

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN E. EISTERHOLD,

Plaintiff-Appellant,

v

DIVERSEY CORP. a/k/a RATHON CORP.,
DIVERSEY CORPORATION, THE MOLSON
COMPANIES, LTD., AMERICLEAN SYSTEMS,
INC., DIVERSEY LEVER, INC., W. GRANT
FENWICK, A. CHRISTOPHER MILLSAP,
MARK J. HANKET, THOMAS E. KLEMA, and
JOHN DEYOUNG,

Defendants-Appellees.

UNPUBLISHED

February 6, 2001

No. 214868

Wayne Circuit Court

LC No. 96-643913-NO

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) (claim barred by statute of limitations) and MCR 2.116(C)(10) (no genuine issue regarding any material fact and defendants entitled to judgment as a matter of law) regarding his claims under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, and his claim of breach of contract, respectively. We affirm.

Plaintiff is a certified public accountant who began working for Diversey Corporation in 1993. In late 1993 or early 1994, plaintiff discovered what he believed were irregularities in Diversey's payroll tax reporting for one of its divisions. There followed several years of plaintiff documenting these alleged irregularities, with no action taken by those who were informed by plaintiff. In 1996, The Molson Companies sold Diversey to Unilver, and along with another company, would be renamed AmeriClean Systems, Inc. Plaintiff continued to criticize AmeriClean's position regarding tax law compliance, and in March 1996, he declined AmeriClean's offer of employment. On April 14, 1996, plaintiff informed one of the vice-presidents that Diversey was required to disclose its past tax violations to the Internal Revenue Service (IRS), and that if the disclosure was not made, plaintiff intended to inform the IRS. On April 23, 1996, plaintiff was placed on administrative leave and discharged from employment.

Plaintiff filed suit on October 18, 1996, alleging, that he was discharged in violation of the WPA and in violation of public policy, and he alleged in his amended complaint, in part,¹ breach of contract for Diversey's failure to pay plaintiff a performance bonus. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), with regard to the claim under the WPA, because plaintiff filed this action after the expiration of the ninety-day statute of limitations, and pursuant to MCR 2.116(C)(10), because the trial court found no genuine issue of material fact regarding the existence of a contractual relationship between the parties. Finally, the trial court determined that plaintiff's WPA claim was frivolous and granted defendants' request for costs and attorney fees.

Plaintiff first argues that the trial court erred in granting summary disposition of his WPA claim on the basis that the claim was time barred. The issue whether a claim is within the period of limitation is a question of law, and is reviewed de novo. *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 324; 577 NW2d 881 (1998). The pleadings, affidavits, admissions, depositions, and documentary evidence filed in the action or submitted by the parties must be considered by the court when ruling on a motion under MCR 2.116(C)(7). MCR 2.116(G)(5).

A civil action under the WPA must be brought within ninety days after the occurrence of the alleged violation of the act. MCL 15.363(1); MSA 17.428(3)(1). In his complaint, the only wrongful conduct that plaintiff alleged under the WPA was defendants' placement of him on administrative leave on April 23, 1996. Plaintiff's original complaint was filed on October 18, 1996. Plaintiff initiated this action well after the expiration of the ninety-day limitations period. Because the sole basis of plaintiff's WPA claim was his discharge on April 1996, plaintiff's claim was time barred.

Plaintiff, however, contends that his claim under the WPA should not be dismissed on the basis of the statute of limitations because of the continuing violations doctrine. Although the continuing violations doctrine applies to claims under the WPA, *Phinney v Perlmutter*, 222 Mich App 513, 546; 564 NW2d 532 (1997), plaintiff alleged that the violation under the WPA was his discharge, which occurred on April 23, 1996. He also alleged in his complaint, with regard to any continuing violations, that after "April 23, 1996 through July 22, 1996 (a period of 91 days), there were settlement discussions between Plaintiff and Defendants." Plaintiff's complaint does not allege that defendants discriminated against him during these discussions. The only allegation of a violation of the WPA is plaintiff's discharge, which occurred on April 23, 1996. Based upon this date, plaintiff's claim is time barred by the WPA's ninety-day limitation period.

Accordingly, the trial court did not err in ruling that plaintiff's claim under the WPA was barred by the ninety-day limitation period.

¹ Additionally, plaintiff asserted a public policy basis for recovery on his count of wrongful termination. Plaintiff also asserted claims of national origin discrimination, defamation, slander, libel, and invasion of privacy. On appeal, plaintiff does not challenge the trial court's grant of summary disposition regarding these claims.

Plaintiff next argues that the trial court erred in finding that the WPA claim was frivolous, meriting the award of costs and attorney fees to defendants. Pursuant to MCL 600.2591; MSA 27A.2591, on motion of any party, if a court finds that an action was frivolous, the court shall award the prevailing party costs and fees. See also MCR 2.114. “A trial court’s finding that a claim was frivolous will not be reversed unless it is clearly erroneous.” *Meagher v Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997). “A claim is frivolous when (1) the party’s primary purpose in initiating the action or asserting a defense was to harass, embarrass, or injure the prevailing party, (2) the party had no reasonable basis to believe that the underlying facts were true, or (3) the party’s position was devoid of arguable legal merit.” *Id.*, citing MCL 600.2591(3)(a); MSA 27A.2591(3)(a). If the court determines that plaintiff pleaded a frivolous claim, the imposition of sanctions is mandatory. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

Plaintiff’s WPA claim was clearly barred by the statute of limitations and was therefore frivolously pursued. Plaintiff acknowledged that he was aware, as his counsel was aware, that any WPA claim began to accrue on the date that plaintiff was discharged on April 23, 1996. Plaintiff’s position was devoid of arguable legal merit. Plaintiff did not specify acts of continuing violations in his complaint that could have removed the statute of limitations bar to the WPA claim. In his response to defendants’ motion for summary disposition, plaintiff argued, but presented no evidence in support, that defendants engaged in continuing violations by denying him a standard severance package. Further, plaintiff refused to sign the severance agreement that defendants offered.

Plaintiff also had retained counsel and knew about the time constraints for filing his claim. The evidence showed that after April 23, 1996, plaintiff corresponded with defendants through his attorney. On July 15 or 16, 1996, plaintiff consulted a different attorney about filing a WPA claim. Plaintiff admitted in his deposition that he was concerned about the expiration of the ninety-day statute of limitations, which he believed would occur on July 22, 1996. Still, plaintiff did not file his original complaint until October 18, 1996.

The trial court concluded that plaintiff’s claim was frivolous in light of “[p]laintiff’s admissions that he was aware that the statute of limitations expired before he filed a cause of action.” In *Covell v Spengler*, 141 Mich App 76; 366 NW2d 76 (1985), this Court held that the trial court properly granted accelerated judgment and rejected the plaintiff’s argument that the application of the ninety-day statute of limitations was unfair. This Court specifically noted that the plaintiff admitted that he had consulted an attorney within one month of his discharge and was “specifically informed by labor board personnel of his potential cause of action against defendants under the Whistleblowers’ Protection Act.” *Id.* at 83. Here, as in *Covell*, plaintiff failed to make any showing that the statute of limitations operated arbitrarily or capriciously in barring his cause of action.

Accordingly, the trial court did not clearly err in finding that plaintiff’s WPA action was frivolous, and in awarding costs and attorney fees to defendants as mandated by MCL 600.2591; MSA 27A.2591.

Lastly, plaintiff argues that the trial court erred in granting summary disposition regarding the breach of contract claim on the basis that there was no genuine issue of any material fact. A

trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek, supra* at 337. The court is to consider the pleadings, affidavits, admissions, depositions, and any other documentary evidence submitted in the action or filed by the parties, MCR 2.116(G)(5), to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra* at 337.

In order to form a valid contract, there must be mutual assent with regard to all the essential terms. *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). Mutual assent is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Id.*, quoting *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990).

The documentary evidence supporting plaintiff's breach of contract claim is limited to a March 29, 1996, memorandum written by defendant Thomas Klema (a vice-president with Diversey), a letter dated April 26, 1996, and Klema's deposition testimony. In the memorandum summarizing his telephone conversation with plaintiff, Klema stated that the performance bonus of \$6,000 was contingent upon the completion of certain objectives, which were listed. Klema stated that plaintiff wanted more money, but the offered bonus was \$6,000. Plaintiff maintains that the amount of the bonus was \$12,000. The typewritten memorandum concludes a handwritten notation and signature suggesting that the amount of the bonus was changed from \$6,000 to \$12,000. In his letter following plaintiff's termination, Klema stated that on June 30, 1996, or shortly thereafter, plaintiff would "receive the performance bonus previously discussed of \$6,000, gross."

Although plaintiff presented evidence of a factual dispute regarding the amount of the performance bonus, we conclude that the amount of the bonus is irrelevant and summary disposition was properly granted with respect to plaintiff's breach of contract claim. Even if a binding contract existed, plaintiff did not perform under the contract. By the terms set forth in the memorandum, and by Klema's deposition testimony, the payment of the bonus was conditioned upon plaintiff's service during the transition period until June 30, 1996, and the fulfillment of certain objectives. Plaintiff failed to complete these objectives. Klema testified that plaintiff was terminated on April 23, 1996 based upon his refusal to cooperate with the goals of the team and the winding down process.

The trial court found, in part, that plaintiff had acted in bad faith. Plaintiff discovered irregularities in Diversey's payroll tax accounting system in December 1993 or January 1994. Plaintiff did not bring this matter to the attention of management until November 1994. Plaintiff did not threaten to report the violations to the IRS until he had rejected employment from AmeriClean in March 1996. Furthermore, defendants supported their motion for summary disposition with the deposition testimony of Klema. Klema described plaintiff as uncooperative and insubordinate during the transition period. Plaintiff was unfocused on the tasks at hand and did not fulfill the expectations connected with the offer of a bonus. Although, when plaintiff was initially placed on administrative leave Klema stated that plaintiff would still receive his bonus if he signed the agreement, this statement was gratuitous because plaintiff did not perform the required duties.

Accordingly, we conclude that Diversey was not obligated to pay the bonus because plaintiff's failure to complete the objectives excused Diversey's performance. "One who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317, 323; 395 NW2d 31, (1986). The trial court properly granted summary disposition for defendants with regard to the breach of contract claim.

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Hilda R. Gage