

[Cite as *Miller v. Wire One Technologies, Inc.*, 2004-Ohio-2038.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

LAWRENCE F. MILLER :

Plaintiff-Appellant : C.A. CASE NO. 19876

vs. : T.C. CASE NO. 02CV3883

WIRE ONE TECHNOLOGIES, INC. : (Civil Appeal from  
Et al. Common Pleas Court)

Defendant-Appellees :

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O P I N I O N

Rendered on the 23<sup>rd</sup> day of April, 2004.

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GRADY, J.

{¶1} Plaintiff, Lawrence F. Miller, appeals from a directed verdict for Defendants, Wire One Technologies, Inc. and Leo Flotron, on Miller's claims for relief arising from termination of his employment.

{¶2} Miller was the majority shareholder of Advanced Acoustical Concepts, Inc. ("AAC"). On July 17, 2001, Wire One Technologies, Inc. ("Wire One") acquired AAC's assets.

Miller and Wire One also entered into a two-year employment agreement. The employment agreement includes a provision that states: "At any time during the seventh month of the Employment Period, you shall have the right, and the Company shall have the right, exercisable upon at least ten (10) days' written notice to the other party, to terminate the Employment Period effective upon the conclusion of such ten day period."

{¶3} The employment agreement also contains a provision that states: "You acknowledge and agree that nothing contained herein shall require the Company to utilize your services, the Company's only obligation to you being the payment of the compensation to which you are eligible under paragraph 2 above." Finally, the employment agreement contains the following integration clause:

{¶4} "This agreement \* \* \* constitutes the entire agreement, and shall supercede any prior agreement, between the parties hereto on the subject matter hereof. No waiver or modification of the terms or conditions hereof shall be valid unless in writing signed by the party to be charged and only to the extent therein set forth."

{¶5} On August 14, 2001, Wire One terminated Miller but continued to pay him pursuant to his employment agreement, until January 28, 2002. Miller commenced an action on June 14, 2002, against Wire One and its then-President and Chief Operating Officer, Leo Flotron. Miller's complaint alleged four causes of action: fraud in the inducement of an

employment agreement by Wire One and Flotron; breach of contract by Wire One; breach of an assumption agreement by Wire One; and tortious interference with a business expectancy by Flotron.

{¶6} On March 24, 2003, approximately two-weeks before the scheduled trial date, Miller moved for leave to amend his complaint in order to add a claim for relief for spoliation. The trial court denied Miller's motion on April 3, 2003.

{¶7} A trial on Miller's initial complaint commenced, and at the close of Miller's case-in-chief the trial court granted Wire One's oral motion for directed verdict on all four counts of Miller's complaint. On April 17, 2003, the trial court entered judgement against Miller.

{¶8} Miller filed a timely notice of appeal. He now presents three assignments of error. We will address these three assignments of error in the order we find more convenient.

#### THIRD ASSIGNMENT OF ERROR

{¶9} "THE TRIAL COURT ERRED IN DENYING APPELLANT LEAVE TO FILE AN AMENDED COMPLAINT"

{¶10} On March 24, 2003, approximately two-weeks before his scheduled trial date, Miller moved to amend his complaint to add a cause of action for spoliation. Miller's motion to amend alleged "several inconsistencies" between documents provided by Wire One during discovery and those

subsequently made available by Wire One on CD-ROMs it produced on March 18, 2003.

{¶11} The elements of a claim for spoliation or destruction of evidence are: (1) pending or probable litigation involving the plaintiff; (2) knowledge on the part of defendant that litigation exists or is probable; (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; (4) disruption of the plaintiff's case; and (5) damages proximately caused by the defendant's acts. *Smith v. Howard Johnson Co., Inc.* (1993), 67 Ohio St.3d 28.

{¶12} The trial court denied Miller's motion to amend his complaint. It found that Miller failed to make a prima facie showing of spoliation. Specifically, the trial court found that Miller's evidence failed to satisfy the last three elements required to prove a claim for interference with or destruction of evidence. The trial court did not preclude Miller from bringing a separate claim for spoliation at a later date.

{¶13} Miller argues that, inasmuch as his request was to amend his pleadings, the trial court erred when it required him to substantiate his claim. Miller is correct that, when passing on the sufficiency of a pleading, facts alleged must be assumed to be true. *O'Brien v. Univ. Community Tenants Union, Inc.* (1995), 42 Ohio St.2d 242. Further, a pleading need only set out a short and plain statement of operative facts showing that the pleader is entitled to relief.

Civ.R. 8(A). However, when passing on a plaintiff's Civ.R. 15(A) motion to amend a pleading to add a claim for relief, the court does not abuse its discretion by denying the motion "where a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded." *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.* (1991), 60 Ohio St.3d 120, 123.

{¶14} We find no abuse of discretion. Miller failed to present any evidence showing that Wire One willfully destroyed evidence in an attempt to interfere with or disrupt Miller's case. Therefore, Miller failed to satisfy the third element of a claim for interference with or destruction of evidence. Further, the record does not show how Miller's case was disrupted, or that Miller suffered any damages that were proximately caused by the Wire One's willful destruction of evidence in an attempt to interfere or disrupt Miller's case. Miller's third assignment of error is overruled.

#### FIRST ASSIGNMENT OF ERROR

{¶15} "THE TRIAL COURT ERRED IN GRANTING A MOTION FOR DIRECTED VERDICT ON APPELLANT'S CLAIM FOR FRAUDULENT INDUCEMENT"

{¶16} A motion for directed verdict may be made at the close of the opponent's evidence or at the close of all the evidence. Civ.R. 50(A)(1). Paragraph (A)(4) of the rule states:

{¶17} "When a motion for a directed verdict has been

properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶18} "In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment." *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 1998-Ohio-612.

Miller claimed that Wire One and Flotron promised him employment opportunity benefits with no intention to perform at the time they were offered and agreed. Specifically, Miller argues that when he negotiated his employment contract with Wire One he bargained for an absolute promise of serving as Wire One's Senior Vice President of Integration Services for two years, subject to right of either party to terminate the agreement during the seventh month.

{¶19} Evidence Miller offered shows that Wire One offered Miller's position of Senior Vice President to another person within six days after his employment began. Miller argues that he therefore had no real employment opportunity to be Senior Vice President for six months, let

alone the twenty-four month period. Miller contends that the court improperly applied the parol evidence rule to reject the evidence that his job was offered to another.

{¶20} Fraud in the inducement to enter into a written contract may be proved by parol evidence, and circumstantial evidence of that kind is sufficient to prove fraud. See, e.g., *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78; *Sparhawk v. Gorham* (1957), 101 Ohio App. 362. However, the parol evidence rule was not the source of Miller's difficulties before the trial court.

{¶21} Fraud cannot be proved by showing that the inducement to enter into an agreement was an oral promise within the scope of an integrated written agreement which the promisor and promisee did not ultimately include in the written agreement. *Busler v. D & H Mfg., Inc.* (1992), 81 Ohio App.3d 385. Further, where the terms of the writing directly and expressly contradict the promise which allegedly operated as an inducement, a claim of fraud cannot lie. *Ed Schory & Sons Inc. v. Society Natl. Bank*, 75 Ohio St.3d 433, 1996-Ohio-194. Thus, if there is a binding and integrated agreement, evidence of prior or contemporaneous representations is inadmissible to contradict the unambiguous, express terms of the writing. *Busler, supra.*

{¶22} Also, where the nature of a fraud is alleged false representations of intent to perform a contract, there must be a breach of the contract itself in order for the false representations to be actionable. *Estate of Fine v. Home*

*Ins Co.* (Feb 21 1992), Lucas County App. No. L-91-111.

Here, the trial court found no such breach, and Miller did not appeal from that judgment.

{¶23} Miller relies on *Galmish v. Cicchini* (2000), 90 Ohio St. 3d. 22. In *Galmish*, parties entered into a contract for the sale of an office building. Pursuant to a clause in the written agreement, the buyer promised to pay the seller one-half of all proceeds in excess of \$765,000 if the property was conveyed to developers within one year. The property was not conveyed within one year and the seller sued the buyer for breach of contract and fraud, arguing that the buyer had intentionally prevented the resale of the property in order to foreclose the seller's right to one-half of the proceeds.

{¶24} The issue in *Galmish* was whether parol evidence was admissible to prove the breach of contract claim when the written contract imposed no affirmative duty on the defendant to sell the property within the one year. The court found that the parol evidence rule did not bar evidence of the breach of contract claim. The court emphasized that the seller's claims "do not seek to contradict or vary the terms of the written agreement. In fact, they do not rest on any prior agreements or promises at all. \* \* \* To the contrary, [the seller's] claims fully admit, and indeed rely upon, the fact that [the buyer's] promise to split the excess proceeds is, as stated in the written agreement, entirely conditional upon the sale of the



property to Developers within one year." *Id.*, at pp. 30-31.<sup>9</sup>  
The court stated that the proffered parol evidence was offered to show that the buyer "intended from the outset to prevent the fulfillment of the condition that would invoke his contractual promise to share the excess proceeds," and that the evidence was therefore not barred by the parol evidence rule. *Id.* at p. 31.

{¶25} In *Galmish*, the express promise to pay a commission was conditioned on an implied promise to make reasonable efforts to sell the property within the time provided. Here, there was no implied oral promise on which the express written promise was conditioned, and the express promise by its terms foreclosed the prior implied promise alleged. Paragraph 5 of the employment agreement states: "You acknowledge and agree that nothing contained herein shall require the Company to utilize your services, the Company's only obligation to you being the payment of the compensation to which you are eligible under paragraph 2 above."

{¶26} There was substantial, circumstantial evidence that Wire One harbored an intention to exercise its option to terminate Miller pursuant to the written agreement when the parties entered into it. However, the unambiguous, express terms of the employment contract addressed the actual opportunity Miller understood he obtained by signing the employment contract. At trial, Miller, an attorney who has practiced merger, acquisition and contractual law in

Ohio for six years, testified that he negotiated the terms of the employment agreement himself. (Tr. 356). He also testified that he fully understood the contract's integration clause. (Tr. 346).

{¶27} Although Wire One stopped utilizing Miller's services shortly after the employment agreement was signed, Wire One was authorized by the contract to do just that. Further, Wire One abided by the employment contract and continued paying Miller his salary in accordance with the contract. There was no breach.

{¶28} We cannot find the trial court erred in granting Wire One's motion for directed verdict on Miller's claim for fraudulent inducement.

{¶29} The first assignment of error is overruled.

#### SECOND ASSIGNMENT OF ERROR

{¶30} "THE TRIAL COURT ERRED IN GRANTING A MOTION FOR DIRECTED VERDICT ON APPELLANT'S CLAIM OF TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY"

{¶31} To establish a claim for tortious interference with a business relationship, a plaintiff must prove that: (1) a business relationship with a third party existed; (2) the alleged wrongdoer had knowledge of the relationship; (3) the alleged wrongdoer intentionally interfered with that relationship causing a breach or termination of the relationship; and (4) the plaintiff suffered damages resulting therefrom. *Wolf v. McCullough-Hyde Mem. Hosp.*

(1990), 67 Ohio App.3d 349. "The basic principle of a 'tortious interference' action is that one, who without privilege, induces or purposely causes a third party to discontinue a business relationship with another is liable to the other for the harm caused thereby." *Id.* at 355.

{¶32} Ohio does not recognize a claim for tortious interference made against an employee's supervisor where the act complained of is within the scope of employment. *Anderson v. Minter* (1972), 32 Ohio St.2d 207.

{¶33} Miller argues that Flotron tortiously interfered with the business relationship between Miller and Wire One. In granting Wire One's motion for a directed verdict, the trial court found that Flotron was not liable because "he was at all times acting as an agent of the corporation within the scope of his position to make decisions on personnel matters." (Tr. 6).

{¶34} We agree. There is no evidence that Flotron acted independently of his role and duties as President and Chief Operating Officer of Wire One. Therefore, Flotron was not a "third party" with whose dealings with Wire One Flotron might tortiously interfere.

{¶35} Miller's second assignment of error is overruled.

{¶36} Having overruled Miller's three assignments of error, we will affirm the trial court's decision.

Judgment affirmed.

BROGAN and YOUNG, JJ., concur.

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Hon. Jeffrey E. Froelich