STATE OF MICHIGAN

COURT OF APPEALS

DUANE H. BARLOW,

Plaintiff-Appellee/Cross-Appellant,

v

M.J. WATERMAN & ASSOCIATES, INC., and MICHAEL J. WATERMAN,

Defendant-Appellant.

UNPUBLISHED
May 30, 2000

No. 206929
Oakland Circuit Court
LC No. 96-522879-CK

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

KELLY, J. (concurring in part and dissenting in part).

I concur in the majority opinion parts I and IV, but respectfully dissent as to parts II, III and V.

First, I believe that a directed verdict should have been granted in favor of defendant on plaintiff's breach of contract claim. I do not believe that the contract was modified by defendant's oral statement to plaintiff that he would "make things right." The burden was on plaintiff to prove an oral modification to the contract by presenting objective evidence of the parties' mutual assent. *Barber v SMH (US), Inc*, 202 Mich App 366, 369-370; 509 NW2d 791 (1993). The oral statement is analyzed to determine the meaning that reasonable persons might attach to the language. *Id.*, 369.

Waterman denied making a promise to repay the lost commissions and testified that he may have stated that he would "try to make things better" for plaintiff or that he would "help him out." Defendant presented testimony and other evidence supporting its contention that the step-down method was permanent. Plaintiff presented no evidence other than his subjective belief of what Waterman meant by his statement. Looking at the circumstances surrounding the institution of the step-down commission payment method and the relevant discussions between the parties, I do not find sufficient evidence of an oral modification of plaintiff's employment contract with defendant to flesh out a question of fact. Waterman's statement that he would "try to make things better" does not support plaintiff's subjective interpretation that the step-down method was temporary and that lost commissions would be paid when defendant's situation improved. There was no evidence of a meeting of the minds concerning the alleged oral modification of the contract. The court should have granted defendant's motion for directed verdict.

Second, any of plaintiff's claims that had accrued more than six years before the filing of the complaint were barred by the statute of limitations governing breach of contract claims. MCL 600.5807(8); MSA 27A.5807(8); *Tucker v Allied Chucker Co*, 234 Mich App 550, 562; 595 NW2d 176 (1999). Breach of contract claims accrue when the promisor fails to perform under the contract. *Id.*, citing *Cordova Chemical Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995). Since I believe plaintiff failed to present sufficient evidence of an oral modification of the 1988 commission reduction, his claims could only be grounded upon breach of his 1985 employment contract. Consequently, the statute of limitations barred any claim for unpaid commissions that occurred more than six years before the complaint was filed in March 1996.

Since I believe the trial court erred in denying defendant's dispositive motions based on the breach of contract count, and since the jury awarded damages only on that count, I would also find that the trial court erred in awarding attorney fees under MCR 2.403.

I would reverse the trial court's orders denying defendant's motions for directed verdict, JNOV, summary disposition based on the statute of limitations, and awarding mediation sanctions.

/s/ Michael J. Kelly