STATE OF MICHIGAN

COURT OF APPEALS

LINDA L. BURNETT,

Plaintiff-Appellant,

v

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE LIFE INSURANCE COMPANY, NATIONWIDE GENERAL INSURANCE COMPANY, NATIONWIDE PROPERTY AND CASUALTY COMPANY, NATIONWIDE VARIABLE LIFE INSURANCE COMPANY, and COLONIAL INSURANCE COMPANY OF CALIFORNIA,

Defendants-Appellees,

and

EDWARD MALINKOWSKI, d/b/a EDWARD MALINKOWSKI INSURANCE,

Defendant

UNPUBLISHED
July 7, 2000

No. 212413
Wayne Circuit Court
LC No. 96-626674-CK

Before: Kelly, P.J., and Doctoroff and Collins, JJ.

PER CURIAM.

Plaintiff Linda Burnett appeals as of right from the trial court's order granting summary disposition in favor of defendants (collectively, "Nationwide") in this contract action. She claims that Nationwide wrongfully terminated her position as an insurance sales agent in part because of its desire to remove its products from certain geographical areas, namely, Wayne County and Detroit. We affirm.

Factual Background

In 1990, plaintiff's father, Algie Prato, considered retiring from his position as a career Nationwide insurance agent. In April 1991, plaintiff entered Nationwide's New Agent Development Program ("NADP"), allegedly in anticipation of assuming her father's business. Pursuant to the NADP agreement, plaintiff agreed to obtain certain licenses in order to be able to sell all lines of insurance available through Nationwide.

On January 27, 1995, plaintiff signed a Performance Agreement for Servicing Portfolios ("PASPORT") memorandum setting forth the terms of the transfer of Prato's business to plaintiff's new agency. That same day, plaintiff also signed a Nationwide Agent Agreement. The PASPORT memorandum expressly stated, "PASPORT is comprised of two parts – a memorandum of the expected standards to be met by the new agent (this memo) and a Nationwide Agent Agreement." If plaintiff successfully satisfied the terms of the agreement, including obtaining her NASD Series 6 and 63 securities licenses no later than December 31, 1995, she would receive 60-70% of Prato's business book.

From April 1995 through July 1995, 60-70% of Prato's business was transferred to plaintiff's agency. However, she failed to obtain her NASD securities licenses as required and her agency was terminated on January 24, 1996, less than five years from the time she entered the NADP and less than one year from the time she signed the agent's agreement. Under the Agent's agreement, Nationwide was not required to give a reason for the termination, though plaintiff testified at deposition that she was terminated for failing to obtain her securities licenses. Plaintiff thereafter filed a twelve-count complaint seeking damages under theories in tort, contract, public policy and promissory estoppel. She sought to amend the complaint to add claims for emotional and punitive damages, asserting that she had evidence that Nationwide segregated insurance claims based on race and residential zip code. The trial court denied the motion based on *Kerwin v Massachusetts Mutual*, 409 Mich 401; 295 NW2d 50 (1980), which bars non-economic damages in breach of contract claims, and also on the basis that discovery was closed, the case had already been mediated, and Nationwide would suffer prejudice if the amendment were allowed. Nationwide filed a motion for summary disposition under MCR 2.116(C)(10), which the trial court granted in a fifteen-page opinion. We affirm.

Standards of Review

This Court reviews the trial court's decision granting Nationwide's motion for summary disposition under MCR 2.116(C)(10) de novo to determine whether any genuine issue of material fact exists that would prevent entry of judgment in favor of defendant as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). We review the entire record, viewing the evidence in a light most favorable to the nonmoving party, to decide if there exists a relevant factual issue about which reasonable minds might differ *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the nonmoving party bears the burden of proof at trial, that party must provide documentary evidence showing the existence of a disputable issue in order to avoid summary

disposition. *Id.* Statutory interpretation is a question of law that is also reviewed de novo. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998).

Fraudulent and Innocent Misrepresentation and Business Compulsion[1]

First, plaintiff claims that she was induced to enter into the agent's agreement and the PASPORT memorandum by Nationwide's representations that the only way for her to become a career agent was for Prato to retire and pass his agency to plaintiff, that 100% of the accounts serviced by Prato would be transferred to plaintiff's new agency, and that plaintiff would receive by way of transfer many of Prato's former accounts.

The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and (6) suffered damages as a result. *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *Id.*, citing *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981).

Beside the fact that we find no evidence that any of the alleged statements were made to plaintiff, she acknowledged in her deposition that there was more than one way for her to become a career agent. Her unequivocal deposition testimony established that she knew before signing the agreements that she would only be receiving 60-70% of Prato's business. She failed to show that she reasonably relied on the alleged statements. Also, her claims relating to the transfer of her father's business pertain to future promises. An action for fraudulent representation must be predicated on a statement relating to a past or an existing fact. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208-209; 544 NW2d 727 (1996). Future promises are contractual and cannot constitute actionable fraud. *Id.* at 209.

Plaintiff argues that a claim for fraudulent misrepresentation can be made if she can prove that a promise of future action was made in bad faith and without any intention of performing. Plaintiff asserts that she provided the trial court with evidence that Nationwide was engaged in a national scheme of redlining[2], and that her claim falls under the "bad faith exception" to the rule that future promises cannot provide a basis for fraudulent misrepresentation claims. We are unable to find evidence from which it could reasonably be inferred either that any Nationwide representative made promises without intention

[1] We agree with the trial court that any claim for "business compulsion" belonged to Prato and that plaintiff lacked standing to bring a claim of forced retirement on behalf of her father, who was the real party in interest. MCR 2.201(B)(1).

[2] "Redlining" refers to the practice in the insurance business in which insurers either decline to write insurance or charge higher rates for people who live in particular areas, especially those with large or growing minority populations. 36A Words and Phrases (1999 Cum Supp), Redlining, p 91.

of performance or that Nationwide misrepresented a past or present fact. Plaintiff stated in her deposition that she had no information that when statements were made concerning the transfer of the Prato business that they were not true. To the contrary, she stated that she was sure the statements were made with the belief that they were true. Further, plaintiff's admission that she wrote all eligible business, never refused to write an eligible piece of business from Detroit, and that she knew of no policy that was canceled because of geographic location or factors unrelated to insurability, belies her position that Nationwide's alleged redlining scheme supports her allegations of fraud.

Breach of Contract and Breach of Reasonable and Legitimate Expectations

Next, plaintiff argues that Nationwide breached its agency agreement by terminating her contract based on her conclusion that the agency relationship was not terminable at will. She basis this argument on the terms of the written agreements, as well as alleged oral representations. She also argues that she was entitled to commissions and deferred compensation benefits.

Termination of Agency Relationship

The agent's agreement signed by plaintiff contained the following provision: "This Agreement shall be in force until canceled by either party . . . . Further, due to the personal nature of our relationship you or the Companies have the right to cancel this Agreement at any time after written notice . . . ." This unambiguous provision clearly supports the presumption that the agency relationship was terminable at will. *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 453; 502 NW2d 696 (1993). By signing the agreement, plaintiff assented to an at-will relationship and she cannot now establish the converse by asserting that she had an expectation of termination for cause only. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 507; 538 NW2d 20 (1995). See also 44 CJS Insurance, § 190 (1993).

Plaintiff's reliance on the Agency Administration Handbook, which was not part of the PASPORT agreement, is not persuasive. As the trial court correctly found, the handbook set forth guidelines concerning how agents were to treat their own employees, not how Nationwide would treat its independent contractors. Consequently, the handbook was not "reasonably capable of instilling a legitimate expectation of just-cause employment." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 166; 579 NW2d 906 (1998).[3]

We agree with the trial court that the statement that "as long as the sales were where they needed to be, that everything else was negotiable and could be worked out" was too vague to create a promise of job security. Verbal assurances of just-cause employment must be clear and unequivocal, *Id.* at 171, citing *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 636; 473 NW2d 268 (1991).

[3] The plaintiff in *Lytle* was an employee claiming a legitimate expectation of just-cause employment. Though the relationship here was an agency, we nonetheless find the *Lytle* analysis applicable.

Plaintiff also argues that she had a reasonable and legitimate expectation that she would not be terminated "on the basis of discriminatory reasons . . . in light of both company policy and her own subjective belief." Plaintiff has failed to cite any authority in support of this argument and this issue is deemed waived on appeal. A party may not leave it to this Court to search for authority to support her position. *Schadewald v Brule*, 225 Mich App 26, 34; 570 NW2d 788 (1997). Moreover, plaintiff relies on Nationwide's Agency Office Administration Guide, which directed agents not to terminate their employees for "discriminatory reasons," and Marketing Policies, which stated Nationwide's "relative policy for agents." Neither of these documents formed part of plaintiff's agent's agreement.

Commission and Deferred Compensation

Plaintiff also asserts that a letter written by Nationwide enumerating earnings she would receive upon departure acted as a modification of the agent's agreement and that she was entitled to receive deferred compensation and extended earnings upon her termination. We are not persuaded by plaintiff's argument. First, the letter was sent as the result of a clerical error as was evidenced by the uncontroverted affidavit of Nationwide's director of agency services. Second, under the terms of the agent's agreement, any modification had to be in a writing signed by both plaintiff and Nationwide. There was no such writing. Third, plaintiff forfeited her agency security compensation benefits by violating the non-competition clause contained in the agent's agreement. The terms of the clause, which prohibited plaintiff from competing with Nationwide within a twenty-five mile radius and one year of termination, were reasonable. MCL 445.774a; MSA 28.70(4a)(1). See *Hamilton Ins Services, Inc v Nationwide Ins Companies*, 86 Ohio St 3d 270, 275; 714 NE2d 898 (1999). The evidence supports the trial court's finding that there was no question of fact whether plaintiff breached the terms of the non-competition clause of the agent's agreement.

Plaintiff also claims that Nationwide breached the implied contractual covenant of good faith and fair dealing as it relates to her breach of contract claim, specifically alleging that Nationwide failed to prepare the paperwork necessary for her to sit for the licensing examination a third time. The record shows, however, that plaintiff voluntarily dismissed her claim for breach of covenant of good faith and fair dealing and, consequently, this issue is not properly before this Court.

Violation of the Federal Fair Housing Act

Initially, we note that this Court recently recognized the split of authority concerning whether insurance redlining is actionable under the federal Fair Housing Act ("FHA"), 42 USC 3601 *et seq*. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 691; 599 NW2d 546 (1999). We again need not decide the issue because plaintiff's deposition testimony established that at no time while she was serving as a Nationwide agent was she restricted from writing insurance in Wayne County or from writing eligible policies for any insured, regardless of race.

Nationwide submitted evidence showing that it continues to do business in all of Wayne County. The trial court directed plaintiff to submit evidence that former insureds were actually canceled as a result of a redlining scheme. Specifically, the trial court ordered plaintiff to submit a list of former insureds to rebut the "cancellation list" prepared by Nationwide, which plaintiff failed to do. Plaintiff

had no proof that the termination of her agency resulted in the withdrawal of insurance products from predominantly minority areas that she serviced, and she submitted no evidence that any of the policy cancellations was racially motivated. Thus, plaintiff failed to meet her burden of showing the existence of a disputable issue and summary disposition was proper.

Violation of the Michigan Insurance Code

The Michigan Insurance Code precludes termination of an agent's contract for certain specified reasons, including the location of the agent's business, the loss experience of the business as it relates to the location of that business, or the performance of the agent's obligations under the chapter dealing with home and auto insurance. MCL 500.1209(4); MSA 24.11209(4). Plaintiff claims that there was a question of fact whether Nationwide terminated her contractual relationship because of the loss history and geographic location of her office in violation of the insurance code's anti-redlining provision, which states, in pertinent part, as follows:

> (3) As a condition of maintaining its authority to transact insurance in this state, an insurer transacting automobile insurance or home insurance in this state shall not cancel an agent's contract . . . except for 1 or more of the following reasons:
>
> (a) Malfeasance.
>
> (b) Breach of fiduciary duty or trust.
>
> (c) A violation of this act.
>
> (d) Failure to perform as provided by the contract between the parties.
>
> (e) Submission of less than 25 applications for home insurance and automobile insurance within the immediately preceding 12-month period.
>
> (4) Subsection (3) shall not be construed as permitting a termination of an agent's authority based primarily upon any of the following:
>
> (a) The geographic location of the agent's home insurance or automobile insurance business.
>
> (b) The actual or expected loss experience of the agent's automobile or home insurance business, related in whole or in part to the geographical location of that business.
>
> * * *
>
> (5) Application of law. Subsection (3) and the written notice requirement prescribed in subsection (1) shall not apply with respect to an agent who is an employee of an insurer or to an agent who by contractual agreement represents only 1 insurer or group of affiliated insurers, if the property rights in the renewal are owned by the insurer or group

> of affiliated insurers and the cancellation or termination of the agent's contract does not result in the cancellation or nonrenewal of any home or automobile insurance policy. [MCL 500.1209; MSA 24.1209.]

Plaintiff argues that she presented the trial court with sufficient evidence to support her claim that her contract was terminated as a result of an alleged redlining scheme. Relying on the unreported case of *Redman Agency, Inc v Allstate Ins Co*, 1991 WL 526300; 125 Lab Cas P 57,420 (WD Mich, 1991), she claims her termination was prohibited because Nationwide's intent was based on geographic location, loss ratio, and on the agent's obligation to sell to all qualified individuals. We find that *Redman*, which denied retroactive application of the statute and allowed termination of the plaintiff's at-will agent's agreement, is not applicable to this case.

The trial court ruled that the relationship between the parties was governed by subsection (5), which required a showing of a causal connection between the termination of plaintiff's contract and policy cancellations, a connection plaintiff failed to establish even when ordered by the court to present documentation doing so. The court based its ruling on the fact that plaintiff was an agent who by contractual agreement represented only Nationwide, and also on the fact that no evidence was presented to support a finding that policies were canceled or not renewed because of plaintiff's termination.

This Court addressed this very issue in *Novak* and held that the plaintiff had an obligation to show that at least one home or auto policy cancellation resulted from his termination as an agent and not from a legitimate reason. *Novak*, *supra* at 684. The *Novak* Court rejected the plaintiff's claim that some policies were constructively canceled where Nationwide made the servicing of the policies difficult, a claim also presented by plaintiff here. The *Novak* Court ruled that inefficient servicing of an account cannot be equated with a policy cancellation under the unambiguous language of subsection (5). Because plaintiff was a captive agent, because Nationwide retained ownership of the policies, and because plaintiff failed to produce evidence of even one cancellation as a result of her termination, she did not enjoy the protection of subsection (3). *Id.* at 685.

Like Terry Novak, plaintiff argues that subsection (4) precludes canceling an agent's agreement based on her obligation to sell to all qualified individuals. The *Novak* Court ruled that subsection (4), by its plain wording, merely construes subsection (3) and does not stand alone. If subsection (3) is inapplicable, then subsection (4) is inapplicable, also. *Id.* Because plaintiff fell within the exclusion of subsection (5), she was not protected by subsection (4). *Id.* at 686.

Plaintiff also argues that the trial court erred in its analysis of the Uniform Trade Practices Act ("UTPA"), MCL 500.2019; MSA 24.12019, and in holding that plaintiff could not make a claim, arguing that the trial court examined the wrong statute and should have reviewed § 1209(4)(c). Plaintiff clearly asserted in paragraph 60 her complaint that Nationwide violated § 2019 of the insurance code. The trial court addressed that argument and correctly ruled that the UTPA does not create a private right of action. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 17; 527 NW2d 13 (1994); *Young v Mich Mutual Ins Co*, 139 Mich App 600, 604-606; 362 NW2d 844 (1984).

Violation of the Michigan Civil Rights Act

The question of plaintiff's status as an employee or as an independent contractor was one of law for the court and not one of fact for the jury because the evidence and facts were susceptible of one inference only: plaintiff was an independent contractor. *Kidder v Miller-Davis Co*, 455 Mich 25, 37; 564 NW2d 872 (1997). As such, she had no claim under §202 of the Civil Rights Act, MCL 37.2101 *et seq.*, MSA 3.548(101) *et seq.*, which applies only to employees.

Plaintiff argues, nevertheless, that she had a claim under § 302, which prohibits conspiring to prevent compliance with the act, and § 701, which prohibits denying public accommodations or services based on such factors as age, race and sex. The *Novak* Court specifically held that the Act does not confer standing on insurance agents for claims under § 302, stating, "Section 302 of the Civil Rights Act protects the persons who are being denied goods and services, not the persons who are attempting to provide the goods and services." *Novak*, *supra* at 693. Moreover, plaintiff's claim that Nationwide violated § 701 of the Act is not supported by the evidence.

Promissory Estoppel

Plaintiff argues that she had a viable claim based on promissory estoppel because of her reasonable reliance on "oral promises and on the long-standing oral and written policies of the companies." Again, we find nothing in the record to support plaintiff's allegations.

The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993). In determining whether a requisite promise existed, this Court objectively examines the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions. *Novak*, *supra* at 687; *State Bank of Standish v Curry*, 442 Mich 76, 86; 500 NW2d 104 (1993). This Court exercises caution in evaluating an estoppel claim and applies the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted. *Marrero, supra* at 442-443.

As noted above, the agency relationship was terminable at will. The signed written contract, with its integration clause, expressly contradicted any alleged oral representation to the contrary. *Novak*, *supra* at 687. Moreover, as the trial court observed, alleged promises regarding the transfer of the Prato book of business appear to have been made prior to plaintiff signing the agent agreement and the PASPORT memo. If the promises were made after the agreements were signed, then they failed to satisfy the modification requirements set forth in the agreement. The trial court properly dismissed plaintiff's promissory estoppel claim.

Motion to Amend the Complaint

Plaintiff next claims the trial court abused its discretion in denying her motion to amend the complaint to add a claim for emotional damages. Leave to amend a complaint should be freely given when justice so requires. MCR 2.118(A)(2). *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). This Court will reverse a trial court's decision on a motion to amend a complaint only where the trial court abused its discretion. *Id.*

Leave to amend a complaint may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

The recovery of damages for the breach of a contract is limited to those damages that are a natural result of the breach or those that are contemplated by the parties at the time the contract was made. *Kewin, supra* at 414. Therefore, it is generally held that damages for emotional distress cannot be recovered for the breach of a commercial contract. *Id.* Consequently, an amendment to add a claim for emotional damages would have been futile since such damages are not recoverable in a breach of contract action. Similarly, amendment to add a claim for punitive damages under the FHA would have been futile since plaintiff testified at her deposition that she had no evidence to support a viable claim under the act.

Conclusion

Plaintiff failed to produce sufficient documentary evidence of the existence of a factual issue to avoid summary disposition. Her own deposition testimony was fatal to her claim that her contractual relationship was terminable only for cause, that she had a reasonable and legitimate expectation that she would receive 100% of her father's business, and that she was entitled to compensation upon termination of the agreement. The written agreements set forth that the relationship was at-will, that plaintiff had to obtain her securities licenses, that she would receive 60-70% of her father's business, and that she had to complete five years of service before she would be entitled to extended earnings. Additionally, the unrefuted documentation and other evidence presented by Nationwide dispelled plaintiff's claim of redlining.

Affirmed.

/s/ Michael J. Kelly
/s/ Martin M. Doctoroff
/s/ Jeffrey G. Collins