[Cite as *Allen Nichol v. Am. Health Network*, 2016-Ohio-8346.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Allen Nichol,	:	
Plaintiff-Appellant,	:	
		No. 16AP-210
v.	:	(C.P.C. No. 15CV-2151)
American Health Network et al.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 22, 2016

On brief: *Hammond Law Office* and *Gary W. Hammond,* for appellant. **Argued:** *Gary W. Hammond.*

On brief: *Ice Miller LLP, Robert J. Cochran,* and *Daniel O. Culicover*, for appellee. **Argued:** *Robert J. Cochran.*

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Plaintiff-appellant, Allen Nichol ("Nichol" or "appellant"), appeals from the February 26, 2016 decision of the Franklin County Court of Common Pleas granting American Health Network of Ohio PC's ("AHN" or "appellee") motion for summary judgment. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 10, 2015, appellant filed a lawsuit against appellee alleging breach of his employment contract and tortious interference with his contractual relationship with his patients. On December 15, 2015, appellee filed a motion for summary judgment. On February 26, 2016, the trial court issued its decision and entry granting appellee's motion for summary judgment. The court stated the basic facts:

> Plaintiff Allen Nichol joined the practice of Defendant American Health Network of Ohio as a pharmacist in 2013.

> Deposition of Allen Nichol, p. 60. The Plaintiff worked in collaboration with doctors of the practice in designing drug therapies for chronically ill patients. Id. at 31-33. Various patients followed Plaintiff to AHN. Plaintiff's Exhibits 3, 4, 5, filed January 4, 2016. In 2014, Newby Consulting, Inc., a Medicare regulations and coding consulting company, visited AHN to conduct an audit of its coding and billing practices. Deposition of Sanda Owings, pp. 22-24. Newby Consulting recommended that AHN bill Plaintiff's services in a way different from how it had been billing the patients. Id. at 63. It was after this recommendation that Defendant informed Plaintiff his employment would be terminated. Id. at 23. Plaintiffs employment with AHN ended in September 2014. Nichol Depo., p. 148.
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> Upon Plaintiffs departure from AHN, patients were contacted via letters and informed of the change in their care. Nichol Depo. at 136. Various patients then contacted Plaintiff and sought to follow him to his next employer. Id. at 154. Currently, only 29 patients out of 178 left AHN to follow Plaintiff to his new employer. Id. at 166-68.

(Decision & Entry at 1-2.)

{¶ 3} The trial court found that appellant was an at-will employee, and as such, there was no breach of contract. (Decision & Entry at 4 [20].) In addition, the court found that no contracts existed between appellant and his former patients, and therefore, appellee could not and did not tortiously interfere with said contracts. (Decision & Entry at 5 [21].) Based on the foregoing, the court found that summary judgment for appellee was proper and granted the same. (Decision & Entry at 6.)

II. ASSIGNMENT OF ERROR

{¶ 4} Nichol appeals, assigning a single error:

> The trial Court erred in Granting Defendant Appellee American Health Network of Ohio PC (AHN-OPC)'s Motion for Summary Judgment based on the undisputed material facts, disputed material facts and applicable law.

III. STANDARD OF REVIEW

{¶ 5} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent

review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). The party against whom the motion for summary judgment is made is entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 6} A "party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). In accordance with Civ.R. 56(E), when a properly supported motion for summary judgment is made, the nonmoving party may not rest upon the mere allegations or denials contained in the pleadings but must come forward with specific facts demonstrating a genuine issue of fact for trial. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against him.

IV. DISCUSSION

{¶ 7} In *Phu Ta v. Chaudhry*, 10th Dist. No. 15AP-867, 2016-Ohio-4944, ¶ 10-12, we stated the basic law applicable to breach of contract claims:

> "To successfully prosecute a breach of contract claim, a plaintiff must present evidence of (1) the existence of a contract, (2) plaintiff's performance of the contract, (3) defendant's breach of the contract, and (4) plaintiff's loss or damage as a result of defendant's breach." *Barlay v. Yoga's Drive-Thru*, 10th Dist. No. 03AP-545, 2003-Ohio-7164, ¶ 6, citing *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994).
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> It is well-settled that "[t]he existence of a contract is dependent upon an offer, an acceptance and consideration." *DeHoff v. Veterinary Hosp. Operations of Cent. Ohio, Inc.*, 10th Dist. No. 02AP-454, 2003-Ohio-3334, ¶ 47, quoting *Renaissance Technologies, Inc. v. Speaker Components, Inc.*, 9th Dist. No. 21183, 2003-Ohio-98. An offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Reedy v. Cincinnati Bengals, Inc.*, 143 Ohio App.3d 516, 758 N.E.2d 678 (1st Dist.2001). Courts generally determine the

> existence of a contract as a matter of law. *Motorists Mut. Ins. Co. v. Columbus Fin., Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090, 861 N.E.2d 605 (10th Dist.2006).
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> To prove the existence of a contract, written or oral, " 'a plaintiff must show that both parties consented to the terms of the contract, that there was a "meeting of the minds" of both parties, and that the terms of the contract are definite and certain.' " *Barlay* at ¶ 6, quoting *Nilavar v. Osborn,* 137 Ohio App.3d 469, 484, 738 N.E.2d 1271 (2d Dist.2000), citing *McSweeney* at 631; *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Industrial Relations*, 61 Ohio St. 3d 366, 369, 575 N.E.2d 134 (1991).

A. Breach of Contract

{¶ 8} On appeal, appellant challenges the trial court's holding that no contract existed between appellant and appellee. Appellant claims that he was an employee at-will under an oral contract with specific terms and duties imposed on both appellant and on appellee. He argues that this express oral contract precluded appellee from terminating him. Appellant argues that he also had an "oral contract" with appellee "from the time [he] was hired" to "[p]erform this work, get paid a certain rate, adhere to schedules and directions of [appellee]." (Oct. 15, 2015 Depo. Of Allen Nichol "Nichol Depo." at 141.) Appellant further argues that the trial court erred in finding that appellee could unilaterally change his employment terms, cut his hours and pay and terminate his employment contract based on appellee's own breach of the contract without appellant having recourse. Appellee argues that appellant was an at-will employee and that no employment contract existed.

{¶ 9} Appellee hired appellant in 2013 to work as an in-house pharmacist to monitor and coordinate patients' medication. (Nichol Depo. at 60, 81.) Appellant acknowledges that he was an at-will employee of appellee. (Nichol Depo. at 136-37.) Furthermore, appellant began working for appellee without a promise of guaranteed employment. (Nichol Depo. at 57, 72-73.) Under Ohio law, "unless otherwise agreed, either party to an oral employment at-will * * * agreement may terminate the employment at any time * * * even without cause." *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-2305, ¶ 21; *Boggs v. Scotts Co.*, 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶ 28. Appellee's Employment Handbook establishes that appellant was an at-will

employee, and contains specific provisions that state that all employees were at-will. (*See* Nichol Depo., Ex. A.) The handbook states at Section 1.2:

> Employment is at-will. * * * No oral or written statements, including the Employee Handbook, shall be interpreted in any way as altering the employment-at-will relationship or deemed to be an employment contract between the employee and the Company. Only an authorized representative of American Health Network may alter an employee's at-will status and then only in writing specific to the employee and signed by the employee and the Chief Executive Officer.

The Supreme Court has found that "disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook." *Wing v. Anchor Media, Ltd.*, 59 Ohio St.3d 108, 110 (1991); *see Taylor v. J.A.G. Black Gold Mgmt. Co.*, 10th Dist. No. 09AP-209, 2009-Ohio-4848, ¶ 20 ("[A] handbook that expressly disclaims any intent to create a contractual relationship cannot constitute an employment contract."). It is apparent that the above paragraph is a disclaimer precluding appellant's alleged employment contract. The only exception within the handbook is if appellant has a written statement altering his employment signed by both himself and the CEO of appellee. Appellant admitted that he never discussed changing his at-will employment with the CEO of appellee. (Nichol Depo. at 220-21.) Therefore, no alteration of his at-will employment was implemented.

{¶ 10} Soon after he started working for appellee, appellant signed a form titled "Acknowledgement of Receipt of Employee Handbook." (Nichol Depo. at Ex. B.) The acknowledgement form provides, in relevant part, that "[n]o oral or written statements, including the Employee Handbook, shall be interpreted in any way as altering the employment-at-will relationship or deemed to be an employment contract between the employee and the Company."

{¶ 11} Moreover, "employee handbooks do not constitute an employment contract." *McNeil v. Medcentral Health Sys.*, 5th Dist. No. 2008CA0104, 2009-Ohio-3389, ¶ 23. An employee handbook only alters the "at-will nature of employment" if "the parties have a meeting of the minds indicating that such items are to be considered valid contracts altering the terms for discharge." *Alexander v. Columbus State Community College*, 10th Dist. No. 14AP-798, 2015-Ohio-2170, ¶ 20. It is apparent that appellee did

not intend to alter the at-will contract and there was not the requisite "meeting of the minds" necessary to form a contract.

{¶ 12} The alleged oral employment contract outlined by appellant is simply a description of a typical at-will employment situation. In addition, appellee hired appellant pursuant to an oral agreement for an indefinite duration. (Nichol Depo. at 77, 57.) Under Ohio law, an oral employment contract which does not include a specific term of duration gives rise to an employment-at-will relationship. *Americare Healthcare Servs. v. Ngozi Akabuaku*, 10th Dist. No. 10AP-777, 2010-Ohio-5631, ¶ 24, citing *Andres v. Drug Emporium, Inc.*, 10th Dist. No. 00AP-1214 (Aug. 30, 2001), at 8. Finally, appellant cites no evidence that shows appellee agreed to the alleged terms. Thus, appellant cannot "prove the mutual assent required for the creation" of a contract. *Taylor* at ¶ 22 (affirming summary judgment in favor of employer where employee failed to demonstrate each element necessary for the formation of a contract, including mutual assent).

{¶ 13} After appellee filed its properly supported motion for summary judgment, it was appellant's duty to produce competent evidence to show that there is a genuine issue for trial. *See CitiMortgage, Inc. v. Bennett*, 10th Dist. No. 13AP-228, 2013-Ohio-4062, ¶ 9. Appellant did not offer any evidence to rebut the conclusion that he was an at-will employee. Accordingly, no such oral contract existed. There being no contract, there can be no breach of contract.

B. Tortious Interference with Contracts

{¶ 14} There are five elements in a tortious interference claim: "(1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) the lack of justification; and (5) resulting damages." *Bansal v. Mt. Carmel Health Sys.*, 10th Dist. No. 10AP-1207, 2011-Ohio-3827, ¶ 29. Under Ohio law, when a plaintiff fails to provide evidence of the existence of a contract, the claim fails. *Bansal* at ¶ 32. Courts routinely grant summary judgment denying a claim of tortious interference where a party fails to demonstrate the existence of a contract. *See, e.g., Reali Giampetro & Scott v. Society. Natl. Bank*, 133 Ohio App.3d 844, 849 (7th Dist.1999). Appellant's claim fails at the inception because he cannot provide competent evidence of a contract with his patients.

{¶ 15} Appellant argues that the trial court erred in finding that appellant had no contract with his patients, and in ignoring that appellant's patients were, or should have been, free to follow appellant, absent appellee's tortious interference. Three of appellant's patients signed affidavits. (Nichol's Ex. Nos. 3, 4 and 5, filed Jan. 4, 2016.) Two of the affidavits state, in conclusory fashion without any supporting evidence, that "I have contracted with Dr. Nichol for care" while he worked in different medical practices. (Nichol's Ex. No. 4 at ¶ 7.)

{¶ 16} A purely conclusory statement in an affidavit, without competent evidentiary material to support the conclusion, must be disregarded in deciding a motion for summary judgment. *Davis v. Findley Indus.*, 2d Dist. No. 13982 (Aug. 24, 1994), at 11, citing *Ohio Poly Corp. v. Packaging & Handling Supplies Co.*, 44 Ohio App.3d 88, 91 (2d Dist.1988). None of the affidavits demonstrate that appellant and the patients entered into contracts with definite or discrete terms, or that they mutually agreed upon contract terms. As such, we do not find the conclusory allegations, without any further evidence or explanation, to be competent evidence of a contractual relationship.

{¶ 17} In regard to appellant's tortious interference claim, the trial court noted:

> Plaintiff alludes to preferences of the patients to follow him to other practices, and a history of patients following Plaintiff from practice to practice. Nichol Depo. at 167-69. The choice of patients for their health care providers is exactly that, a choice. The patients of AHN and the patients of Plaintiff have the choice to change providers at any time. Just because a patient chooses to follow his pharmacist or doctor, or hair dresser for that matter, is not evidence of a binding contract but evidence of the free market. Thirty four patients followed Plaintiff from AHN then five returned to AHN after originally moving. Id. The court finds this testimony to be direct evidence of the open market, not existing contracts with patients to seek their medical care only from Plaintiff.
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> Therefore, as no contracts existed between Plaintiff and his former patients, Defendant could not and did not [tortiously] interfere with said contracts.

(Decision & Entry at 5.) We agree with the trial court. Here, appellant offered no competent evidence that he had contracts with the patients he advised. He concedes that

no explicit contract existed. Further, he provided no proof regarding the obligations of these patients, or vice versa.

{¶ 18} In the present case, appellant has offered no evidence that he had a contract with any patient. After appellee filed its properly supported motion for summary judgment, it was appellant's obligation to produce "specific facts showing that there is a genuine issue for trial." *Dresher* at 293. Instead, appellant's facts are merely naked assertions and legal conclusions contained in affidavits. Appellant has not met his burden.

{¶ 19} Based on our de novo review of the facts and relevant law, we agree with the trial court that appellant presented no competent evidence demonstrating any employment contract between himself and appellee, nor did he present any evidence suggesting that he had contracts with patients he advised. Appellant did not meet his burden to come forward with specific facts demonstrating that there is a genuine issue of material fact for trial. Appellant's assignment of error is overruled.

V. DISPOSITION

{¶ 20} Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, J., concurs.
LUPER SCHUSTER, J., concurs in judgment only.
