STATE OF MICHIGAN

COURT OF APPEALS

ROBERT B. LEDBETTER, JR.,

Plaintiff-Appellant,

v

BHAGWAN P. THACKER, DIRECT SOURCING SOLUTIONS, INC., SNAPP, INC., BPT SYSTEMS & SERVICES, INC., and SNAPP, L.L.C.,

Defendants-Appellees,

and

ANCERS CORPORATION, PCS CORPORATION, and DEARBORN SYSTEMS & SERVICES, INC.,

Defendants.

UNPUBLISHED
December 18, 2003

No. 241039
Oakland Circuit Court
LC No. 00-027680-CK

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

In this interlocutory appeal, plaintiff Robert Ledbetter appeals by leave granted the trial court's order granting summary disposition and awarding costs to defendants Bhagwan Thacker, Direct Sourcing Solutions, Inc., SNAPP, Inc., BPT Systems & Services, Inc., and SNAPP, L.L.C. We affirm in part, reverse in part, and remand.

I. Basic Facts and Procedural History

Plaintiff was employed by one or more of the defendants in this matter from October 1998 until October 2000.[1] There is no dispute that plaintiff was terminated from this

[1] As explained below, the identification of which defendant or defendants actually employed plaintiff is the subject of the instant litigation.

employment, or that there was no just cause for that termination. Although there is also no dispute that plaintiff was an "at will" employee properly terminable without such cause, plaintiff contends that he was nonetheless contractually entitled to certain benefits upon his termination that were not received.

The basis for this contention arises from negotiations that took place between plaintiff and defendant Thacker, which plaintiff alleges culminated in an employment contract evidenced by the exchange of a letter and responsive email in October 1998. According to plaintiff, in early 1998 Thacker began soliciting him to leave his employment as a procurement manager at General Motors in order to work for Thacker and the defendant companies, each of which are similarly involved in the business of procuring materials and services for the automotive industry, and with which Thacker is allegedly associated either as a founder, director, officer, or behind the scenes principal.

Plaintiff alleges that after extensive discussions he submitted to Thacker a letter of agreement, dated October 9, 1998, setting forth the terms and conditions of his employment as agreed between the two. In this letter, which was addressed to Thacker as president of defendant Dearborn Systems & Services, Inc., plaintiff expressly indicated that he was "very excited to work for [Thacker] and [his] companies." Plaintiff also indicated that he was "eager to get started," and requested that Thacker respond with any "changes" to the letter by email. Thacker did so respond in an email dated October 11, 1998. In this response, Thacker acknowledged that the October 9, 1998 letter "fairly summarize[d]" the employment discussions between the two. Thacker, however, sought to add the following three provisions: (1) that plaintiff's employment would be at will, (2) that future compensation would be established by annual achievement objectives, and (3) termination for cause would excuse any liability on the part of "the company."

Plaintiff asserts that he agreed to these modifications and entered into a contract of employment under which he worked until his termination in October 2000. Plaintiff claims that because his termination was involuntary and without cause, he is entitled to benefits in accordance with his October 9, 1998 letter of agreement, which provided, for example, that "[i]n the event of my . . . non-voluntary termination my Current Compensation will be paid for one full year." When such post-termination benefits were denied, plaintiff brought this action for breach of contract, naming as defendants Thacker and each of the seven companies with which Thacker is allegedly associated.[2]

Defendants Thacker, Direct Sourcing Solutions, Inc. (Direct), SNAPP, Inc., BPT Systems & Services, Inc. (BPT), and SNAPP, L.L.C., thereafter moved for summary disposition, arguing that they were not liable to plaintiff because (1) the letter of agreement and email relied on by

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[2] The October 1998 letter and responsive email, as well as a number of other documents in this case, make reference to "DSSI," an acronym that plaintiff contends was used to collectively refer to all of the defendant companies allegedly controlled by Thacker. Defendants maintain that plaintiff is wrong in this regard and that the trial court correctly determined that DSSI refers only to defendant Dearborn Systems & Services, Inc.

plaintiff did not create a contract of employment, and (2) even if those documents did create such a contract none of those defendants were liable under the terms of that agreement because defendant Ancers Corporation (Ancers), which paid plaintiff's salary and retirement benefits during the term of his employment, was plaintiff's sole employer.[3] In response, plaintiff claimed that although Ancers was designated as the entity through which his employment would be administered, he was hired to work for Thacker and "his companies," and thus each of the named defendants were jointly and severally liable for the alleged breach of the contract.

The trial court, although concluding that the October 1998 letter and email created a valid contract of employment, found no basis to conclude that Thacker, Direct, SNAPP, Inc., BPT, or SNAPP, L.L.C. were liable under that contract. The trial court further concluded that because there was no basis for such liability, plaintiff should be held liable for the costs incurred by those defendants in defending against the breach of contract claim. See MCR 2.114(F); MCL 600.2591. Plaintiff thereafter sought leave to appeal the trial court's decisions in this regard, which this Court granted.[4]

II. Summary Disposition

A. Grant Before Completion of Discovery

On appeal, plaintiff first argues that the trial court erred in granting the defendants' motions for summary disposition because plaintiff had not yet been granted all requested discovery. We disagree.

As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. *Vargo v Sauer*, 215 Mich App 389, 401; 547 NW2d 40 (1996), rev'd on other grounds, 457 Mich 49; 576 NW2d 656 (1998). However, summary disposition may be proper before the completion of discovery where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id*. Thus, in order to prevail on an argument that summary disposition is inappropriate because discovery was not yet complete, the party opposing summary disposition must provide evidence that the discovery sought could establish the existence of a factual dispute. See *Gara v Woodbridge Tavern*, 224 Mich App 63, 68; 568 NW2d 138 (1997).

Here, plaintiff argues that summary disposition was premature because he has filed motions to compel discovery on which the trial court has not yet ruled. However, the record shows that plaintiff has successfully conducted extensive discovery in this matter and that all but a few discovery issues had been resolved at the time summary disposition was granted. Further,

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[3] The nature of the obligations of any contract that might exist here are not at issue on appeal.

[4] We reject defendants' argument that this Court is without jurisdiction to consider this matter because, as plaintiff argues, each of the company defendants in this matter have since merged under SNAPP, Inc., which has been dismissed from this appeal. For purposes of this appeal we do not consider the separate business entities to have merged in any way but, instead, consistent with defendants' argument, are treating each company as a separate entity.

the discovery deadline had passed. Plaintiff argues that he should have been given the opportunity to complete discovery before defendants were granted summary disposition. However, he has failed to identify what information he seeks to discover to establish that there exists a disputed issue of fact regarding his employment. Although it is possible that additional discovery could provide more insight into the matters at issue in this case and establish the existence of disputed facts, plaintiff has failed to persuasively demonstrate that this will happen, especially with respect to the defendants dismissed on summary disposition. Therefore, plaintiff has not demonstrated that summary disposition was inappropriate in the absence of further discovery. The trial court found that no further discovery would provide support for plaintiff's position. Because plaintiff has not shown otherwise, we decline to reverse on this ground.

B. Grant in Favor of Defendant Thacker

Plaintiff next argues that the trial court erred in granting summary disposition to defendant Thacker. We review a trial court's decision on a motion for summary disposition de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). Because the trial court relied on evidence outside the record in considering defendants' motions, we review the summary dispositions at issue here pursuant to MCR 2.116(C)(10). *Decker v Flood*, 248 Mich App 75, 80; 638 NW2d 163 (2001). MCR 2.116(C)(10) tests the factual support for a claim. *Hazle*, *supra*. All of the evidence and all reasonable inferences drawn from it must be viewed in favor of plaintiff. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

As previously noted, the trial court here concluded that although a contract was formed by the exchange of the subject letter and email, defendant Thacker was not personally liable under the terms of that contract. We find no error in either of these conclusions.

The existence and interpretation of a contract presents a question of law that is reviewed de novo on appeal. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). A trial court may determine the meaning of a contract as a matter of law only if the contractual terms are unambiguous. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994); *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991). Whether the contract is ambiguous is a question of law reviewed de novo. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

Reading the documents at issue here, we find no ambiguity and conclude that the trial court correctly determined both that a contract was formed but that this contract was not personal to Thacker. With respect to the existence of a contract for employment, the trial court reasoned that although Thacker's responsive email made three modifications to the terms of plaintiff's letter, the email nonetheless constituted an acceptance of plaintiff's offer as set forth in the October 9, 1998 letter of agreement or, at the very least, was a counteroffer that plaintiff accepted through his employment under the terms set forth in both the email and letter. We find no error in this conclusion and thus reject defendants' argument that the trial court erred in finding that a valid contract for employment exists in this matter. See, e.g., *Zurcher v Herveat*, 238 Mich App 267, 279; 605 NW2d 329 (1999) (with respect to the element of mutuality of agreement, all that is required for a valid contract is a "meeting of the minds regarding the 'essential particulars' of the transaction"); see also *St Paul Fire & Marine Ins Co v Ingall*, 228

Mich App 101, 106; 577 NW2d 188 (1998) (acceptance may be implied by the offeree's conduct, if an offer does not require a specific form of acceptance).

We similarly do not conclude that trial court erred in determining that Thacker was not personally liable under the terms of this contract. Rather than indicating that plaintiff was to be employed by Thacker personally, the October 9, 1998 letter was directed to Thacker as president of Dearborn Systems & Services, Inc., and referenced a position with that entity as a "key senior executive . . . reporting to the owner/president." Thacker's responsive email similarly referenced "employment with DSSI" and noted that such employment would have "the same general terms . . . that apply to all senior executives." Moreover, corporate documentation evidencing plaintiff's hire was generated on DSSI letterhead, and his business card while employed identified him as a "Director" at DSSI. Given these facts, the trial court correctly concluded that Thacker was not personally liable under the contract of employment and that, therefore, summary disposition in his favor was appropriate.[5]

C. Grant in Favor of the Defendant Companies.

Plaintiff also argues that the trial court erred in granting the defendant companies summary disposition because they are jointly and severally liable for the breach of contract. Plaintiff argues that the parties' use of the term "DSSI" was meant to refer to all of the corporations related to Thacker, thus binding each of those companies to the terms of the employment contract. However, we note that while other documents on record in this case use the acronym "DSSI" in a manner collectively referring to a number of the company defendants, the contractual documents themselves, i.e., the October 1998 letter and email, quite clearly do not. And, of course, that is the relevant inquiry with respect to which of the business entities are bound by the contract at issue here.

Moreover, it is uncontested that neither BPT nor Direct existed at the time of the contract at issue here was formed, but rather were incorporated sometime in 1999. While plaintiff argues that these entities can nonetheless be bound by the contract, the precedents cited by plaintiff in support of this assertion are inapposite. For example, in contrast to the facts in *Henderson v Sprout Brothers, Inc*, 176 Mich App 661, 671-673; 440 NW2d 629 (1989), plaintiff has produced no evidence to suggest that either BPT or Direct were "de facto" corporations at the time he contracted for employment. Moreover, it is insufficient to argue without precedential support, as plaintiff does, that BPT and Direct can be held liable under the contract of plaintiff's hire under a "ratification" theory, simply because they later provided services to customers that plaintiff

[5] We note that, on appeal, plaintiff argues that the trial court erred by not considering the "economic reality test" or the "joint employer" theory. However, plaintiff did not bring those arguments before the trial court and they are not preserved for appeal. See *Camden v Kaufman*, 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000). Further, we note that their merit (or lack thereof) depends on factual questions not resolved in the record. Accordingly, we decline to consider this argument. Cf. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997) (unpreserved issues may be addressed on appeal where "all the necessary facts are before this Court").

secured while working under that contract. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Plaintiff also argues that the trial court erred in granting summary disposition to defendants SNAPP, Inc. and SNAPP, L.L.C. because of their relationship to defendant Dearborn Systems & Services, Inc., which has since changed its name to, or has otherwise merged under, SNAPP, Inc. In doing so, plaintiff correctly points out that the trial court, in its opinion on summary disposition, did not dismiss Dearborn. Plaintiff thus argues that the trial court erred by entering an order that dismissed the two SNAPP defendants, as they were formerly known as Dearborn Systems & Services, Inc.

To the extent that this argument relates to SNAPP, Inc., we need not consider it. Following the trial court's order granting summary disposition, plaintiff and SNAPP, Inc. both accepted a mediation evaluation and, as a result, this Court entered an order dismissing SNAPP, Inc. as an appellee in this matter on the ground that, by accepting the case evaluation with respect to SNAPP, Inc., plaintiff's dispute with SNAPP, Inc. has ended. See MCR 2.403(M); see also *CAM Construction v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002). That being the case, we are bound by that order under the law of the case doctrine and can, therefore, offer plaintiff no relief against SNAPP, Inc. See *McNees v Cedar Springs Stamping Co (After Remand)*, 219 Mich App 217, 222; 555 NW2d 481 (1996). Moreover, with respect to SNAPP, L.L.C., plaintiff points to no evidence in the record to show that this entity was formerly known as Dearborn Systems & Services, Inc. Further, plaintiff did not make the argument presently advanced before the trial court. Accordingly, this issue is not preserved for appeal. *Camden v Kaufman*, 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000). In any event, we find that plaintiff's claims against SNAPP, L.L.C. were appropriately dismissed on summary disposition because there was no allegation or factual suggestion that defendant ever worked for SNAPP, L.L.C., a European-based company with which he had no relation. MCR 2.116(G)(4). Accordingly, we find that the trial court correctly granted summary disposition in favor of each of the defendants at issue here.

III. Order of Costs

Plaintiff next argues that the trial court erred in assessing costs for bringing frivolous claims against each of the defendants dismissed from this suit on summary disposition. We agree.

We review the trial court's decision to award costs against plaintiff for bringing frivolous claims against the dismissed defendants for clear error, reversing if we are left with a firm and definite conviction that a mistake has been made. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). We conclude here that a mistake has been made, and reverse the trial court's award of costs.

To begin with, the trial court engaged in no analysis whatsoever on this issue, merely stating that plaintiff had no relationship with the dismissed corporations and that "it was just a shotgun approach, and you should have waited to add parties if, after discovery you felt that it was true." The applicable test under the governing statute is whether plaintiff (1) had "no reasonable basis to believe that the facts underlying [his] legal position were in fact true," or (2) asserted a "legal position . . . devoid of arguable legal merit." MCL 600.2591(3)(a). As

discussed above, the trial court did not err in granting summary disposition to the defendants following discovery and argument on plaintiff's claims. However, that does not necessarily mean that plaintiff's view of the facts was unfounded or that the legal position he was advancing was completely without arguable merit. See *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22; 36; 666 NW2d 310 (2003).

As outlined above, the conditions of plaintiff's hiring and employment were confusing with regard to the identity of his employer. To summarize, plaintiff struck a deal with Thacker, purportedly to be hired by Dearborn Systems & Services, Inc., was actually paid by Ancers but was represented as a director of "DSSI," an acronym that was used during his employment to at times refer to a number of different entities. Further, during his employment, Dearborn changed its name to SNAPP, Inc., thus taking on the name of a corporation that had been in existence long before plaintiff was hired.

In light of these facts, the trial court clearly erred in concluding that plaintiff's claims against the dismissed defendants were frivolous. The overlapping relationship between the dismissed and remaining defendants, while perhaps more apparent than real upon detailed analysis, reasonably could have led plaintiff to conclude his filing suit against all the defendants was at least arguably meritorious.

We affirm in part, reverse in part, and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello