IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ALPHA DATA CORPORATION, a Florida corporation,

Appellant,

v.

HX5, L.L.C., a Florida limited liability company, TIMOTHY DECKERT, individually, MARGARITA HOWARD, individually, TRACY ALLEN, individually, CHARLES BRASFEILD, individually, and individually MARGARITA HOWARD, INFOPRO CORPORATION, an Alabama corporation,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-2885 and 1D12-5517
(Consolidated)

Opinion filed October 18, 2013.

An appeal from the Circuit Court for Okaloosa County.
Thomas Remington, Judge.

M. Hope Keating and Barry Richard of Greenberg Traurig, P.A., Tallahassee; A. Benjamin Gordon of Keefe, Anchors & Gordon, P.A., Fort Walton Beach, for Appellant.

Tiffany A. Sullivan of Moore, Hill & Westmoreland, P.A., Pensacola, for Appellees InfoPro Corporation and Charles Brasfeild.

John R. Zoesch, III, and J. Nixon Daniel, III, of Beggs & Lane, R.L.L.P., Pensacola, for Appellees HX5, L.L.C., Margarita Howard, Timothy Deckert, and Tracy Allen.

PER CURIAM.

Appellant, Alpha Data Corporation, a government contractor that provides information technology and engineering services, filed a multi-count complaint against Appellees HX5, Margarita Howard, Timothy Deckert, and Tracy Allen.[1] Count I alleged theft of trade secrets, Count II alleged Appellees breached a teaming agreement, Count III alleged breach of a "Mentor-Protege Agreement", Count IV alleged promissory estoppel, Count V alleged breach of a fiduciary relationship, and Count VII alleged unjust enrichment. The trial court entered summary judgment in favor of Appellees on all counts, and Alpha Data appeals that judgment.[2] As explained below, we affirm the court's judgment as to Counts II and V.[3] As to the remaining counts, we are constrained to agree with Alpha Data that there existed genuine issues of material fact, thus precluding summary judgment.

The trial court found that the Statute of Frauds precluded the claims of breach of agreement, breach of the Mentor-Protege Agreement, promissory

[1] Alpha Data's complaint also alleged two counts against InfoPro Corporation and Charles Brasfeild. The judgments arising from that case are addressed in our opinion in case number 1D12-2886 (which was consolidated for all purposes with case number 1D12-5140).

[2] The trial court also entered a separate judgment awarding costs, which is the subject of the appeal in case number 1D12-5517, which has been consolidated with this case for all purposes.

[3] Alpha Data's briefs do not address the trial court's finding that it failed to establish the existence of a fiduciary duty. Thus, any argument that this was error is waived, hence our affirmance as to that issue.

estoppel and fraudulent inducement because there were no written agreements and the alleged oral contracts could not be performed within one year; that Appellant could not prove damages; that damages were speculative; that Appellant failed to demonstrate the existence of a fiduciary relationship; that Appellant's claim of promissory estoppel is barred by the Economic Loss Rule; and that Appellant failed to demonstrate the existence of trade secrets or the misappropriation thereof. The summary judgment also concluded that Appellant could not prove any of the defendants caused damages to Appellant. The summary judgment further found that the two breach of agreement claims failed because there was not a meeting of the minds between the parties on the essential terms of the alleged agreement, and that the unsigned draft teaming agreement and unsigned draft mentor-protege agreement were only agreements to agree.

We affirm the trial court's finding that the Statute of Frauds bars ADC's claim that HX5 breached the Mentor-Protege Agreement.[4]

> No action shall be brought . . . upon any agreement that is not to be performed within the space of 1 year from the making thereof . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

[4] Appellant did not address the trial court's finding that Appellant failed to establish the existence of a fiduciary duty. Thus, any argument that this was error is waived and the trial court's finding is affirmed.

§725.01, Fla. Stat.

The general rule is that the Statute of Frauds bars enforcement of oral contracts which by their terms are not to be performed within a year. Yates v. Ball, 181 So. 341, 344 (Fla. 1937). The fact that a contract may not be performed within a year does not bring it within the statute. Id. "In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." Id. Contracts for an indefinite period generally do not fall within the Statute of Frauds. Id.

Here, it is undisputed that HX5 never signed the proposed Mentor-Protege Agreement ADC sent to it. It is clear from the record and, according to the terms of the unsigned agreement that ADC sent to HX5, and which forms the basis of the alleged oral contract, this partnership was intended to last three years, thus bringing it within the Statute and, consequently, unenforceable.

We reverse the summary judgment in all other respects and remand for further proceedings because there remain genuine issues of material fact. Orders granting summary judgment are reviewed *de novo.* Dianne v. Wingate, 84 So. 3d 427 (Fla. 1st DCA 2012). An appellate court's "task is to determine whether, after reviewing every inference in favor of Appellant as the non-moving party, no genuine issue of material fact exists and the non-moving party is entitled to a judgment as a matter of law." Id. Summary judgment should only be granted when

there is no doubt that material fact issues remain. If there is even the slightest doubt that material factual issues remain, summary judgment may not be entered. Any doubts must be resolved in favor of the non-moving party. Feizi v. Dep't of Mgmt Servs., 988 So. 2d 1192 (Fla. 1st DCA 2008).

As to allegations involving breach of contract, fraud in the inducement, unjust enrichment and promissory estoppel and injunctive relief the record clearly shows that genuine issues of material fact remained as to whether Appellant could prove or whether Appellee could defeat the elements of the remaining counts and whether Appellant could prove how it was damaged. These factual disputes preclude summary judgment. Moreover, a recent opinion from our supreme court requires us to reverse the trial court's finding that the Economic Loss Rule bars Alpha Data's fraudulent inducement claim. See Tiara Condo Ass'n, Inc. v. Marsh & McLennan Co., 110 So. 3d 399, 407 (Fla. 2013) (holding the Economic Loss Rule is limited to product liability cases).

It is up to the fact finder to resolve factual disputes. Consequently, Appellees were not entitled to judgment as a matter of law.

BENTON and CLARK, JJ., CONCUR; THOMAS, J., CONCURS AND DISSENTS WITH OPINION.

THOMAS, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur with the majority's opinion affirming the trial court's order as to ADC's claims for breach of the Mentor-Protege Agreement and for breach of fiduciary duty. I also concur with the majority's reversal of the trial court's order finding that the Economic Loss Rule barred ADC's fraudulent inducement claim, pursuant to our supreme court's recent decision in Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc., 110 So. 3d 399 (Fla. 2013). I respectfully dissent, however, with the majority's holding that there existed genuine issues of material fact concerning ADC's claims for theft of trade secrets, breach of the teaming agreement, promissory estoppel, fraudulent inducement, and unjust enrichment.

With respect to the trade secrets claim, in my view, ADC failed to establish that any of the trade secrets it alleges Appellees misappropriated were trade secrets at all. Rather, all of the information forming the basis of its claim was generally known or readily accessible to third parties. "Information that is generally known or readily accessible to third parties cannot qualify for trade secret protection." Am. Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998).

As for the rest of the claims, the underlying and fatal flaw in ADC's case is that any damages arising from the alleged actions by Appellees are purely

speculative and, thus, ADC's claims are barred. "Damages cannot be based on speculation, conjecture or guesswork." Swindell v. Crowson, 712 So. 2d 1162, 1164 (Fla. 2d DCA 1998).

Here, ADC's claims rest on two assumptions: First, that a proposal submitted jointly by HX5 and ADC, as opposed to InfoPro, would have resulted in the award of the contract; and second, pursuant to the alleged teaming agreement, that HX5 and ADC would have come to terms on a subcontract for ADC. Whether either or both of these would have occurred is the very definition of speculative. It is impossible to know whether the government employees responsible for assessing and awarding the contract would have looked just as favorably upon a proposal submitted by HX5 and ADC as it did upon HX5 and InfoPro. In fact, ADC's own expert agreed that whether an HX5/ADC partnership would have been better positioned to obtain the contract was purely speculative.

Furthermore, the record is undisputed that, prior to the pre-solicitation for the contract at issue, the HX5 defendants Howard and Deckert, according to ADC's own chief executive officer, resigned in lieu of being terminated. The chief executive officer also accused Appellee Howard of stealing from ADC. Yet these were the same people whom ADC now contends would have to come to an agreement to work together as primary and subcontractors. Whether they would have been able to overcome these differences and come to an agreement is, again,

pure speculation. Thus, ADC was unable to establish the essential element of non-speculative damages to support its claims for breach of contract, promissory estoppel, or fraudulent inducement.

Finally, the majority has overlooked that the teaming agreement ADC alleges HX5 breached was nothing more than an unenforceable "agreement to agree." A court cannot "afford a remedy for the breach of a promise to negotiate a contract, because there would be no way to determine whether the parties would have reached an agreement had they negotiated." State, Dep't of Corr. v. C & W Food Serv., Inc., 765 So. 2d 728, 730 (Fla. 1st DCA 2000).

Here, the unsigned proposed teaming agreement provides that in the event the parties' joint proposal resulted in a successful bid, the "successful Prime Contractor (i.e., HX5) will execute its best effort to negotiate a subcontract agreement that meets the intent of this Teaming Agreement within 30 days after the contract award." ADC essentially acknowledged that this is an agreement to agree by citing various federal cases from around the country in which courts in other jurisdictions have found that such teaming agreements may constitute the basis for contractual liability where the prime contractor fails to enter into a subcontract with the subcontractor as anticipated in the teaming agreement. That may be, but this court is bound by its prior decision in C & W Food Services, which holds to the contrary.

The clause here is very similar to that in C & W Food Services. In that matter, the contract included a renewal clause. 765 So. 2d at 729. C & W sued when the Department unilaterally decided not to renew the contract without any negotiations. Id. "[T]he company asserted that the Department had breached its duty to negotiate renewal in good faith. This argument was based on the Department's contracting manual, which incorporates a directive that the renewal clause of a procurement contract must include a provision for good faith negotiations." Id. This court rejected this argument, explaining:

> Whether the Department's contracting manual is the equivalent of a rule is, in our view, immaterial. Even if the contract could be construed to incorporate the good faith negotiation requirement from the manual, C & W would be without a remedy. The obligation to negotiate renewal in good faith is, at most, an agreement to agree on something in the future. Because the parties have not yet agreed on the essential terms for the period in which the contract could be renewed, they do not have an enforceable contract for that period. An agreement to negotiate the terms of a renewal does not create a contractual right to renew.

Id. Consequently, this court affirmed the trial court's summary judgment in favor of the Department. Id. at 731.

Similarly, here, the teaming agreement, in addition to including an agreement to submit a joint bid proposal, also includes an agreement to *attempt* to reach a subcontractor agreement with mutually acceptable terms, in the event the joint bid proposal proved successful. This is the essence of an agreement to agree on something in the future and, thus, is unenforceable under Florida law.

For the foregoing reasons, the trial court correctly entered summary judgment as to all of these claims. Even when viewing the evidence in a light most favorable to ADC, ADC was not entitled to relief as a matter of law. Consequently, I would also affirm the costs award.