

STATE OF MICHIGAN
COURT OF APPEALS

ANTOINETTE BEUCHE KEMP,

Plaintiff-Appellant,

v

HOWARD & HOWARD, P.C.,

Defendant-Appellee.

UNPUBLISHED

January 18, 2002

No. 220884

Oakland Circuit Court

LC No. 98-009817-NZ

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders denying her motion to amend her complaint, denying her motion to extend discovery, and granting defendant's motion for summary disposition. We affirm.

Plaintiff, an attorney since 1973, joined defendant law firm in 1984. Approximately two years later, plaintiff married the law firm's president and chief executive officer (CEO), John Michael Kemp (Kemp). In 1993, plaintiff signed an at-will employment agreement which provided, among other things, for an annual base salary commensurate with duties assigned, bonuses to which plaintiff may be entitled, and provisions for termination of employment that included regular salary up to the date of termination. The agreement provided for no further compensation upon termination of employment except as specifically authorized by the firm and further provided that any modifications or changes must be in writing and signed by plaintiff and the firm.

In June 1998, plaintiff and Kemp announced their plans to retire at the end of 1999. A transition committee was established to select a new CEO and negotiate plaintiff's role and compensation following her retirement. Following a period of failed negotiations, plaintiff was terminated on September 14, 1998, by defendant's new CEO. Plaintiff filed a complaint alleging violation of the Michigan Business Corporation Act, promissory estoppel, and violation of public policy.

Defendant filed a motion for summary disposition. After the filing of the dispositive motion, plaintiff filed a motion to extend discovery. At the motion to extend discovery, plaintiff's new counsel indicated that a short time was needed to take one or two more depositions and "clean up." The trial court denied the motion to extend discovery, noting that

substitution of counsel had no impact on the scheduling order. After the denial of the motion to extend discovery, plaintiff moved to amend her complaint. In this proposed amendment, plaintiff alleged that Kemp, in 1994, promised benefits to her in exchange for transitioning clients to other members of defendant law firm prior to her retirement. This complaint alleged promissory estoppel and unjust enrichment based on Kemp's 1994 promise, promissory estoppel and unjust enrichment based on the 1998 promise, breach of contract, violation of public policy, and gender discrimination. In support of the motion to amend her complaint, plaintiff merely alleged that the amendment clarified the allegations and added two claims, breach of contract and discrimination, that would not prejudice defendant. The trial court denied plaintiff's motion to amend complaint based on the timeliness of the motion, following the close of discovery, and prejudice to defendant. In a written opinion, the trial court granted defendant's motion for summary disposition.

Plaintiff first argues that the trial court abused its discretion by denying her motion to amend the complaint. We disagree. A motion to amend a complaint may be denied for the following particularized reasons: "(1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment." *Lane v Kindercare Learning Centers, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998). The prejudice must stem from the fact that new allegations are offered late, not from the fact that they might cause the defendant to lose on the merits. *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999). An amendment that restates the counts and allegations in the first complaint or adds allegations that fail to state a claim presents an exercise in futility. *Lane, supra*; *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

At the hearing regarding the motion to extend discovery, plaintiff did not object to defendant's assertion that the parties agreed to submit the motion to quash subpoenas and motion to hold plaintiff in contempt to the court after the hearing regarding the motion for summary disposition. Defendant then objected to any extension of discovery, noting that twenty individuals had been deposed and plaintiff chose not to pursue an additional twenty members of defendant law firm. In response, plaintiff requested additional time for discovery to take a deposition or two and "maybe" request additional documentation. Plaintiff did not move to amend her complaint prior to or at this hearing. After the motion to extend discovery was denied, plaintiff moved to amend her complaint. This amendment merely further extended and subdivided the theory of promissory estoppel into unjust enrichment and breach of contract and added the new theory of gender discrimination. Under these circumstances, we conclude that the trial court did not abuse its discretion. The amendment to the complaint merely restated and reclassified the allegations contained in the original complaint and presented an exercise in futility. *Lane, supra*. Defendant also was prejudiced by the late addition of the claim of gender discrimination following the close of discovery. *Amburgey, supra*. Apart from prejudice to defendant, the circumstances showed undue delay and dilatory motive, in that plaintiff's substitute counsel acknowledged that an extension of discovery was necessary to prepare the case. It was only after the court denied plaintiff's request for an extension of discovery that the motion to amend was filed.

Plaintiff next argues in her statement of questions presented that the trial court abused its discretion by denying her motion to extend discovery. However, plaintiff abandoned this issue

by failing to discuss it in her brief. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Lastly, plaintiff argues that the trial court erred by granting summary disposition of plaintiff's promissory estoppel claim. We disagree. "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." *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). To determine whether a requisite promise existed, this Court shall objectively examine 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. *Id.* at 687. We apply the doctrine of promissory estoppel only where the facts are unquestionable and the wrong to be prevented undoubted. *Id.*

After examining the facts and circumstances surrounding plaintiff's retirement negotiations, we conclude that the trial court properly granted summary disposition of the promissory estoppel claim. Plaintiff's employment agreement provided that she was an at-will employee. Any changes to the terms of the employment agreement had to be in writing. Thus, plaintiff's status as an at-will employee was not altered by identification of a retirement date. Plaintiff alleged that she was to receive a separation and retirement package in exchange for the transfer of plaintiff's good will and client relationships. However, in the employment agreement, defendant retained the right to define, extend, and curtail services as it deemed necessary. Additionally, the terms of any separation and retirement package were not without question. While Kemp attempted to negotiate a written agreement for plaintiff with allies of the firm prior to a formal retirement announcement, an agreement was not reached. Upon announcement of plaintiff's upcoming retirement, the issue of a benefits package was sent to the transition committee. Plaintiff categorically rejected defendant's last attempt at reaching an agreement. Accordingly, the trial court properly granted defendant's motion for summary disposition of the promissory estoppel claim.¹ *Novak, supra*.

Affirmed.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey

¹ We note that plaintiff has not taken issue with the disposition of the two remaining claims in her initial complaint.