STATE OF MICHIGAN

COURT OF APPEALS

KAREN LONDON,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

AMERICAN HEARING CENTERS, INC.,

Defendant/Counterplaintiff-Appellee/Cross-Appellant,

and

EUGENE FELL,

Defendant/Counterplaintiff.

UNPUBLISHED
September 23, 2004

No. 245774
Oakland Circuit Court
LC No. 2001-037227-CL

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

In this action for breach of contract, violation of the Michigan Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq.*, promissory estoppel, and fraud and misrepresentation, plaintiff appeals as of right from the trial court's order granting defendant American Hearing Centers, Inc.'s[1] motion for summary disposition under MCR 2.116(C)(10). Defendant cross appeals, challenging the trial court's order denying its motion for summary disposition and granting summary disposition to plaintiff under MCR 2.116(I)(2) on defendant's counterclaims

[1] We note that, although Eugene Fell was named as a defendant below, he is not a party to this appeal. As used in this opinion, the term "defendant" will refer only to American Hearing Centers, Inc. We further note that defendant's attorney indicated at oral arguments that defendant's name has been changed. However, there has been no formal attempt to change the caption of this case. Therefore, the caption remains the same as it was upon the initiation of the appeal.

for breach of contract, breach of a common-law duty of loyalty and obedience, fraud in the inducement, and attorney fees and costs. We affirm.

Plaintiff argues that the trial court erred in dismissing each of her claims. A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). Although the trial court *stated* that it was granting summary disposition to defendant under both MCR 2.116(C)(8) and (10), its reliance on documentary evidence precludes a finding that it granted summary disposition under subsection (C)(8). See MCR 2.116(G)(2) and (5). Therefore, we will consider defendant's motion as having been granted under subsection (C)(10). When reviewing a motion under MCR 2.116(C)(10), we must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A question of fact exists if reasonable minds could differ with regard to the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); *Quinto*, *supra* at 367, 371-372.

Plaintiff first argues that the trial court erred in granting defendant summary disposition on her breach of contract claim because there was a question of fact concerning whether she was discharged without just cause. We disagree.

Plaintiff's employment agreement provided that she would

> exercise such powers and comply with such directions and perform such duties in relation to the business and affairs of the Company, as may from time to time be vested in or be given to her by the President, any Vice President or the Board of Directors of the Company. The Employee agrees to devote substantially all of her business time, attention and services to the diligent, faithful and competent discharge of her duties as an employee of the Company to enhance the operation of the Company's business and agrees to use her best efforts to improve and extend the business of the Company.

It is undisputed that, sometime after the sale of her company to defendant, plaintiff reduced her business hours to a part-time basis, that she was asked to increase her business hours to full time, and that she refused. We reject plaintiff's reliance on evidence of an alleged prior oral agreement that she could continue working part time. Indeed, because the employment agreement contained an integration clause stating that the writing constituted the entire agreement of the parties and that the agreement could not be modified except in writing, plaintiff could not rely on evidence of an alleged oral agreement to allow her to continue working part time. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492, 502; 579 NW2d 411 (1998); see also *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714-715; 580 NW2d 8 (1998). Similarly, she could not offer evidence of defendant's separate

arrangement with plaintiff's former partner, Andrea Luby, to create an ambiguity in the employment contract. Further, because the agreement was not ambiguous, there was no need to construe it against the drafter, defendant.[2] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 473-474; 663 NW2d 447 (2003).

In any event, as noted by plaintiff, the board of directors did not discharge her for refusing to follow orders. Rather, it relied on the contractual provision requiring that plaintiff "devote substantially all of her business time, attention and services to the diligent, faithful and competent discharge of her duties as an employee." Whether or not the contract required plaintiff to work full time, it clearly required that she "use her best efforts to improve and extend the business of the Company." The contract stated that there was "cause" for termination if the board found, in good faith, that plaintiff "materially and inadequately performed the duties of her employment." When plaintiff refused to increase her work hours, the board of directors found her in material breach not only of an alleged obligation to work full time, but also of her independent obligation to use her best efforts to improve and extend defendant's business. Plaintiff does not challenge the good faith of that decision. Therefore, the trial court properly concluded that there was no question of material fact concerning whether defendant had cause to terminate plaintiff's employment. Summary disposition of plaintiff's breach of contract claim was properly granted.

Plaintiff next argues that the court improperly dismissed her disability discrimination claim. The trial court dismissed this claim because plaintiff never notified defendant in writing of the need for accommodation under the act. We find no basis for reversal.

The Michigan Persons With Disabilities Civil Rights Act states that "[a] person with a disability may allege a violation against a person regarding a failure to accommodate under this article *only if* the person with a disability notifies the person *in writing* of the need for accommodation within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed." MCL 37.1210(18) (emphasis added). In *Petzold v Borman's, Inc*, 241 Mich App 707, 716; 617 NW2d 394 (2000), this Court, citing § 210(18), held that the defendant employer was entitled to summary disposition because the plaintiff failed to make a written request for accommodation. However, § 210(19) requires an employer to post a notice or use other appropriate means to notify its employees of the requirements of § 210(18). MCL 37.1210(19).

The effect of an employee's failure to provide written notice of the need for accommodation and an employer's failure to post the notices required by § 210(19) is addressed in § 606(5) of the act, which provides:

> A person with a disability may not bring a civil action . . . for a failure to accommodate under article 2 unless he or she has notified the person of the need

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[2] Contrary to what defendant asserts on appeal, its own witnesses testified in deposition that the agreement was drafted by defendant's attorney.

> for accommodation as required under section 210(18). *This subsection does not apply if the person failed to comply with the requirements of section 210(19).* [MCL 37.1606(5) (emphasis added).]

Therefore, if an employer fails to post the notices required by § 210(19), an employee's failure to provide written notice of the need for accommodation in accordance with § 210(18) is not a bar to filing a lawsuit.

In the present case, plaintiff alleged that she suffers from a disability caused by her injury in a slip and fall and that defendant failed to accommodate her. Defendant presented evidence, which plaintiff did not refute, that plaintiff failed to provide written notice of her need for accommodation. Plaintiff argues that she was not obligated to provide written notice to defendant because defendant failed to post the notices required by § 210(19). However, plaintiff merely *alleges* that defendant failed comply with § 210(19). We have found no affidavit or other documentary evidence in the record, and plaintiff points to none, indicating that defendant failed to make the required notification. As noted in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), a party may not simply announce a position and leave it up to this Court to find support for her claim. See also MCR 7.212(C)(7) (facts stated in an appellant's brief "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court"). We conclude, contrary to the implication in the unpublished federal case cited by plaintiff, that it was incumbent upon *plaintiff* to show that defendant failed to comply with § 210(19) if she wished to proceed with her disability claim despite her failing to notify defendant in writing of her need for accommodation. Accordingly, we conclude that the trial court did not err in dismissing plaintiff's disability claim on the basis that plaintiff failed to provide written notice of her need for accommodation.

Plaintiff next argues that there was a question of material fact concerning her promissory estoppel claim and that the trial court therefore erred in granting defendant summary disposition with respect to this claim. We disagree.

The integration clause contained in plaintiff's employment agreement nullified all preexisting agreements not contained in the employment contract, including an alleged promise to allow plaintiff to continue working part time. *UAW-GM*, *supra* at 504; see also *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). Therefore, plaintiff's reliance on defendant's alleged pre-contractual promise was unreasonable as a matter of law. The trial court did not err in granting summary disposition to defendant with regard to this claim.

Plaintiff also argues that summary disposition of her claim for fraud and misrepresentation was improper. We again disagree.

"The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, 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 suffered damages as a result." *Novak*, *supra* at 688. Additionally, a party's reliance on an alleged misrepresentation must be *reasonable*. *Id.* at 689-691. Further, the misrepresentation must relate to a past or existing fact. *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998).

In the present case, we agree with defendant that plaintiff failed to allege that it made a false statement of fact. The alleged statement that plaintiff would be permitted to continue working part time was promissory, not factual, in nature. Additionally, as discussed above, if a contract contains an integration clause, it is unreasonable, as a matter of law, to rely on any pre-contractual representations not included in the agreement, even if they induced the plaintiff to enter into the contract. See *UAW-GM*, *supra* at 502-505. Thus, the trial court properly granted defendant's motion for summary disposition with regard to plaintiff's claim for fraud and misrepresentation.

For her last claim of error, plaintiff argues that the trial should have denied defendant's motion for summary disposition because defendant failed to comply with the requirement in MCR 2.116(G)(4) that the moving party "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." We disagree.

Plaintiff never argued below that defendant's motion was procedurally deficient and, therefore, this issue is not preserved. See *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 524; 679 NW2d 106 (2004). Moreover, we have reviewed defendant's motion and supporting brief,[3] and it is apparent that they were sufficient to provide plaintiff with ample notice of the bases for seeking summary disposition and were sufficient to allow plaintiff to defend against the motion. Indeed, plaintiff never argued otherwise below. Plaintiff's reliance on *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000), is misplaced because in that case the defendant failed to support its motion with documentary evidence. In this case, defendant presented documentary evidence in support of its motion. For these reasons, we reject this unpreserved claim of error.

In its cross appeal, defendant argues that the trial court erred in dismissing its counterclaim for breach of contract. We disagree.

MCR 2.116(I)(2) provides that, "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

The employment agreement between plaintiff and defendant expressly provided for thirty days' *paid* notice if there is "cause" for termination. In light of that provision, we reject defendant's claim that it is entitled to recover damages for plaintiff's alleged breach of contract based on the conduct that led to plaintiff's termination. Moreover, none of the cases cited by defendant stand for the proposition that an *employer* can fire an employee for breach of contract, sue the employee for the same breach, and recover at least nominal damages. See *Chicago & Northwestern Railway Co v Bayfield*, 37 Mich 205, 207-211; 1877 WL 3800 (1877);[4] see also

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[3] The motion specifically indicated that summary disposition was sought "for the reasons more particularly set forth in the Brief filed in support of this Motion."

[4] We note that the passage from *Northwestern* cited by defendant in support of its argument today is not binding for purposes of the instant case because it was not pivotal in deciding the (continued…)

Michigan Paper Co v Kalamazoo Valley Elec Co, 141 Mich 48, 50-52; 104 NW 387 (1905), *Sax v Detroit, Grand Haven & Milwaukee Railway Co*, 129 Mich 502, 503-507; 89 NW 368 (1902), and *Sepanske v Bendix Corp*, 147 Mich App 819, 822-824, 828-829; 384 NW2d 54 (1985). The trial court properly granted summary disposition to plaintiff with regard to defendant's counterclaim for breach of contract.

Defendant next argues that the trial court erred in dismissing its counterclaim alleging that plaintiff breached a duty of loyalty. We again disagree.

Michigan does not recognize an action for breach of an implied covenant of good faith and fair dealing. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003). Additionally, an action in tort may not be maintained if a contractual agreement exists, unless a duty, separate and distinct from the contractual obligation, is established. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 52; 649 NW2d 783 (2002). Thus, there is no merit to defendant's argument that a duty, enforceable in tort, arose from the parties' contractual relationship.

A contract implies a duty to carry out contractual obligations in a non-negligent manner and, therefore, "'"[m]isfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and tangible things."'" *Sherman*, *supra* at 51, quoting *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997), quoting Prosser & Keeton, Torts (5th ed), § 92, pp 656-657 (emphasis omitted). However, "[i]f the omission is one of nonfeasance, a failure to act, the action lies in contract only." *Sherman*, *supra* at 52.

In this case, defendant's claim was based on plaintiff's alleged failure to work more hours, failure to perform her duties completely, and failure to obey orders, i.e., nonfeasance. Because defendant's claim was based on allegations of nonfeasance, a tort action could not be maintained arising from the parties' agreement. *Sherman*, *supra* at 51-52. Because defendant has failed to show that plaintiff owed it an independent duty of loyalty and obedience enforceable in tort, the trial court properly granted plaintiff summary disposition with respect to this counterclaim.

Defendant also argues that the trial court erred in dismissing its counterclaim for fraud in the inducement. We disagree.

"Fraud in the inducement . . . addresses a situation where the claim is that one party was tricked into contracting." *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 371; 532 NW2d 541 (1995). "Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely . . . but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior." *Id.* at 372-373.

(…continued)

legal issues in *Northwestern* and was stated in a prefatory fashion without any citation to authority.

To be actionable, however, an allegedly fraudulent misrepresentation must relate to a past or existing fact and must not be promissory. *Forge*, *supra* at 212. In this case, plaintiff's alleged misrepresentation to defendant – that she would work full time – was promissory in nature, not factual. Additionally, because the parties' contract contained an integration clause, it was unreasonable, as a matter of law, for either party to rely on any representation not included in the agreement, even if it induced the party to enter into the contract. See *UAW-GM*, *supra* at 502-505. Thus, the trial court properly granted summary disposition to plaintiff with respect to defendant's counterclaim for fraudulent inducement.

Lastly, defendant argues that it stated a claim for attorney fees and expenses, that there was no question of material fact concerning that claim, and that, therefore, the trial court erred in granting summary disposition to plaintiff with regard to this counterclaim. We disagree.

The parties' employment agreement stated:

> The parties agree that any damages granted to a party hereunder shall include, without limitation, the reasonable attorney's fees and expenses incurred by such party.

Because we have concluded that the trial court properly granted summary disposition to plaintiff on all of defendant's counterclaims, and because defendant is not entitled to recover damages from plaintiff, the trial court properly granted summary disposition to plaintiff with regard to defendant's counterclaim for attorney fees and expenses.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter