STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY KONOVALIV,

Plaintiff-Appellant,

v

JULIE BROWN,

Defendant,

and

PLASTECH ENGINEERED PRODUCTS, INC., FORD MOTOR CO., DIVERSIFIED CHEM TECH. INC., COAT-IT, INC., and ARNOLD S. JOSEFF,

Defendants-Appellees.

UNPUBLISHED
September 4, 2008

No. 278559
Wayne Circuit Court
LC No. 06-614779-CL

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiff Anthony Konovaliv appeals as of right the trial court's order granting defendants Plastech Engineered Products, Inc. (Plastech), Ford Motor Company (Ford), Diversified Chemical Technologies, Inc. (Diversified), Coat-It, Inc. (Coat-It),[1] and Arnold S. Joseff summary disposition under MCR 2.116(C)(8) and (C)(10).[2] This case arises out of Konovaliv's employment with Plastech. We affirm.

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[1] Coat-It is the wholly owned subsidiary of Diversified, whose stock is owned in substantial part by Arnold Joseff. Konovaliv worked for Diversified/Coat-It, and Coat-It will be used to refer to his employment with both companies.

[2] Julie Brown is not a party to this appeal because Konovaliv filed an amended complaint removing her as a defendant in June 2006.

I. Basic Facts And Procedural History

Konovaliv accepted employment with Plastech in December 2005. Plastech hired Konovaliv in the position of Vice President of Quality. The position was short-lived, and Plastech terminated Konovaliv on February 24, 2006. Konovaliv brought suit soon after.

Prior to his position with Plastech, Konovaliv worked for Ford and then Coat-It. Ford employed Konovaliv in various positions from April 1969 through December 1998. Konovaliv then worked for Coat-It from January 1999 through December 2005.

While at Ford, Konovaliv worked with Philip Martens, who went on to join Plastech in October 2005, as President and Chief Operating Officer. In mid-November 2005, Martens arranged a dinner meeting with Konovaliv to discuss the possibility of Konovaliv coming to work for Plastech. During the dinner, Martens, as stated in his affidavit, allegedly discussed his "goals and aspirations for Plastech and opportunities [he] thought might exist for someone with Mr. Konovaliv's background." He also discussed Konovaliv's future plans and how long he might want to work at Plastech. Konovaliv responded that he was nearing retirement, but he would like to work another five years. According to Konovaliv, the conversation allegedly went as follows: "How long do you expect to work for us?" "At least five years." "Good. I want you here at least five years." Konovaliv, as is made clear in his affidavit and complaint, understood the discussion to suggest a contract for five years, while Martens allegedly understood it to mean only that he was hopeful the working relationship would last at least five years because he believed five years to be an adequate amount of time to fully develop the company in the desired direction.

Although Konovaliv was securely employed with Coat-It, he was unhappy and interested in a change. He began negotiating an offer with Martens to join Plastech. Konovaliv was 59 years old at the time and preferred this to be his last career change. During negotiations, Konovaliv requested a written contract for five years, but Martens said that Plastech would not agree to put that in writing. Konovaliv then requested a for-cause-only clause, and Martens told him that Plastech would not agree.[3] Finally, he requested a written severance agreement, and Martens again told him that Plastech would not agree to such an arrangement. Konovaliv alleged in his affidavit that Martens told him not to worry because he would not be fired. He also alleged that he believed that Martens had the authority to hire whomever he wanted and set the terms of employment. On December 16, 2005, after discussing the terms of the proposed employment, including compensation, benefits, and various fringe benefits, Konovaliv believed he had an employment agreement with Plastech to work for five years as the Vice President of Quality.

Martens then arranged a meeting between Konovaliv and Jim Brown, Plastech's Chief Administrative Officer, and James Beining, Plastech's Vice President of Human Resources, on December 20, 2005, to review the specifics of an offer. Beining forwarded a formal employment

[3] Konovaliv's affidavit disputes Marten's affidavit on this point. Konovaliv claims that he did not request a "termination for cause" clause in his offer letter.

offer to Konovaliv that afternoon, and Konovaliv signed it that same day. Beining also refused Konovaliv's request for a written term contract or severance agreement. The offer specifically noted that the offer and acceptance did not create a contractual obligation and that terms and conditions of employment beyond those in the letter were outlined in Plastech's employee handbook. Konovaliv alleged that no one at Plastech provided him with a copy of the handbook, but he apparently also made no attempt to request a copy. The handbook clearly stated that employment with Plastech was on an "at-will" basis and that "[n]o employee or representative of the Company has the authority to enter into any contract of employment unless the same is in writing and signed by the President of Plastech. Nothing . . . shall alter, or be construed to alter, [an employee's] 'at-will' status . . . ." Konovaliv alleged that no person in connection with Plastech mentioned the term "at-will," and he believed that he had a five-year deal, regardless of the offer he signed and the lack of a written contract. He believed Martens had the authority to agree to such a contract term and had made the offer.

Konovaliv informed Martens on December 23, 2005, that he had resigned from Coat-It earlier that day, despite Coat-It's substantial counter-offer. On January 9, 2006, Konovaliv completed and signed a Plastech job application and received the Plastech employee handbook. Both the application and the handbook confirmed Konovaliv's at-will employment.

Konovaliv was discharged on February 24, 2006, after less than two months with Plastech. The reason for the dismissal is also disputed. Konovaliv alleged that it was due to an order from Ford headquarters. Coat-It and Plastech are both Ford minority suppliers. Konovaliv alleged that on or about February 15, 2006, Tony Brown, Ford's Senior Vice President of Purchasing, told Julie Brown, Plastech's owner, that she should not poach employees from other minority suppliers, referring to Plastech's hiring of Konovaliv. Konovaliv further alleged that Julie Brown was particularly sensitive to this complaint because it had been raised before with respect to her hiring Martens and another former Ford employee in 2005. Julie Brown was allegedly worried about losing business from Ford, a large purchaser important to Plastech's success.

Tony Brown alleged in an affidavit that he did not know Konovaliv before this lawsuit was instituted and knew nothing of his employment. He further alleged that he had no recollections of "any conversations with either Julie Brown, Arnold Joseff, or any other employee of Diversified, Coat-It, or Plastech," and that he did not suggest to anyone that hiring Konovaliv would "jeopardize Plastech's business relationship with Ford[,]" that it caused him any concern, or that "Plastech should terminate Mr. Konovaliv's employment." Julie Brown similarly alleged that

> [she did] not recall any conversation with Ford Motor Company representative Tony Brown or any other Ford representative concerning the fact that Anthony Konovaliv was employed by another minority-owned supplier of Ford prior to being hired by Plastech. I further do not particularly recall being told by Mr. Brown or any other Ford representative or gaining the impression from any conversation I had with Mr. Brown or any other Ford representative that he or any other representative of Ford was at all concerned about Plastech's action of hiring Mr. Konovaliv.

She alleged that she made the decision to discharge Konovaliv and that the decision to terminate "had nothing to do with the fact that he was previously employed by another minority-owned supplier of Ford Motor Company. Nor did anything Mr. Brown or any other representative of Ford may have said influence in any way my decision to terminate Mr. Konovaliv's [sic] employment." Rather, the decision was made relying on her observations that he "lacked the knowledge for the job for which he was hired and he was not a team player." Arnold Joseff, one of Coat-It's owners, also alleged in an affidavit that he had not spoken with Tony Brown or anyone else affiliated with Ford about Konovaliv, Plastech hiring Konovaliv, or Plastech "raiding." He alleged that he did not complain or tell anyone at Ford, Plastech, or any other supplier that Plastech's hiring of Konovaliv "was causing dissension."

Konovaliv filed a complaint in May 2006, alleging innocent misrepresentation against Plastech and tortious interference with contractual relations against Ford, Coat-It, Diversified, and Arnold Joseff. Before answering the complaint, Plastech moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that the claim was legally and factually unsupported. The trial court granted the motion in March 2007, on the ground that Konovaliv failed to meet the privity requirement for an innocent misrepresentation claim. The trial court denied Konovaliv's motion for reconsideration later that month. Ford, Coat-It, Diversified, and Joseff also moved for and received summary disposition, after alleging that Konovaliv could not factually sustain his claim for tortious interference in his employment relationship with Plastech. Konovaliv now appeals.

II. Summary Disposition

A. Standard Of Review

Konovaliv argues that the trial court erred in granting Plastech's, Coat-It's, Diversified's, Joseff's, and Ford's motions for summary disposition. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone;[4] the motion may not be supported with documentary evidence.[5] The court accepts all factual allegations in support of the claim as true, as well as any reasonable inferences or conclusions that parties can draw from the facts.[6] The court construes all factual allegations in the light most favorable to the nonmoving party.[7] However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.[8] The court should grant the motion only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.[9]

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[4] *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

[5] *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

[6] *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

[7] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[8] *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

[9] *Maiden*, *supra* at 119.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.[10] The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists,[11] and the disputed factual issue must be material to the dispositive legal claims.[12] Normally, the existence of a disputed fact must be established by admissible evidence;[13] a mere possibility that the claim might be supported by evidence at trial is insufficient.[14] When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party,[15] and "all reasonable inferences are to be drawn in favor of the nonmovant."[16] This Court reviews de novo a trial court's grant of summary disposition.[17]

B. Innocent Misrepresentation

Konovaliv argues that Plastech, through Martens, falsely promised him employment for five years and that in reliance on this alleged misrepresentation he resigned his employment with Coat-It. "[I]nnocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation."[18] A claim of innocent misrepresentation also requires, however, that the plaintiff and defendant be in privity of contract.[19] And here, the trial court found that the claim failed because it lacked privity of contract.

There is a presumption in Michigan that employment is at-will.[20] To overcome this presumption, a party alleging a contractual right to just-cause employment must provide sufficient evidence of a contractual provision for a definite term of employment or a just-cause term.[21] The statute of frauds bars a contract that is not in writing and cannot be performed within

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[10] *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

[11] MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[12] *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003).

[13] MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002).

[14] *Maiden*, *supra* at 121.

[15] *Corley*, *supra* at 278.

[16] *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

[17] *Maiden*, *supra* at 118.

[18] *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

[19] *Id*. at 28.

[20] *Rood v Gen Dynamics Corp*, 444 Mich 107, 116-117; 507 NW2d 591 (1993).

[21] *Id*. at 117.

one year.[22] Konovaliv argues that Martens' alleged oral promise to employ him for five years is not within the statute of frauds because the contract would be performed and employment could have been for less than one year if he had "performed his duties so poorly as to give Plastech just cause to discharge him." This argument is not convincing. A five-year contract for employment logically cannot be performed in one year.[23] If it ends by termination or agreement, the contract would not be performed "by its terms."[24] Finally, an alleged agreement that is void for failure to satisfy the statute of frauds cannot serve as the basis for an innocent misrepresentation claim.[25] Martens' alleged promise is void under the statute of frauds and as such, cannot serve as the basis for Konovaliv's innocent misrepresentation claim.

Alternatively, Konovaliv argues that they were in privity of contract by way of their at-will employment agreement. However, the at-will employment agreement did not come into being until December 20, 2005, when Konovaliv accepted Plastech's employment offer. Therefore, at the time Konovaliv alleged the misrepresentation took place, his dinner meeting with Martens, Konovaliv was not in privity of contract with Plastech. Further, the at-will employment agreement did not include a promise of continued employment. Rather, it specifically stated that "your acceptance does not create a contractual obligation upon Plastech. Additional terms and conditions of employment are as outlined in Plastech's Salaried Employee Handbook. If you are in agreement with the foregoing terms and conditions, please sign . . . ." The handbook was available on request and contained an explicit statement that employment with Plastech was at-will.

Konovaliv also raises a promissory estoppel argument in his appeal. Konovaliv did not, however, raise this claim in the trial court or in his statement of questions presented in his brief on appeal, so the claim was not preserved for appellate review, and we need not discuss it further.[26]

Accordingly, we conclude that the trial court properly awarded summary disposition to Plastech.

C. Tortious Interference With Employment

The elements of tortuous interference are the existence of a valid business relationship, defendant's knowledge of the relationship, an intentional interference by the defendant that causes or induces a termination of the relationship, and resultant damage to the plaintiff.[27] The interference must be improper, demonstrated by proving the intentional doing of an act wrongful

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[22] MCL 566.132; *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 533-534; 473 NW2d 652 (1991).

[23] See *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441-442; 505 NW2d 275 (1993).

[24] *Id*.

[25] *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426, 435-437; 280 NW 814 (1938).

[26] *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

[27] *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003).

per se or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading the plaintiffs' contractual rights or business relationship.[28] Further, "'[t]o establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.'"[29] A defendant's actions do not constitute improper motive or interference and are not wrongful per se when motivated by legitimate business reasons.[30]

The trial court found that even presuming that Joseff and Coat-It complained to Ford about Plastech poaching their executive and that Ford consequently complained to Julie Brown that she should not poach employees from other minority suppliers, Konovaliv still failed to establish that the complaints or interferences were improper or malicious. As the trial court stated: "There is nothing even straining the most creative analysis that would indicate that there was anything wrongful about somebody complaining to Ford about a hiring practice of another minority firm who may or may not be a competitor." Unease over employment practices is certainly a legitimate business reason to raise a complaint or concern. Konovaliv failed to establish, or even show the probability of establishing, that Ford acted improperly with the intent to harm Konovaliv's business relationship with Plastech.

Nevertheless, citing MCL 750.352,[31] Konovaliv contends that Ford's actions were unlawful because Michigan law explicitly prohibits a person from interfering with a person's pursuit of his lawful occupation through threats or intimidation. However, this statute is inapplicable where, again, even assuming arguendo that Joseff, Coat-It, and Ford complained about Plastech's alleged poaching, such complaints did not constitute threats or intimidation intended to interfere with Konovaliv's employment with Plastech.

Because Konovaliv failed to show improper or malicious interference, we agree that summary disposition was appropriate.

D. Summary Disposition Before End Of Discovery

A motion for summary disposition under MCR 2.116(C)(10) is generally premature when discovery on a disputed issue has not yet been completed.[32] However, the mere fact that the

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[28] *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-367; 695 NW2d 521 (2005).

[29] *Mino*, *supra* at 78, quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).

[30] *Badiee*, *supra* at 366.

[31] MCL 750.352 provides as follows:

> Any person or persons who shall, by threats, intimidations, or otherwise, and without authority of law, interfere with, or in any way molest, or attempt to interfere with, or in any way molest or disturb, without such authority, any person, in the quiet and peaceable pursuit of his lawful occupation, vocation or avocation, or on the way to and from such occupation, vocation or avocation, or who shall aid or abet in any such unlawful acts, shall be guilty of a misdemeanor.

[32] *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

discovery period remains open does not automatically mean that the court's decision to grant summary disposition was untimely or otherwise inappropriate. "The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position."[33] Mere speculation that additional pertinent information will be uncovered during the remainder of discovery is not sufficient to overturn the trial court's grant of summary disposition.[34]

In this case, there is little more than speculation that additional information will be uncovered during the remaining discovery period. No discovery could alter the fact that Konovaliv failed to plead a viable claim against Plastech. Even if Konovaliv acquired information showing a five-year oral promise on Plastech's part (unlikely considering that Martens said otherwise in his deposition and affidavit), this would not change the applicability of the statute of frauds. Further, Konovaliv failed to demonstrate that he stands a "fair chance" of discovering information showing that Ford, Coat-It, Joseff, or Diversified tortiously interfered with his employment. He merely argues that further discovery could uncover additional facts, without specifying what he expects to find or how it would help his argument. Indeed, Julie Brown stated in her affidavit:

> I made the decision to discharge Mr. Konovaliv. That decision was based upon my professional observation that he lacked the knowledge for the job for which he was hired and he was not a team player. The decision to terminate Mr. Konovaliv's employment had nothing to do with the fact that he was previously employed by another minority-owned supplier of Ford Motor Company. Nor did anything Mr. Brown or any other representative of Ford may have said influence in any way my decision to terminate Mr. Konovaliv's employment.

It is unlikely that Konovaliv will be able to prove otherwise, according to the affidavits and what Julie Brown, Tony Brown, and Joseff are prepared to testify.

Finally, even if we presume that Konovaliv's allegations are correct and that he is able to show that Joseff complained to Ford, Ford complained to Julie Brown, and this complaint and fear of losing Ford's business did impact Julie Brown's decision to terminate Konovaliv, there is still no evidence of improper or malicious interference. "Poaching" among minority suppliers is a legitimate business concern, and Konovaliv has failed to show any fair chance that he will find evidence of malicious intent with reference to Joseff, Coat-It, Diversified, or Ford.

Finally, it is worth mentioning that Konovaliv only took Martens' deposition during the year his action was pending. The deadline for conclusion of discovery would have already expired but for the fact that Ford filed a Motion to Extend Dates for Discovery. Konovaliv has failed to show a dispute of material fact concerning whether Ford, Coat-It, Diversified, and

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[33] *Id.*

[34] *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004).

Joseff behaved improperly, and we agree with the trial court that nothing would be gained by allowing the remaining few months of discovery.[35]

For these reasons, we agree with the trial court's decision to award summary disposition before the completion of discovery.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[35] See *Mable Cleary Trust, supra* at 507.