STATE OF MICHIGAN

COURT OF APPEALS

CHARLES GARAVAGLIA,

Plaintiff-Appellant/Cross-Appellee,

v

CENTRA, INC., CENTRAL TRANSPORT, INC., CENTRAL CARTAGE CO. and MANUEL J. MOROUN a/k/a MATTIE MOROUN,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
June 2, 1998

No. 196203
Oakland Circuit Court
LC No. 95-500491CK

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Plaintiff sued defendants, claiming breach of an agreement to provide consulting services in the area of labor relations. After hearing oral arguments on counter motions for summary disposition, the trial court entered an order of judgment in favor of plaintiff, which held defendants jointly and severally liable for two retainer fee payments. The trial court determined that defendants had legally terminated the parties' contract, but, under the circumstances, had failed to adequately notify plaintiff of their intention to terminate the agreement.

Plaintiff appeals, claiming that he produced sufficient evidence to overcome the presumption that the parties' contract was terminable at will. Defendants cross appeal, claiming that since the contract was terminable at will by either party at any time, no notice was required.

There is a strong presumption in Michigan that an employment contract for an indefinite duration is terminable at the will of either party for any reason or no reason at all. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 654-655; 513 NW2d 441 (1994). "The rule is rather that where the parties have not agreed upon the term, duration, or manner of termination of such an agreement it is generally deemed to be terminable at the will of either party because they have not agreed otherwise." *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 240; 324 NW2d 732 (1982). However, the presumption may be overcome and a just-cause employment relationship may be established, if a party

can identify a just-cause provision in the contract relating to the discharge of employees or if an employee has a legitimate expectation to just-cause discharge in reliance on company policies. *Coleman-Nichols, supra* at 654. See also *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993).

A party claiming a contract must present sufficient proof either of a contractual provision for a definite term or of a provision forbidding termination absent just cause. *Rood, supra* at 117. In *Rowe v Montgomery Ward & Co, Inc,* 437 Mich 627, 652; 473 NW2d 268 (1991), the Court quoted 56 CJS, Master and Servant § 31, p 414:

> Permanent employment contracts. As a general rule employment contracts which in some form purport to provide for permanent employment, as where the agreement is for the employee to have a permanent position or permanent employment or employment for life, or the employee is hired to fill a "permanent vacancy," or where the employment is to be for as long as the master is operating, as long as the employee desires the position, or as long as the employee satisfactorily performs his duties, are terminable at will by either party where they are not supported by any consideration other than the obligation of service to be performed on the one hand and wages or salary to be paid on the other. [Emphasis added.]

Relying on the history behind *Lynas v Maxwell Farms,* 279 Mich 684; 273 NW 315 (1937), the Court determined that "as long as" statements do not necessarily provide durational terms and that any contract which seeks to provide permanent employment should be specific and definite with regard to duration. *Rowe, supra* at 654. The Court distinguished between employment contracts and contracts in general. *Id*. at 654.

In the instant case, plaintiff relied upon his understanding , as stated in his retention letter of July 18, 1986, that his financial arrangement would last "as long as (Moroun is) with the company." The trial court, in its opinion, cited a number of cases which dealt with similar open-ended durational periods and determined that they were contracts for an indefinite duration. See *Schippers v SPX Corp*, 444 Mich 107,123-124, 127; 507 NW2d 591 (1993) (as long as Hy-lift has a truck, you will be the driver); *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579, 611; 292 NW2d 880 (1980) (as long as I did my job); *Barber v SMH (US), Inc*, 202 Mich App 366; 509 NW2d 791 (1993) (as long as I was profitable and doing the job); and *Cowdrey v A T Transport*, 141 Mich App 617; 367 NW2d 433 (1985) (as long as you do your job and A T Transport is in business). However, plaintiff argues that all the cases relied upon by the trial court were oral durational promises. According to plaintiff, his case was clearly distinguishable because the parties placed the durational provision directly into their written agreement. Thus, the parties overcame any policy considerations and judicial distrust associated with giving contractual intent to oral employment arrangements. Because the durational provision, as long as Moroun is with the company, was in writing, plaintiff asserted that the contract was terminable only for just cause. We disagree. While the *Rowe* Court noted that it is easier to discern the parties' intention regarding the duration of their contract when they placed the provision in writing, there is no support for plaintiff's argument that by placing the durational provision in writing the parties

automatically created an agreement with a definite duration which was terminable only for just cause. *Rowe, supra* at 655.

Based on the holding in *Lichnovsky, supra,* plaintiff argues that the contract had a sufficiently definite duration and therefore, the contract was not presumptively terminable at will. In *Lichnovsky*, the defendant, the licensor, granted the plaintiff, the licensee, the exclusive right to use the Ziebart process in Genesee County. While the parties' contract stated that it would remain in full force and effect indefinitely, the contract could be terminated if the licensee failed to perform any of the terms or conditions of the agreement. In effect, the parties had provided for the manner of termination. Therefore, the *Lichnovsky* Court determined that despite the absence of a specific duration, the parties had agreed to terminate the contract based on just cause. To construe the agreement as permitting termination at will would be inconsistent with the provisions in the agreement relating to termination for the failure to perform. Because the parties provided the manner for termination, the contract was not terminable at will.

In the instant case, defendant Moroun may have left defendants' company at any time. He may have stayed with the company for twenty years or he could have left the day after the parties entered into the agreement. Unlike *Lichnovsky*, the parties' agreement did not provide for the manner of termination. No provision stated that the contract could be terminated for cause. Because the parties had not agreed upon the term, duration, or manner of termination, the contract was terminable at the will of either party.

Moreover, plaintiff failed to produce sufficient evidence to overcome the presumption that the parties' contract was terminable at will. Plaintiff failed to offer any evidence of a provision in the contract which stated that his discharge would be based on just cause. According to plaintiff, he provided sufficient evidence to rebut the employment at-will presumption through the letter of understanding and through his own affidavit. However, it is the substance of the parties' agreement which is relevant, not the fact that the agreement was manifested by a writing.

Plaintiff argues that the contract provided a durational term, which was a manifestation of the parties' intentions. According to plaintiff, the durational term was specifically negotiated by the parties because of his concern over job security. However, oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will. *Rowe, supra* at 645. In the instant case, plaintiff's affidavit fails to detail any such conversations between the parties. Therefore, plaintiff is unable to provide this Court with clear and unequivocal evidence of an oral statement made by any defendant concerning termination of the agreement. Because plaintiff has failed to provide any evidence to support the contention that his employment was only to be terminated for cause, the trial court correctly granted summary disposition.

Next, plaintiff argues that the trial court erred in determining that the parties' employment agreement was an at-will contract terminable at any time by either party because the parties' employment agreement was deemed to be valid and enforceable in a prior court proceeding. An agreement cannot be enforceable if it is not a binding contract. According to plaintiff, a contract both terminable at will and enforceable cannot coexist. We disagree.

The fact that a contract is terminable at will relates to the circumstances under which the parties may terminate future performance under the agreement. However, termination is just one of the terms contained in the employment arrangement. The remaining provisions in a party's contract are not deemed unenforceable simply because the parties have provided for a flexible method to terminate their contractual relationship. In the instant case, the parties established an agreement to govern their future working relationship. The agreement provided a detailed plan of compensation. Under the agreement, plaintiff was to remain available to handle employment relations matters for defendants in exchange for payment of a quarterly retainer fee and payment of his hourly rate. Because the parties' agreement was valid and enforceable, plaintiff was entitled to compensation until the time that the contract was terminated. The fact that a contract is terminable at will does not render the contract illusory.

Finally, plaintiff argues that the doctrine of res judicata bars defendants' claim that the contract was terminable at will. We disagree.

The doctrine of res judicata bars a subsequent suit between the same parties when the evidence or essential facts remain the same. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215; 561 NW2d 854 (1997); *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). However, res judicata bars relitigation of claims asserted by one party against another. *Van Deventer v Michigan National Bank*, 172 Mich App 456, 463-464; 432 NW2d 338 (1988). Plaintiff attempts to prohibit defendants from litigating an issue: whether the parties' agreement established an at-will employment relationship.

In the instant case, the parties have engaged in three different legal proceedings over the last decade. All three lawsuits dealt with breaches of the parties' employment agreement at three different points in time. Therefore, the facts or evidence essential to the instant action are not identical to facts or evidence essential in the prior actions. Moreover, defendants did not raise an at-will employment defense in the prior actions because defendants never asserted that they had terminated the contract. The issue in the instant case, whether the parties' employment agreement was terminable at will, could not have been resolved in the first two court proceedings.

Furthermore, we note that the doctrine of collateral estoppel does not apply in the instant case. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627, cert den 497 US 1004; 110 S Ct 3238; 111 L Ed 2d 749 (1990). Plaintiff has offered no evidence that the issue of whether the parties' employment agreement was terminable at will was essential to the judgment in either prior court actions. In fact, the issue was never asserted by either party.

On cross-appeal, defendants argue that the trial court erred by requiring them to provide notice to plaintiff of their intention to terminate the contract. We disagree.

Defendants correctly note that in cases of employment terminable at will, notice is not required by either party. *O'Connor v Hayes Body Corp*, 258 Mich 280, 282; 242 NW 233 (1932).

However, such notice relates to the advance warning of intended action. While defendants were not required to give advance notice of their intentions to terminate the parties' agreement, defendants should have notified plaintiff that the contract was terminated. However, plaintiff was not aware that defendants terminated the contract until he filed his lawsuit.

Defendants argue that plaintiff was notified that they were terminating the agreement when they failed to pay a quarterly retainer fee payment. Based on the parties' history, the fact that a payment was late was not an out of the ordinary occurrence. Plaintiff had no reason to know that defendants terminated their agreement until he was provided an answer to his complaint in the instant lawsuit. Furthermore, general contract principles of good faith and fair dealing required defendants to inform plaintiff that the contract was terminated. See generally, *Misco, Inc v United State Steel Corp*, 784 F2d 198, 203 (CA 6, 1986). Such a requirement does not seem unduly harsh in light of the ease with which defendants could have informed plaintiff that the contract was terminated. We find that the trial court's resolution of the issue was fair and reasonable under the circumstances.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff