

STATE OF MICHIGAN
COURT OF APPEALS

KRISTINA MATHIS,

Plaintiff/Counter-Defendant-
Appellant,

v

CONTROLLED TEMPERATURE, INC., and
PATRICIA DREFFS-SCHULTZ

Defendants/Counter-Plaintiffs-
Appellees.

UNPUBLISHED

March 25, 2008

No. 275323

Oakland Circuit Court

LC No. 2005-068478-CZ

Before: White, P.J., and Hoekstra and Schuette, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I respectfully dissent regarding defendant's motion to add an affirmative defense,¹ and plaintiff's claims of breach of contract, interference with business relations and retaliation.

I

As applicable to the instant case, MCR 2.111(F)(2) provides that defenses a party has against a claim must be asserted in a responsive pleading or are waived. MCR 2.111(F)(3) provides that "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.118(A)(2) provides that "[l]eave [to amend] shall be freely given when justice so requires." "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part" *Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 (2007). "Delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997).

¹ Defendants' motion also sought leave to file a counter claim. I agree with the majority's determination to affirm the circuit court's grant of the motion regarding the counterclaim.

On April 3, 2006, more than a year after plaintiff filed her complaint,² defendants moved for leave to file an amended affirmative defense to add the release contained in plaintiff's application for employment with Farbman (Farbman release), which she completed in January 2005. The circuit court granted the motion, although noting that plaintiff had convinced it that the motion "was not as timely as it could have been." The court ordered defendants to pay \$300 for the proceedings that day, for any discovery that would have to be repeated and for a new case evaluation.

Defendants supported their motion for leave by arguing that they learned of the Farbman release "during the course of discovery." Plaintiff established below that that argument was false. Plaintiff's response to defendants' motion provided documentary evidence establishing that on January 21, 2005, *several months before plaintiff filed suit*, see n 2, *supra*, defendants faxed a copy of the Farbman release back to Wolanin (the company that performed reference checks for Farbman), meaning that defendants had in fact received a copy of the release before January 21, 2005.

Defendants neither argued nor provided evidence below to refute such was the case. At the hearing on defendants' motion, defendants' sole argument regarding the affirmative defense was:

With respect to the release, we have an affirmative defense in our original set of affirmative defenses regarding release, we're just seeking clarification with regard to the second release that was signed in connection with her employment with Farbman (ph) in January of 2005. Again, this release has been discussed and brought up in depositions, so there's no surprise to plaintiff in this respect as well.

Defendants' argument that they were "just seeking clarification with regard to the second [Farbman] release," is disingenuous. Defendants' amended (not original)³ answer and affirmative defenses included:

14. Plaintiff's claims against Defendants are barred to the extent Plaintiff released and discharged her right to bring such claims against Defendants

² Plaintiff filed her complaint on March 11, 2005, and amended complaint on April 27, 2005. Defendant answered the amended complaint in June 2005. The parties exchanged witness, expert witness and exhibit lists in November-December 2005 and January 2006. On January 24, 2006 case evaluation was set for March 14, 2006. Discovery ended March 24, 2006 and trial was set for June 2006.

³ Defendants answered plaintiff's amended complaint on June 2, 2005, and their originally-pleaded affirmative defenses did not include release at all. On June 16, 2005, defendants filed an amended answer and affirmative defenses, which included an affirmative defense of release by way of reference to the CTI release and settlement agreement.

pursuant to the Settlement and Release Agreement entered into by the Plaintiff and CTI on July 10, 2003.^[4]

In contrast, the Farbman release provision was contained in an employment application plaintiff completed for employment at Farbman in January 2005:

I hereby release from liability your company and all agents of your company for their acts performed in good faith and without malice in connection with evaluating my application and my credentials and qualifications. *I hereby release from liability any and all individuals and organizations, any firm . . . releasing data pertinent to the review of my application and information released in good faith and without malice* concerning my professional competence, ethics, character and other qualifications. [Emphasis added.]

Adding an affirmative defense regarding the separate and unrelated Farbman release, contained in plaintiff's application for employment with Farbman and to which CTI was not a party, was not a "clarification" of the affirmative defense regarding the release in the CTI agreement.⁵

MCR 2.111(F)(3)(a) requires that "a party must state the facts constituting" an affirmative defense. Defendants' amended answer and affirmative defenses to plaintiff's amended complaint, filed June 16, 2005, clearly did not state facts constituting a defense involving the Farbman release, it referred only to the CTI settlement and release agreement.

Plaintiff submitted documentary evidence establishing that defendants had a copy of the Farbman release months before they answered plaintiff's amended complaint in June 2005.⁶ Thus, defendants could and should have raised the Farbman release in their initial affirmative defenses and their (first) amended affirmative defenses, both filed in June 2005. Instead, defendants delayed filing their motion for leave to amend until April 2006, more than 14 months after they had first received the Farbman release, and 7 months after they had *again* received the

⁴ Defendants apparently were relying on the following language of the CTI settlement and release agreement:

WHEREAS, there has been no adjudication on the merits in the Discrimination Charge or Retaliation Charge, and the parties now desire to terminate, resolve and settle the Discrimination Charge and the Retaliation Charge and all of their disputes in accordance with certain conditions, terms and responsibilities described more fully below.

⁵ Plaintiff's awareness of the release in the Farbman application certainly is not tantamount to awareness that defendants would argue that the Farbman release operated to absolve defendants, who were non-signators to the Farbman release, of liability.

⁶ Plaintiff's response to defendants' motion for leave also provided documentary evidence supporting that defendants *again* received the Farbman release in September 2005, in connection with a discovery request.

Farbman release during discovery, see n 6, *supra*, and after discovery had closed, and case evaluation had been held. As discussed above, defendants' arguments in support of their motion were false. Under these circumstances, I conclude that justice did not require that leave be granted to add the affirmative defense of Farbman's release. MCR 2.118, *Weymers, supra, Stanke v State Farm Mutual Automobile Ins*, 200 Mich App 307, 321; 503 NW2d 758 (1993).⁷ I conclude that the circuit court abused its discretion in granting defendants leave to amend affirmative defense and would reverse that ruling.⁸

As discussed below, even if the circuit court did not abuse its discretion by granting defendants' motion for leave to amend to add an affirmative defense, I conclude that factual development could provide a basis for recovery on the issue whether defendants' statements to potential employers of plaintiff fell *outside* the scope of the Farbman release, i.e., were not "released in good faith and without malice."

II

I also dissent regarding plaintiff's breach of contract claim. While employed by defendant CTI, plaintiff filed charges of discrimination and retaliation with the Michigan Department of Civil Rights and Equal Employment Opportunity Commission. In July 2003, plaintiff and CTI, defendant Dreffs-Schultz as signator, executed a Settlement and Release Agreement under which plaintiff agreed to dismiss the charges and CTI agreed to pay plaintiff a sum. The agreement states that the parties agreed that "Mathis' employment with CTI ceased for a variety of reasons, including a lack of work, on or about June 25, 2003." The agreement stated that plaintiff agreed that she would not "disparage, criticize, condemn, or impugn the reputation or character of CTI, its agents," and CTI agreed that it would not disparage plaintiff to potential employers and would provide a neutral reference consisting of dates of employment and position held with CTI. The Settlement and Release Agreement provided in pertinent part:

6. **Non-Disparagement.** * * * CTI agrees that it shall not verbally or in writing by any means to any other person or entity, including without limitation past, present, or future employers of Mathis, disparage, criticize, condemn, or impugn the reputation or character of Mathis.

7. **Reference.** CTI agrees that upon request, it shall provide a neutral reference for Mathis' future employment, confirming the dates and positions of her employment with CTI only.

Plaintiff presented evidence from which a reasonable fact finder could conclude that, when CTI was contacted by two potential employers for a reference, CTI disparaged plaintiff,

⁷ Defendants' appellate brief argues only that plaintiff did not establish prejudice. Defendants do not address bad faith.

⁸ The circuit court awarded plaintiff \$300 in light of the amended affirmative defense, and ordered defendants to bear the costs of a second case evaluation. See MCR 2.118(A)(3).

provided information beyond confirming the dates and position of plaintiff's employment, and provided an incorrect date for the end of plaintiff's employment.

One of the two potential employers to contact CTI regarding plaintiff was the Farbman Group, through Wolanin & Associates, Inc., the company Farbman used to obtain references for it. The documentary evidence plaintiff presented below raised a genuine issue of fact whether Schultz spoke to Susan Pierce of Wolanin, and communicated to her disparaging information regarding plaintiff, in violation of the CTI release and settlement agreement. Pierce testified that she prepared the following document regarding plaintiff's reference checks.

REFERENCE CHECK

MATHIS, KRISTINA

EDUCATION

* * *

EMPLOYMENT

* * *

Controlled Temperature

Walled Lake, MI

Contact with this company reveals the given supervisor, Patricia Preville, could provide no information and **referred us to Pattie Schultz, an owner**. She indicated they are a very small company and subject mainly did billing and some payroll, not full accounting. She further indicated, after receiving a letter and signed release from us, that she is very shocked that subject would list them as a reference. Pattie preferred to make no further comment and indicated she could only verify dates of employment and position. She did indicate that the given reason for leaving, lack of work, is inaccurate. According to return fax correspondence, subject was employed from 7-21-01 to 12-29-02 as Payroll/Billing. This company does not provide references on previous employees. No other information available.

Defendant Schultz testified at deposition that she was one of three owners of CTI, and a vice-president, and she named the other two owners (both male). Schultz testified that CTI had 20 employees at the time. Schultz testified that she never discussed plaintiff with Wolanin. Clearly, a reasonable fact-finder could conclude that Schultz conveyed information regarding plaintiff to Wolanin disparaging and impugning of plaintiff and thus breached the Settlement and Release Agreement.

CTI also gave Farbman erroneous dates of employment for plaintiff (7-21-01 to 12-29-02, when plaintiff was employed until late June 2003).

The second potential employer to contact CTI for a reference on plaintiff was Awrey. At the time, plaintiff was employed at Awrey on a temporary basis, filling in for an employee on maternity leave. While plaintiff was at Awrey, Dawn Smart, plaintiff's supervisor at Awrey, sought to obtain permanent employment for plaintiff there. Smart testified that she when she contacted CTI to check plaintiff's references, she was provided with incorrect dates for plaintiff's employment in a fax from CTI. Further, Smart testified that she received a follow-up phone call from CTI, and was told that plaintiff's employment at CTI was not favorable, and that due to the legalities of the situation, she could not give details.⁹ This all led to Smart asking plaintiff what had happened at CTI. Smart testified that plaintiff responded that her manager had treated her badly and as a result she was involved in a legal action and had won. Smart had not received approval from her supervisor to retain plaintiff at the time that she communicated with CTI, but she testified that she believed that the negative information CTI conveyed to her regarding plaintiff sealed the deal such that a new position was not possible for plaintiff.

Because Awrey declared bankruptcy soon after Smart contacted CTI for a reference on plaintiff, the majority concludes that plaintiff could not show there was a position open at Awrey's and thus could not show damages. I disagree. The majority's conclusion ignores 1) that Awrey could be called by a potential future employer of plaintiff's for a reference for plaintiff, and 2) that Awrey did not cease operating.

I conclude that the circuit court erroneously dismissed plaintiff's breach of contract claim as to both Farbman and Awrey.

III

Based on the evidence summarized above and discussed below, I also conclude that genuine issues of fact remained whether CTI tortiously interfered with the advantageous business relationship plaintiff had with Farbman. Plaintiff presented evidence from which a reasonable fact-finder could conclude that defendants caused a disruption of a business expectancy that was reasonably likely to occur, *Schipani v Ford Motor Co*, 102 Mich App 616; 302 NW2d 307 (1981), and that defendants intended to interfere with that relationship, *Arim v GMC*, 206 Mich App 178; 520 NW2d 695 (1994).

⁹ The fax to CTI stated "Attn Jody." The deposition testimony of Dreffs-Schultz is not in accord with that of Jody Holway. Dreffs-Schultz testified that she told Jody to respond to the reference request from Awrey. Holway testified that there was no one at the company when the reference request came in and that she simply got plaintiff's employment dates from the computer. Schultz testified that she *never mentioned the requirements under the settlement agreement* to Holway, who was responsible for responding to reference requests. A reasonable fact-finder could conclude from the Holway and Dreffs-Schultz depositions that Schultz told Smart that plaintiff's employment was not favorable, that she (Schultz) was "shocked" that plaintiff would have used them as a reference, and that "because of the legalities of the situation" CTI could not give out further information.

Plaintiff presented documentary evidence below that Farbman interviewed her, that after being interviewed she was asked to submit to a drug screen, and that a background investigation was also done on plaintiff. Maureen Mahar of Farbman testified at deposition that only persons that have potential for hire after the interview are asked for a drug screen and investigated. Mahar testified that she did not have independent recollection of reviewing the Wolanin report on plaintiff, but she testified that CTI's statement that plaintiff's reason for leaving CTI was inaccurate, and CTI's statement of being shocked that plaintiff would use them as a reference, would have caused her concern. Mahar also testified that the fact that CTI provided dates of plaintiff's employment that differed from the dates plaintiff provided "possibly" would have caused her concern, standing alone, but that the discrepancy in the dates, in combination with the other statements CTI made about plaintiff would have caused her concern.

IV

I also conclude that the circuit court improperly dismissed plaintiff's retaliation claim, see MCL 37.2701(a). The court concluded that plaintiff failed to establish a causal connection between her protected activity and CTI's adverse employment action.¹⁰ I disagree.

It is undisputed that the only two potential employers who contacted CTI for references on plaintiff after she left CTI's employment—Farbman (via Wolanin) and Awrey—contacted CTI in January 2005. The record is thus amply clear that the first opportunity CTI had to retaliate against plaintiff was when these potential employers contacted CTI. That the adverse employment actions CTI took in January 2005 occurred more than a year after CTI and plaintiff entered into the settlement and release agreement under which plaintiff agreed to dismiss the discrimination and retaliation charges would not, in my opinion, prevent a reasonable fact-finder from concluding that the two were causally connected, particularly under the circumstance that CTI has never provided a legitimate nondiscriminatory reason for having provided Farbman and Awrey disparaging information regarding plaintiff. Although defendants take the position that the incorrect dates given Farbman and Awrey were simply an "honest mistake," they take no such position on the comments that plaintiff's given reason for leaving CTI was inaccurate, that they were "shocked" that plaintiff would use CTI as a reference, and that plaintiff's employment was "not favorable." Clearly, one could infer from the record that plaintiff's protected activity was the only reason for CTI's adverse employment actions.

I thus conclude that the circuit court erred in dismissing plaintiff's retaliation claim.

¹⁰ A prima facie case of retaliation is shown when a plaintiff establishes established that she engaged in a protected activity (filing of the MDCR/EEOC charges of discrimination and retaliation), that defendants knew about the charges, that defendants took an employment action adverse to the plaintiff (giving the two potential employers who contacted CTI for a reference check on plaintiff negative and disparaging information regarding plaintiff), and a causal connection between the protected activity and adverse employment action. *DeFlaviis v Lord & Taylor, Inc.*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Finally, I conclude that the circuit court improperly granted defendants summary disposition under MCR 2.116(C)(7) on the issue whether the Farbman release barred plaintiff's claims. Even if the release in the Farbman application is valid and operates to supersede the settlement and release agreement CTI entered into with plaintiff, plaintiff presented ample evidence below from which a reasonable fact-finder could conclude that CTI's statements to both Farbman and Awrey regarding plaintiff were not made "in good faith and without malice."

The circuit court's opinion states one reason for granting defendants summary disposition motion on the issue of the Farbman release: "Plaintiff was asked at the hearing what evidence of bad faith or malice existed, yet Plaintiff's answer was unresponsive to the Court's inquiry." Given the documentary evidence plaintiff submitted in support of her claims below, the circuit court improperly rested its ruling on what it deemed to be an unresponsive answer by plaintiff's counsel at the hearing alone.

I would reverse the dismissal of plaintiff's breach of contract claims as to Farbman and Awrey, intentional interference with business relations claim as to Farbman, and retaliation claim. I would vacate the court's grant of summary disposition to defendants on the issue of the Farbman release, and would also vacate the grant of summary disposition to defendants on their counterclaim for breach of contract.

/s/ Helene N. White