STATE OF MICHIGAN

COURT OF APPEALS

DARRELL IVES, BRADLEY LEMKE, and EVENTS SERVICES, INC.,

Plaintiffs-Appellants,

v

THE CITY OF DETROIT, CLARENCE ROME, PHILLIP TALBERT, CHENE PARK MUSIC THEATER, and DETROIT RECREATION DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED
July 21, 2000

No. 208741
Wayne Circuit Court
LC No. 96-617200 NZ

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

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this reverse discrimination, breach of contract, and tortious interference with contractual or business relationship case. We affirm.

I

Plaintiff Events Services, Inc. ("ESI"), provides security services for entertainers, theaters and concert promoters. Plaintiffs Ives and Lemke were at pertinent times ESI's president, and director of operations, respectively. Defendant Chene Park Music Theater (Chene Park) is owned by defendant City of Detroit and its concert operations were operated at pertinent times by defendant Detroit Recreation Department.

In May 1995, Geoffrey Hayes, operations manager of Chene Park, solicited bids from three companies for perimeter and overnight security services,[1] and subsequently chose ESI. A letter dated May 23, 1995 from Lemke to Hayes stated:

[1] The bids did not apply to stage security services.

> I would like to take this opportunity to express how pleased we are with the opportunity to assist you to make your events a success. Events Services, Inc. is a fully licensed, and insured security company in the State of Michigan. All of our agents are trained to provide non-violent, service oriented security.
>
> Events Services will Provide [sic] peer security on an exclusive basis to Chene Park Music Theater. Our service will be provided at $11.50 per supervisor hour worked . . . . . We request one week notice of your needs, but we can normally take care of your needs with 24 hours notice. Payment is due at the end of each event.
>
> Events Services, Inc. will also provide 1 agent for 24 hour security of light and sound equipment starting approximately 6/1/95 till 9/8/95 at the rate of $9.50 per man hour. Billing and payment will run on one week intervals.
>
> If the above terms are acceptable, Please [sic] sign and return. We look forward to a positive working relationship that is beneficial to all. If you have any further questions or if I can be of any assistance, please feel free to call me . . .

The letter was signed by both Lemke and Hayes.

After ESI provided security services for one or two concerts, Hayes notified ESI that their services would no longer be needed. ESI last provided services for Chene Park on June 25, 1995.

Plaintiffs' complaint alleged breach of contract, malicious interference with a contractual or business relationship, and racial discrimination under "Michigan and Federal Civil Rights Laws." Plaintiffs' complaint alleged that despite their being qualified to continue in their employment with defendants, defendants terminated their services and replaced them with African-American persons whom, plaintiffs alleged, were less qualified. Plaintiffs Ives and Lemke are both white, and defendant Clarence Rome, general manager of Chene Park and a Recreation Department employee, and defendant Phillip Talbert, special activities coordinator for the Recreation Department and Rome's supervisor, are African-American. Plaintiffs alleged that the termination of their services was motivated in substantial part by their race.

Over defendants' objection, the circuit court granted plaintiffs leave to file a first amended complaint, which alleged, in addition to breach of contract, violations of the state and federal constitutions; 42 USC § 1981 and § 1983;[2] the Civil Rights Act (CRA) MCL 37.2101 *et seq.*; MSA

[2] After plaintiffs amended their complaint, defendants removed the case to federal court. Plaintiffs filed a motion to remand, which was granted by the United States District Court for the Eastern District, on the basis that the notice of removal was untimely under 28 USC § 1446(b), which requires that a notice of removal be filed within thirty days of receipt by the defendant of a copy of the initial pleading setting forth the claim for relief on which the action is based. The district court concluded that defendants' notice of removal was untimely because plaintiffs' original complaint alleged race discrimination in violation of Michigan and federal civil rights laws and thus conferred federal jurisdiction. *Ives v City of Detroit,* Case No. 97-CV-60099-AA.

3.548(101) *et seq.*; and denial of equal protection under MCL 750.146; MSA 28.343, known as the Equal Accommodations Act, which guarantees access to public accommodations free of discrimination. Plaintiffs also amended their malicious interference with contractual relationship claim to include an allegation of gross negligence against defendants Rome and/or Talbert.

On defendants' motion for summary disposition, the circuit court dismissed the contract and discrimination claims on the basis that the agreement Lemke and Hayes signed had not been approved by the Detroit City Council, as required under the Detroit City Code.[3]

II

Plaintiffs argue that the circuit court improperly dismissed their discrimination claims under 42 USC §§ 1981 and 1983[4] on the basis that their breach of contract claim failed, and also argue that they pleaded actionable claims of discrimination and presented evidence that disputed issues of material fact remained.

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[3] The court ruled:

> THE COURT: The Detroit City code, 1855 reads as follows: The following contracts and amendments thereto shall not be entered into without City Council approval. Goods and services over the value of five thousand dollars; all contracts for personal services regardless of the dollar value.
>
> Here there's no contract signed by Detroit Council. Even if the Court were to adopt Plaintiff's [sic] argument, this is an at will situation which they could terminate the service at any time, so Defendant's [sic] motion for summary disposition is hereby granted as to all counts.
>
> MR. YOUMANS [*plaintiffs' counsel*]: Your Honor, do you want to entertain any argument on race discrimination? It's a separate issue.
>
> THE COURT: No. If they don't have a contract, there's no basis for that.
>
> MR. NOSEDA [*defendants' counsel*]: I agree. I'll prepare and submit an order.

[4] Plaintiffs do not challenge the dismissal of their discrimination claims under the CRA and Title VII, 42 USC § 2000 *et seq.* Plaintiffs' appellate brief states that they "agree that since they were independent contractors" these claims were properly dismissed. See *Kamalnath v Mercy Hospital*, 194 Mich App 543, 553; 487 NW2d 499 (1992) (noting that circuit court properly dismissed plaintiff's employment discrimination claim because she failed to rebut that she was terminated because of poor performance, and for additional reason that circuit court properly found plaintiff was independent contractor and not defendant's employee); Institute of Continuing Legal Education, *Employment Litigation in Michigan* (1999), §3.6 (noting that "[b]ecause the ELCRA and Title VII . . . only prohibit discrimination against employees or applicants for employment, independent contractors are not covered.")

We review the circuit court's grant of summary disposition de novo. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties in the light most favorable to the nonmovant. *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). "The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto, supra*. The burden then shifts to the nonmovant to establish that a genuine issue of disputed fact exists. *Id.* When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* at 362.

A

42 USC § 1981, as amended by the Civil Rights Act of 1991, provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For purpose of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 USC § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

B

We agree that a plaintiff need not have a contract with the defendant to maintain an action for racial discrimination under §§ 1981. See e.g., *Bratton v Roadway Package System, Inc*, 77 F3d 168 (CA 7, 1996) (suit by independent contractor against parcel delivery company for race discrimination in violation of § 1981), and *Howard v BP Oil Company, Inc*, 32 F3d 520, 522 (CA 11, 1994) (reversing district court's grant of summary judgment to defendant petroleum distributor in suit by black applicant who alleged racial discrimination in awarding dealerships, in violation of § 1981). Nevertheless, we affirm the circuit court's dismissal of the discrimination claims.

The elements of a prima facie case, as well as the allocations of the burden of production and proof, are the same under §§ 1981 and 1983 as they are under Title VII. A plaintiff must show 1) membership in a protected group, 2) qualification for the job, 3) that the plaintiff suffered an adverse contractual action, and, in the instant case, 4) that similarly situated African-American individuals were treated more favorably. See e.g., *Jackson v Columbus*, 194 F3d 737, 751-752 (CA 6, 1999); *Bratton, supra* at 175-176; *Bickhem v United Parcel Service*, 949 F Supp 630, 633-634 (ND Ill, 1996). A plaintiff may satisfy his burden of proof by offering either direct evidence of discriminatory intent or circumstantial evidence under the burden-shifting analysis articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Bickhem, supra* at 634.

Once a plaintiff establishes a prima facie case, the defendant has the burden of articulating a legitimate non-discriminatory reason for the adverse action. If the defendant meets its burden of production, the plaintiff must demonstrate that the articulated reasons are merely a pretext for discrimination. The plaintiff may show pretext by showing that 1) the proffered reasons had no basis in fact, 2) the proffered reasons did not actually motivate the defendant's decision, or that 3) the proffered reasons were insufficient to motivate the defendant's decision. *Bickhem, supra* at 634-635.

Plaintiffs established a prima facie case of racial discrimination as they are members of a protected class,[5] whose corporation was qualified to provide security services under the contract, the termination of their services was an adverse employment action, and ESI was replaced, at least initially, by X-Men, an African-American-owned company.

Defendants articulated a legitimate nondiscriminatory reason for the decision to replace ESI, presenting deposition testimony of Talbert and Rome that they had observed ESI agents and considered several ESI agents' appearance unsuitable, that ESI agents were late arriving on the job several times, and that they communicated some or all these concerns to Hayes. Talbert testified at deposition that there were several occasions in which valuable audio and lighting equipment was left unguarded at night, even though ESI agreed to provide twenty-four hour protection. Rome confirmed Talbert's testimony regarding the lapses in overnight security protection. Talbert testified that he was unable to distinguish between ESI agents and concert attendees because ESI agents did not wear distinctive security uniforms. Talbert also testified about the unkempt appearance of some ESI agents. Thus, defendants articulated legitimate, nondiscriminatory reasons for replacing ESI.

We conclude that plaintiffs failed to establish that a genuine issue of material fact remained on the question whether defendants' asserted reason for terminating their agreement was a mere pretext for discrimination. Plaintiffs did not establish that the proffered reasons had no basis in fact, or that the proffered reasons were insufficient to motivate defendants' decision. The principal basis for plaintiffs' discrimination claims is Hayes' deposition testimony regarding a conversation he had with Rome relative to ESI. Hayes testified that after ESI had worked two or three events, Rome told him that the security situation was going to have to change and that ESI "did not look like what they wanted" for the park.

[5] See *Douglas v Evans*, 916 F Supp 1539, 1555 (MD Ala, 1996), aff'd without opinion 116 F3d 492 (CA 11, 1997) (noting that "§ 1981 protects all persons, Caucasian and non-Caucasian alike, from racially motivated abridgments of the right to contract equally.")

Hayes testified that Rome told him that X-men, a company operated by an African-American that was already providing backstage security services at Chene at the time, but not perimeter security services, would be doing security for the entire park.[6] Thus, plaintiffs argue that the true motivation was racial. However, it is clear from Hayes' testimony that he did not ask Rome, and Rome did not explain what he meant by the statements regarding wanting a different look. Hayes testified at deposition that he "assumed" that Rome wanted African-American personnel and assumed that the decision to have the X-Men provide security for the entire park was racially motivated. Rome's statement was equally consistent with his stated legitimate nondiscriminatory reason. The only other evidence of discrimination plaintiffs have raised is that several days before ESI was terminated, Rome and Talbert snubbed them at one of the Chene Park events. Lemke testified that he and Ives went to the second concert at Chene Park and, while speaking with Hayes, Rome and Talbert passed by, Hayes introduced them, but Rome and Talbert treated them rudely and did not shake their hands. Lemke testified that this exchange lasted ten to thirty seconds, that he and Ives had not had an appointment to meet either Rome or Talbert, and that he never had any other communications with either of them. Because plaintiffs' claim that defendant's proffered reason for terminating the agreement was a mere pretext for discriminatory conduct rests on Hayes' inference that Rome's remarks evidenced discriminatory intent, it is insufficient to establish a genuine issue of material fact concerning racial discrimination under § 1981 and § 1983.

Thus, plaintiffs' discrimination claims were properly dismissed, albeit for the wrong reason. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

III

Plaintiffs argue that the circuit court erred in dismissing their statutory gross negligence claim because this claim is not dependent on the existence of a contract.

To avoid governmental immunity, plaintiffs added a gross negligence allegation to their tortious interference with contractual or business relations claim, alleging that defendants Rome and/or Talbert's actions in instructing subordinate employees to sever the contractual and business relationship with ESI, knowing that plaintiffs were in full compliance with the agreement and were more qualified than the X-Men, constituted gross negligence.[7]

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[6] Hayes further testified that X-men began providing perimeter security services after ESI was terminated, but that X-men was replaced by Access, a white-owned security company, when it was learned that X-men was not bonded.

[7] Plaintiffs' amended complaint alleged in this regard:

> 10. At the time of this agreement, Defendants knew that Plaintiffs were in full compliance with the contract. Despite this, Defendants acted to cause the contract to be breached and Plaintiffs to be replaced with other security services providers.

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407; MSA 3.996(107); *Tallman v Markstrom*, 180 Mich App 141, 143; 446 NW2d 618 (1989). The gross negligence limitation on governmental immunity applies only to officers, employees, members, or volunteers for governmental agencies and not to governmental agencies themselves. MCL 691.1407(2); MSA 3.996(107)(2).

Although defendants' motion for summary disposition argued several bases for dismissal of plaintiffs' interference with contractual or business relationship claim, plaintiffs' response to defendants' motion did not address any of the arguments, did not set forth evidence supporting the claim, and plaintiffs did not address the claim at the hearing on defendants' motion.

In any event, plaintiff's claim of interference with contractual relations was properly dismissed because plaintiffs failed to present evidence that Rome and/or Talbert, agents of defendant City and Recreation Department, acted solely for their own benefit when allegedly instructing Hayes to discontinue ESI's services. See *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). Nor could plaintiffs' claim of interference with an advantageous business relationship survive defendants' motion, because plaintiffs did not establish that they had a business relationship with a third party, with which defendants interfered. See *Winiemko v Valenti*, 203 Mich App 411, 416-417; 513 NW2d 181 (1994); SJI2d 126.01.

IV

Plaintiffs' last argument is that the circuit court erred in dismissing their breach of contract claim because genuine issues of fact remained whether Hayes had authority to sign the contract, whether

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> 11. Defendants Rome and/or Talbert instructed their subordinate employees to sever Defendants [sic] business relationship with the Plaintiffs and to breach Defendants contract with Plaintiffs.
>
> 10. [sic] Defendants did so with full knowledge that Plaintiffs had complied with the terms of the contract, with knowledge that the above action constituted breach of the agreement, and with knowledge that the black owned security company was not qualified to provide security services.
>
> 11. [sic] Defendants [sic] acts in breaching their agreement with Plaintiffs and in refusing to do business with Plaintiffs were unreasonable, arbitrary and capricious, illegal, and/or discriminatory. Their action was unlawful and discriminatory because one of Defendants' substantial motives was to engage black-owned providers of security services in place of Plaintiffs, who are white.
>
> 12. [sic] The above conduct of Defendants Rome and/or Talbert was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted to Plaintiffs, and therefore in violation of M.C.L. 691.1407.

approval of the contract by the Detroit City Council was needed, and whether plaintiffs could be discharged only for just cause.

Preliminarily, defendants argue that the individual plaintiffs lack standing to sue in their individual capacities because the agreement was entered into by Lemke in his capacity of director of operations for ESI. We agree. The individual plaintiffs were not parties to the agreement. "A real party in interest is one who is vested with the right of action on a given claim although the beneficial interest may be in another." *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991); MCR 2.201(B). A corporation is treated as entirely separate from its shareholders, even where one person owns all the corporate stock. *Environair*, supra at 292. Generally, a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation. *Id.*

Assuming, as plaintiffs argue, that genuine issues of fact remained regarding whether Hayes had authority to sign the agreement and whether the approval of the Detroit City Council was needed,[8] we conclude that summary disposition was nonetheless proper because plaintiffs provided no evidence to raise a genuine issue of fact whether the agreement was terminable for just cause only.

Lemke testified that the services set forth in the agreement were for an unlimited duration and that his understanding was that as long as ESI did the job right, ESI would have the contract for those services exclusively. Lemke testified that there was no discussion as to how the agreement could be terminated, and that he was unsure under what circumstances termination would be allowed, but believed it could be if ESI was not performing the job properly.

Employment contracts for an indefinite duration are presumptively terminable at the will of either party. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). Plaintiffs argue however, that genuine issues of fact remained whether the agreement was terminable for just cause only.

> Courts have recognized the following three ways by which a plaintiff can prove such contractual terms: (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Lytle*, 458 Mich at 164, ns 8-10, citing *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993), *Bullock v Auto Club of Michigan*, 432 Mich 472, 479; 444 NW2d 114 (1989), and *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579, 615; 292 NW2d 880 (1980).]

Plaintiffs' appellate brief does not argue that either the first or third prongs apply, but argues that

[8] Hayes testified that Talbert specifically authorized him to sign the instant agreement.

> Hayes denies that he and Lemke agreed that ESI would be allowed to provide security services as long as ESI properly performed the job. Accordingly, there is a disputed factual issue about the intent of the parties regarding length and reasons for terminating the contract. Obviously, the contract contains no terms of duration.

Given Lemke's testimony, we conclude that plaintiffs presented insufficient evidence to raise a genuine issue of fact regarding the second prong: whether there was an express oral agreement regarding job security that was clear and unequivocal. The breach of contract claim was thus properly dismissed.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot