NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 2229

DONALD BRITTON

VERSUS

HARRIS HAYES, ED KAGLEAR, GOOD SHEPHERD FULL GOSPEL MISSIONARY BAPTIST CHURCH, INC., & GOOD SHEPHERD RESOURCE & SUBSTANCE ABUSE CENTER, LLC

Judgment Rendered: JUN 11 2010

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 555,169

Honorable Kay Bates, Judge Presiding

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Rev. Donald Britton
Baker, Louisiana

Plaintiff/Appellant
In Proper Person

Jennifer W. Moroux
Keely Y. Scott
Baton Rouge, Louisiana

Counsel for Defendant/Appellee
Harris Hayes, Ed Kaigler, Good Shepherd Full Gospel Missionary Baptist Church, Inc., & Good Shepherd Resource & Substance Abuse Center, LLC

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

McCLENDON, J.

Plaintiff Donald Britton appeals a judgment granting a motion for summary judgment that dismissed his claims against the defendants. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 30, 2005, Shepherd Full Gospel Missionary Baptist Church, Inc. ("the Church") incorporated Good Shepherd Resource Substance Abuse Center ("the Center"). On that same date, Britton entered into an agreement with Bishop Harris Hayes, the pastor of the Church, which provided that Hayes would be the clinic's overseer/administrator while Britton would be the program director. The agreement also provided Harris Hayes would receive 60% of the revenue received from the Center, while Britton would receive 40% of the revenue. These amounts were to be paid "after deduction for employee salaries, telephone bill and [light] bill."

The agreement also addresses Britton's duties as director of the Center. Specifically, Britton was to "supervise the operation of the clinic to include keeping compliance with all state and federal law..." and was required to "provide for his own professional liability insurance." The agreement was "binding for thirty six months after the operation of the clinic begins."

As recipient of an Access to Recovery ("ATR") federal grant, the Center was required to operate under the guidelines of the Access to Recovery program and the Louisiana Office for Addictive Disorders ("OAD"), a division of the Louisiana Department of Health and Hospitals ("DHH"). ATR authorizes eligible entities to provide services to ATR clients on a fee-for-service basis. The Center's fee-for-service billing must be consistent with DHH policy and ATR guidelines, and services claimed for reimbursement must be supported with adequate documentation.

During Britton's tenure as director, OAD performed an audit of the Center's records.[1] OAD performed a limited review of the Center's reports and financial statements through September 30, 2006. The auditor randomly selected ten client files for review out of seventy-one clients billed for services. Two of the ten files could not be located. For these two alleged clients, ATR was billed $785.00. The auditor also reviewed the Center's log forms, which revealed that transportation services were not properly documented. The auditor noted that of the 571 transportation services billed to DHH/OAD-Access to Recovery Program, only 11 were documented. The total amount billed to DHH/OAD-Access to Recovery Program for the undocumented services totaled $17,391.00. As a result of the audit, OAD recommended that the Center reimburse DHH/OAD $18,176.00.

Moreover, from September through December 2006, Hayes attested that both the Center and the Church received multiple complaints of sexual harassment made against Britton by females associated with the Center. On December 19, 2006, Hayes sent Britton correspondence to inform Britton that complaints had been made by three employees, provided Britton the names of the employees, and stated that if Britton's "conduct is not immediately corrected other action will be pursued."

On December 21, 2006, Ed Kaigler, Jr., head of the Board of Directors of the Church, notified Britton that a meeting had been scheduled for December 28, 2006, to address, among other things, concerns about the audit and the sexual harassment allegations against him. Kaigler requested Britton to bring "a copy of all documents that outline and describe the Agreement between [the Center] and

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[1] The following were listed as objectives of the audit:

1) To determine if fee-for-service billing is consistent with DHH policy, ATR guidelines and other applicable state/federal regulations.

2) To determine if fee for services claimed for reimbursement were supported with adequate documentation.

3) To determine [if] provider has a balanced set of financial records with reconciled bank statements consistent with generally accepted accounting principals.

the State Funding Source (Community Development Block Grant), billing procedures, audit reports, monthly and/or quarterly reports, and any other documents pertaining to the fiscal and programmatic status of [the Center]." On January 2, 2007, Britton was again asked to provide all documents pertaining to the OAD audit. Despite the requests, Kaigler and Hayes both attested that Britton failed to provide any documentation in connection with the audits. On January 16, 2007, Kaigler terminated Britton for ignoring requests by the Board and Hayes to produce information relating to the audits and due to allegations of inappropriate sexual advances toward females at the Center.

On May 10, 2007, Britton filed a petition for damages, naming Hayes, Kaigler, the Church, and the Center as defendants. Britton alleged that the accusations that he ignored requests to produce information and that he made inappropriate sexual advances towards female employees at the Center were false, and that the accusations damaged his reputation and good name. Britton asserted that the motivation for his termination was to deny Britton his 40% share of the revenue. Moreover, Britton alleged that since the inception of the Center through his termination on January 16, 2007, additional expenses beyond employee salaries, telephone bills, and light bills were deducted from his share of the revenue such that he never received the full amount of compensation required pursuant to the terms of the agreement. Britton sought, among other things, compensation for the reduction beyond that contractually agreed to from inception of the Center through January 16, 2007; his 40% interest in the revenue from January 16, 2007 through the end of the 36 month term; and damages for injury to his reputation and good name.

On August 10, 2009, the defendants filed a Motion for Summary Judgment, asserting that Britton cannot carry his burden of proof with regard to any claims adverse to them. Britton opposed the defendants' motion. On October 5, 2009, the trial court granted the defendants' motion, finding "that there are no genuine issues of material fact, and the defendants are entitled to judgment as a matter of law." On October 27, 2009, the trial court signed a

written judgment dismissing Britton's claims against the defendants with prejudice. Britton has filed the instant appeal to seek review of the trial court's ruling.[2]

DISCUSSION

Because this matter is before us on a motion for summary judgment, it is subject to *de novo* review as to the whether the grant of summary judgment was appropriate. **Motorola, Inc. v. Associated Indem. Corp.**, 02-0716, p.5 (La.App. 1 Cir. 6/25/04), 878 So.2d 824, 828, writs denied, 04-2314, 04-2323, 04-2326, 04-2327 (La. 11/19/04), 888 So.2d 207, 211, 212. The summary judgment procedure is expressly favored in the law, and is designed to secure the just, speedy, and inexpensive determination of nondomestic civil actions. LSA-C.C.P. art. 966(A)(2). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

The mover has the initial burden of proof that he is entitled to summary judgment. See LSA-C.C.P. art. 966(C)(2). If the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. See LSA-C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. See LSA-C.C.P. art. 966(C)(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA-C.C.P. art. 967(B).

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[2] Plaintiff has not assigned as error nor briefed the trial court's ruling with regard to damages for injury to his reputation or good name, so this issue is not subject to our review on appeal.

In his initial assignment of error, Britton asserts that the trial court erred in finding that he was an employee of the Center. Rather, Britton contends that he was a partner in the Center and not subject to termination. We disagree. The Center was incorporated on December 30, 2005, with the Church being designated as its sole shareholder. Later, the Center was converted to a Limited Liability Company, with the Church being designated as the sole owner of the membership interest. Britton had no proprietary interest in the property or stock of the Center. **Medline Indus. v. All-Med Supply & Equip.**, 94-1504, p. 5 (La.App. 1 Cir. 4/7/95), 653 So.2d 830, 833. Britton also had nothing at risk in the entity other than securing profits to receive a paycheck. The mere agreement to share the profits of an enterprise is not sufficient to establish a partnership or joint venture. See e.g., **Medline Indus.**, 94-1504 at p.5, 653 So.2d at 833 ("all parties must share in the losses as well as the profits of the venture"); see also LSA-C.C. art. 2801. Moreover, in his deposition, Britton admitted that he had no ownership interest in the Center.

Rather, the agreement between Britton and the Center was an employment contract. The employer-employee relationship is evidenced by four factors: (1) selection and engagement, (2) payment of wage, (3) power of dismissal, and (4) power of control. **Chailland Bus. Consultants v. Duplantis**, 03-2508, p. 6 (La.App. 1 Cir. 10/29/04), 897 So.2d 117, 123, writ denied 04-2922 (La. 2/4/05), 893 So.2d 878. Herein, Hayes, acting on behalf of the Center, selected Britton to work as the Center's director and Britton was paid a wage for his services in the form of 40% of the Center's revenues after deduction of certain expenses. Although Britton had the power to dismiss certain employees, the Center retained the power to terminate Britton's employment for failing to fulfill the duties set forth in his employment contract. Moreover, the agreement specifically provided that "Hayes will be the overseer/administrator of the substance clinic," while Britton had the authority to "supervise the operations" of the Center. Most importantly, Hayes, as administrator, had the power of control over Britton, including the right to

terminate Britton. Accordingly, because the contract at issue was an employment contract with a 36-month term, the first assignment of error has no merit.

In his second assignment of error, Britton asserts that the trial court erred in finding that he violated the terms of his employment contract. In his third and fourth assignments, Britton contends that the defendants are still indebted to him under the employment contract. Because there is an employment contract with a definite term, the defendants bear the burden of proof at trial and on the motion for summary judgment to establish just cause, or "serious ground for complaint," for termination of Britton's employment during the term of the contract. LSA-C.C.P. art. 966(C)(2); LSA-C.C. art. 2749.[3]

The employment agreement required Britton "to supervise the operation of the clinic to include keeping compliance with all state and federal law." Accordingly, Britton was required to follow all regulations set forth by DHH and OAD to obtain reimbursement under the ATR Program. As reflected in the audit report, those procedures, especially in connection with the transportation services, were not routinely followed.

Although Britton claims that he could not be terminated for overbilling because the audit report was not published until after he was terminated, Britton acknowledged that all of the violations reported in the audit occurred while he was the Center's director. Britton also admitted that he was responsible for the billing and the transportation logs, and that the auditor investigating the discrepancies met with him "numerous times." Britton's testimony was confirmed by Larry Morris, an OAD employee who was the lead auditor of the Center. Morris indicated that he communicated solely with Britton about the audit because he considered Britton to be the person in charge of the daily operation. Morris testified that he gave Britton an opportunity to find the

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[3] Louisiana Civil Code article 2749 provides:

> If, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.

documentation to substantiate the claims, but Britton was unable to do so. In addition, the defendants submitted the affidavits of Kaigler and Hayes, who both attested that Britton failed to provide them any documentation pertaining to the audits, despite repeated requests that he do so.

Moreover, the contract required Britton to maintain his own professional liability policy. Defendants acknowledge that Britton produced a Certificate of Insurance Occurrence Policy Form, effective 5/31/05 through 6/31/06, but note that Britton has not provided any proof of insurance from July 2006 through his termination in January 2007.

In light of the foregoing, we conclude that the defendants met their initial burden to show that Britton was terminated for just cause for his material breach of the terms of the contract. Because defendants put forth supporting proof to show that Britton was terminated for just cause, Britton may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA-C.C.P. art. 967(B).

Britton alleges in his opposition brief submitted to the trial court, as well as in his appellate brief in this court, that Hayes simply "did not provide the auditor with the fuel receipts to validate the transportation billing." Britton also asserts that he properly instructed the drivers on the appropriate paperwork that DHH and OAD required, but that Hayes told the drivers not to follow Britton's instructions. Generally, argument of counsel and briefs, no matter how artful, are not sufficient to raise a genuine issue of material fact. **Wilson v. Davis**, 07-1929, p. 15 (La.App. 1 Cir. 5/28/08), 991 So.2d 1052, 1063, writs denied, 08-2011, 08-2020 (La. 11/10/08), 996 So.2d 1070, 996 So.2d 1071. Even assuming that we could consider these statements despite the fact that they were not submitted in the form of an affidavit,[4] the assertions are self-serving and

[4] We recognize that the jurisprudence has consistently held that *pro se* plaintiffs should be allowed more latitude than plaintiffs represented by counsel because they lack formal training in the law and its rules of procedure. **Gray v. State**, 05-0617, p. 13 (La.App. 3 Cir. 2/15/06), 923 So.2d 812, 821.

unsubstantiated. See **Colon v. Colon**, 43,956, p.8 (La.App. 2 Cir. 2/25/09), 6 So.3d 304, 308 ("unsubstantiated and self-serving evidence did not support denial of summary judgment"). As such, Britton has failed to set forth specific facts showing that there is a genuine issue for trial with regard to whether he was terminated for just cause.[5]

Britton also urges that the defendants deducted additional expenses beyond those that the parties agreed upon in the written contract. We note that written contracts may be modified by oral contracts or by the conduct of the parties. **Fleming v. J.E. Merit Constructors, Inc.**, 07-0926, p.9 (La.App. 1 Cir. 3/19/08), 985 So.2d 141, 146. Modification of a written agreement can be presumed by silence, inaction, or implication. **Fleming**, 07-0926 at p.9, 985 So.2d at 146.

In his affidavit, Hayes attested that after the terms of the contract were agreed upon, he and Britton "decided that the Center needed a larger area in which to treat patients...[so Hayes] began renting a vacated hotel to house and treat the patients, which increased the expenses and revenues of the Center." Hayes attested that "[w]ith Britton's verbal consent, the Center withheld rental payments from Mr. Britton's salary." Moreover, Hayes attested that Britton never challenged these additional withholdings until he was notified of the sexual harassment complaints asserted against him. Britton has not challenged, either through affidavit or in his brief to this court, Hayes' attestations that the parties agreed to this oral modification. As such, Britton has failed to show that a genuine issue of material fact remains for trial. Therefore, assignments of error numbers 2, 3, and 4 are without merit.[6]

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[5] Although the defendants assert that the sexual harassment claims were additional grounds to terminate Britton for cause, we need not address that issue, having found other sufficient grounds for termination.

[6] In his fifth assignment of error, Britton asserts that the defendants are responsible for having to pay the State the sums due. This assignment of error is immaterial and presents no justiciable issue for our review.

DECREE

For the foregoing reasons, we affirm the judgment of the district court. Costs of this appeal are assessed against appellant, Donald Britton.

AFFIRMED.