

STATE OF MICHIGAN
COURT OF APPEALS

JOHN P. TREMBOWICZ and J.P. TREMBOWICZ
& ASSOCIATES, INC.,

UNPUBLISHED

June 13, 1997

Plaintiffs–Appellants,

v

No. 171718

Oakland Circuit Court

LC No. 90394917 CK

PRODUCTION STAMPING, INC., WILLIAM H.
JOHN, R.D. MURRAY & ASSOCIATES, INC., and
RICHARD MURRAY, jointly and severally,

Defendants–Appellees.

Before: Marilyn Kelly, P.J., and MacKenzie and J.R. Ernst,* JJ.

PER CURIAM.

In this breach of contract case, plaintiffs appeal as of right from a grant of summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm.

I

In 1984, William H. John, the owner of Production Stamping Incorporated, orally offered a job as Production Stamping’s exclusive manufacturer’s representative to John Trembowicz. Trembowicz had been working at General Motors Corporation (GM) at the time. He accepted John’s oral offer but informed him that, according to GM’s internal rules, he could not make a sales overture to GM for a period of two years after terminating employment with GM. John was concerned about this problem, because GM was Production Stamping’s biggest account. To cure the problem, Trembowicz arranged for Richard D. Murray to become Production Stamping’s exclusive manufacturer’s representative on an interim basis. On July 1, 1984, Production Stamping and Murray entered into a written contract. On July 15, 1985, Trembowicz left GM and set up his own business, J.P. Trembowicz & Associates.

*Circuit judge, sitting on the Court of Appeals by assignment.

On April 14, 1986, Trembowicz and Murray signed a contract with the knowledge and consent of Production Stamping and John. In it, Trembowicz's new company and Murray and his company, Richard D. Murray & Associates, agreed to share the commissions that each company earned from its respective business. The agreement provided that Trembowicz would be entitled to receive fifty percent of all commissions earned by Murray and Richard B. Murray & Associates. This included future commissions that Murray would earn while working as the manufacturer's representative for Production Stamping. For the first five years after Trembowicz left GM, he and Murray shared equally the commissions that Murray received from Production Stamping.

In April 1989, John approached Murray and informed him that Production Stamping intended to terminate the Murray-Production Stamping contract on August 31, 1989. Production Stamping intended to hire an in-house, salaried salesperson to become its manufacturer's representative. Pursuant to John's oral promise to Trembowicz in 1984, Trembowicz believed that he was entitled to become the in-house salesperson. John and Production Stamping refused to hire Trembowicz and hired Murray for the position instead. Murray's contract with Production Stamping went into effect on March 1, 1990.

Murray intended to honor his agreement with Trembowicz until Murray began working as the in-house salesperson for Production Stamping. However, in August 1989, Trembowicz ceased paying Murray commissions that Trembowicz received from Wright Plastic, an account established by Trembowicz. Trembowicz also refused to come to an agreement with Murray about how the commission sharing agreement should be settled. In March 1990, due to Trembowicz's refusal to share with Murray any of the commissions he was earning from Wright Plastic, Murray stopped paying Trembowicz any portion of the commissions that Murray was earning from business he had previously generated at Production Stamping. On January 28, 1991, Trembowicz sued Murray and Production Stamping for, among other things, breach of the oral and written contracts.

II

Trembowicz first argues that the trial court erred in declaring the oral contract between himself and Production Stamping invalid. We disagree.

We find that the contract was unenforceable as a matter of law pursuant to the statute of frauds. In both his deposition and in his second amended complaint, Trembowicz admitted that the alleged oral contract between himself and Production Stamping was not to become effective until two years after Trembowicz left GM. It was to last until Trembowicz retired at the age of sixty-five. Because the alleged oral contract could not be performed within one year, it had to be in writing to be enforceable. MCL 566.132(1)(a); MSA 26.922(1)(a), *Schipani v Ford Motor Co*, 102 Mich App 606, 612; 302 NW2d 307 (1981).

III

Trembowicz next argues that the trial court erred in dismissing his breach of contract claim against Production Stamping and John, because Trembowicz was a third party beneficiary of the Murray-Production Stamping contract. We disagree.

In order for Trembowicz to have standing to sue Production Stamping and John as a third party beneficiary, he must have been an intended third party beneficiary of the Murray-Production Stamping contract. *Rieth-Riley Construction Co, Inc v Dep't of Transportation*, 136 Mich App 425, 429-430; 357 NW2d 62 (1984). In deciding whether the parties to a contract intended to make someone a third party beneficiary, a court must determine from the form and meaning of the contract itself whether they objectively intended that person as a third party beneficiary. *Kammer v Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 189-190; 504 NW2d 635 (1993). The parties' subjective motives and intentions are irrelevant. *Alden State Bank v Old Kent Bank-Grand Traverse*, 180 Mich App 40, 44; 446 NW2d 599 (1989).

Third-party status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract. *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995). Where the contract is primarily for the benefit of the contracting parties, the incidental benefit that a third person derives from it does not vest that person with the right to sue for breach of contract. *Frick v Design Developers Inc*, 214 Mich App 177, 180; 542 NW2d 331 (1995).

A review of the contract between Murray and Production Stamping shows that Production Stamping never made an express promise to do something to or for Trembowicz. It does not contain an agreement whereby Production Stamping promises to make Trembowicz the exclusive sale agent for Production Stamping upon termination of the Murray-Production Stamping contract. In fact, Trembowicz's name does not appear in the contract. We find no promise, express or implied, in the Murray-Production Stamping contract made by Production Stamping for the benefit of Trembowicz. For this reason, plaintiff's claim that he was a third party beneficiary of the Murray-Production Stamping contract is without merit. *Dynamic Construction Co, supra*, at 427. The trial court did not err in granting Production Stamping and John's motion for summary disposition.

IV

Plaintiffs' next argument is that the trial court erred in granting Murray's motion for summary disposition. Murray, they assert, breached an oral contract with Trembowicz in which Murray agreed to work at Production Stamping under the direction and control of Trembowicz for two years until Trembowicz could assume the manufacturer's representative position at Production Stamping. We disagree.

The fact that the alleged oral contract between Murray and Trembowicz was to last for two years made the contract subject to the statute of frauds. MCL 566.132(1)(a); MSA 26.922(1)(a). Because it was never reduced to writing, it was unenforceable. See *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 550; 487 NW2d 499 (1992).

V

Plaintiffs allege that the trial court erred in granting Murray's motion for summary disposition, because Murray breached the April 14, 1986, written contract with Trembowicz. We disagree.

The trial court properly determined that the contract was unenforceable, because it violated the employee bribery statute. MCL 750.125; MSA 28.320. Contracts which are founded on an act prohibited by a criminal statute are void as violative of public policy. *Krause v Boraks*, 341 Mich 149, 155; 67 NW2d 202 (1954). Under the employee bribery statute, it is illegal for an employee to accept money with the understanding that the employee will act in a particular manner in relation to his employer's business. *People v Nankervis*, 330 Mich 17, 22; 46 NW2d 592 (1951).

Plaintiffs claim in their appellate brief that damages are not being sought on commissions earned by Murray between July 1, 1984 and July 15, 1985. However, the record indicates the contrary.

Plaintiffs argue that, even if we find it illegal for them to claim a percentage of Murray's commissions earned between July 1984 and July 1985, they are entitled to a percentage of the post July 1985 commissions. Those commissions can be separated from any illegal action between the parties. Plaintiffs assert that the issue of whether illegal acts are at the heart of a contract or whether they are sufficiently collateral and distinct so that the contract should be enforced is a question for the jury.

Only if a void section of a contract is not an essential part of the contract can it be severed from the rest. *Peebles v Detroit*, 99 Mich App 285, 296; 297 NW2d 839 (1980). Admissions by Trembowicz demonstrate that he entered into an agreement with Murray and Associates before the actual written agreement was signed. Murray and Associates received compensation from GM for the services it provided. Trembowicz, who was employed by GM, shared in those profits while employed at GM. Therefore, he was accomplishing illegally what he could not do legally. There is no factual issue to be determined by the jury, as it is clear that the illegal acts are at the center of the contract. *Id.* Under these circumstances, we will not overturn the trial court's decision that refused to enforce the contract.

Affirmed.

/s/ Marilyn Kelly
/s/ Barbara B. MacKenzie
/s/ J. Richard Ernst