Kalamazoo facility was "etched in stone" or otherwise final, defendant compelled hundreds of older workers, concerned over finding other employment, to give up their highly paid positions and accept retirement under the SAAA. Because the life of the plant was subsequently extended through 1998, plaintiffs contend that their otherwise voluntary retirements amount to age discrimination and constructive discharge in violation of Michigan's Civil Rights Act, Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*.

On appeal, plaintiffs first argue that the trial court erred in finding that they failed to establish a genuine issue of fact regarding their claims of fraud in the inducement and execution of the SAAA and its accompanying release.

The SAAA conditions of separation form signed by each plaintiff provides in relevant part:

> In consideration for participation in the Special Accelerated Attrition Agreement, I hereby release and forever discharge GM and its officers, directors, and employees from all claims, demands and causes of action, known or unknown which I may have based on my employment or the cessation of my employment with GM. This release specifically includes without limitation, a release of any rights or claims I may have under the Age Discrimination in Employment Act, which prohibits age discrimination, Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, color, national origin, religion or sex; the Equal Pay Act; state fair employment practices or civil rights laws; and any other federal, state or local laws or regulations, or any common law actions relating to employment discrimination. This includes without limitation any claims for breach of employment contract, either express or implied, and wrongful discharge. I further agree not to institute any proceedings against GM or its officers, directors, agents, employees or stockholders, based on any matter relating to my employment or the cessation of my employment at GM.

Such releases are enforceable in Michigan as a valid waiver of claims of employment discrimination under the Civil Rights Act. See, e.g., *Rowady v K Mart Corp*, 170 Mich App 54; 428 NW2d 11 (1988).

A trial court's grant of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Amorello v Monsanto Corp*, 186 Mich App 324, 329; 463 NW2d 487 (1990). The motion must specifically identify the issues regarding which the moving party believes there is no genuine issue of material fact. MCR 2.116(G)(4); *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). In ruling on the motion, the trial court must consider not only the pleadings, but also any depositions, affidavits, admissions, or other documentary evidence submitted by the parties.

MCR 2.116(G)(5). Such evidence must be viewed in the light most favorable to the nonmoving party. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 398; 572 NW2d 210 (1998).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. MCR 2.116(G)(4); *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormick v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

In order to show fraud, a plaintiff must prove: (1) that the defendant made a material representation, (2) that the representation was false, (3) that when the defendant made the representation, the defendant knew that it was false, or made it recklessly without knowledge of its truth or falsity, (4) that the defendant made it with the intent that the plaintiff would act on it, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered injury. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208; 544 NW2d 727 (1996).

In this case the trial court, in ruling on GM's motion for summary disposition, held that there was no evidence to demonstrate that as of December 1992, GM knowingly falsely represented that the plant would close in 1995. Because proof of some false representation made with an intent to deceive is a necessary element of the fraud claimed to invalidate the release, we agree with the circuit court's reasoning that, without such evidence, plaintiffs were bound by the release.

Plaintiffs had the heavy burden of proving that in order to induce its employees to accept the SAAA, GM falsely represented its intent to close the plant at the end of the 1995 model year. At the very least, plaintiffs were obligated to produce some documentary evidence from which it could be inferred that at the time GM announced its intent to close the plant, the company intended something else. *McCart*, *supra*, 437 Mich 115. Plaintiffs, however, have failed to do so. With the exception of speculation based solely upon the fact that the plant's life was extended to 1998, plaintiffs offer nothing to support their allegations that GM knowingly or with reckless disregard for the truth, fraudulently induced them into accepting the SAAA and signing a release of all claims against GM. In fact, plaintiffs' responses to deposition questions posed by GM clearly indicate a lack of specific facts or documentary evidence in support of their position. In response to questions regarding the factual basis for their allegations of fraud, plaintiffs merely speculated, based solely upon the subsequent decision to hold the plant open for an additional three years, that GM had knowingly misrepresented its intentions. As previously noted, mere allegation or speculation is not enough to establish an issue of material fact.

Although the determination of whether GM actually intended to close the Kalamazoo plant in 1995 when it announced its decision in December 1992 is a factual matter, plaintiffs have failed to provide any documentary evidence to refute the various affidavits and deposition testimony of GM

officials, including Tom Brady, stating that the company had no intent to defraud plaintiffs with respect to that fact.

According to affidavits filed by production and engineering officials at the Kalamazoo plant, immediately after the plant closing was announced in December 1992, GM began taking steps to transfer ongoing production and associated press equipment to other metal stamping facilities. The first movement of presses began near the end of January 1993, approximately seven weeks after the original plant closing announcement. From December 1992, when GM first announced its decision to close the plant, through October 1993, when it was announced that the life of the plant would be extended to 1998, a number of presses were moved out of Kalamazoo each month. It appears that throughout 1993, GM was working to close the plant; reallocating production, removing equipment, and transferring employees. Plaintiffs offer nothing to combat GM's assertion that the plant would have been completely shut down by the end of the 1995 model year if not for the scheduled negotiations with the UAW. Based upon the facts established by the record, it cannot be said that there was an issue of fact upon which reasonable minds could differ. Consequently, we find that the trial court's grant of summary disposition was proper.

Plaintiffs argue that they need not show that the plant closing announcement was false, but rather need only show that the announcement was made recklessly, without any knowledge of its truth. Plaintiffs contend this burden was met because Tom Brady, the person who announced the 1995 closing date, testified that he had not been involved in the decision making process that led up to the plant closing decision, nor was he informed as to the rationale for the decision prior to his making the announcement. Plaintiffs, citing *Wettlaufer Mfg Co v Detroit Bank*, 324 Mich 684, 692; 37 NW2d 674 (1949), argue that such conduct represents actionable fraud based upon a reckless misrepresentation of fact made without knowledge of its truth. We disagree.

In *Wettlaufer*, the Court observed that an "unqualified affirmation of a fact not known to be true may constitute fraud, subjecting the speaker to liability, even though he lacked actual knowledge of its falsity and was himself deceived." *Id*., 692, citing 37 CJS, Fraud, § 21, 255-257. We do not believe this observation is applicable to the case at bar. In this case, the day before the announcement, Brady was contacted by his superior and informed of the decision to close the Kalamazoo facility. Brady was further informed that it was his duty to announce the decision to the employees. Although it is true that Brady, at the time he announced the unqualified closing of the plant, did not know the basis for his superior's decision, to hold that his actions in reliance on orders from his superiors constituted fraudulent behavior would stretch too far the rationale underlying fraud as a cause of action. As previously noted, plaintiffs have offered no evidence to support a finding that GM intended something other than to close the plant at the end of 1995. Likewise, there is nothing in the record to indicate that Brady had no basis to believe that the plant closing announcement he made at the behest of his superiors was not true.

Next, plaintiffs contend that the trial court erred in failing to consider plaintiffs' allegation of fraud in the execution of the SAAA documents. According to plaintiffs, one of the critical considerations which caused plaintiffs to accept the SAAA was their understanding that the agreement included a promise of health care benefits for the employee and his family for the duration of the employee's life.

Apparently, however, all benefit packages offered by GM, including those provided under the SAAA, are subject to GM/UAW negotiation in the national contract that is collectively bargained for every three years and as such are subject to modification. Plaintiffs claim to have been told that their benefits under the SAAA would not be subject to change. However, the SAAA conditions of separation form signed by each plaintiff clearly states the opposite:

> I understand that GM and the UAW may be considering and in the future may agree to amend GM's benefit plans and make available different retirement or separation benefits for which I may not be eligible. I further understand the GM benefits plans provide that the Corporation reserves the right to amend, modify, suspend or terminate each plan. Neither this agreement nor the provisions of the Special Accelerated Attrition Agreement limit or in any way modify these provisions of the benefit plans or the UAW's ability to negotiate regarding such modifications.

In light of this provision, we find unpersuasive plaintiffs' argument that they were somehow defrauded into executing an agreement that they did not intend to enter. As this Court has previously stated, "[i]t is well established that a person cannot avoid a written contract on the ground that he did not attend to its terms, did not read it, supposed it was different in its terms, or that he believed it to be a matter of mere form." *Rowady, supra*, 60.

Moreover, plaintiffs have again failed in their burden to provide the evidentiary support required under MCR 2.116(G)(4). In support of their claims of fraud regarding the extent of benefits provided under the SAAA, plaintiffs offer no specific instance wherein an authorized member of GM management explicitly informed them that their benefits would be unreduced for the duration of their lives. Rather, plaintiffs attempt to support their allegations merely by asserting that they were so informed by "GM management" or by UAW benefits representatives. As previously noted, such conclusory allegations are not enough to establish an issue of material fact.

Plaintiffs next challenge the validity of the release under federal law. Specifically, plaintiffs argue that the release relied upon by GM is in violation of the Older Workers Benefit Protection Act (OWBPA), 29 USC 626, and is therefore invalid and unenforceable. We find this challenge to be without merit.

In 1990, Congress amended the Age Discrimination in Employment Act (ADEA), by adding 29 USC 626(f), the OWBPA, which regulates employee waivers and releases under the ADEA. The OWBPA provides that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and that "a waiver may not be considered knowing and voluntary unless at a minimum" it conforms to certain specific statutory requirements. 29 USC 626(f)(1). Thus, an employee may not waive an ADEA claim unless the employer complies with the specific duties imposed upon it by the statute. See *Oubre v Entergy Operations, Inc*, 522 US 422; 118 S Ct 838, 841; 139 L Ed 2d 849 (1998). For example, an employer requesting a waiver in connection with a termination program offered to a group of employees must give the employee a period of at least forty-five days in which to consider the waiver agreement, see 29 USC 626(f)(1)(F)(ii), and must inform the employee of certain facts about the group of individuals eligible or selected for the program, including their job titles and ages. *Id*.; 29 USC 626(f)(1)(H). The required information must be given to the

employee "at the commencement of the period" which the employee is given to consider the waiver. 29 USC 626(f)(1)(H).

In the present case, plaintiffs argue that because GM failed to comply with the requirement that each employee be given 45 days in which to consider the agreement, and because GM did not provide them with the specified information regarding the job titles and ages of other employees involved in the same termination program, the release relied upon by GM is invalid and unenforceable under the OWBPA. Plaintiffs' reliance upon the OWBPA is misplaced. Failure to comply with the OWBPA does not invalidate release of plaintiffs' claims under the Civil Rights Act, since the provisions of the OWBPA apply only to the ADEA and not to state law claims. *Branker v Pfizer, Inc*, 981 F Supp 862 (SDNY, 1997); see also *Carr v Armstrong Air Conditioning, Inc*, 817 F Supp 54 (ND Ohio, 1993)(finding violations of OWBPA to invalidate release as to federal ADEA claim, but leaving release intact as to state law claims). Therefore the release remains effective as to plaintiffs' claims of discrimination under Michigan's Civil Rights Act.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald