STATE OF MICHIGAN

COURT OF APPEALS

HOMER HARRISON,

Plaintiff-Appellant,

v

COMAU PICO, INC,

Defendant-Appellee.

UNPUBLISHED
April 28, 2009

No. 283635
Oakland Circuit Court
LC No. 2007-082041-CK

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

In this employment contract dispute, plaintiff Homer Harrison appeals as of right the trial court order granting defendant Comau Pico, Inc. summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts and Procedural History

Defendant, an industrial automation systems supplier, hired plaintiff as the President and Chief Operating Officer (COO) of its Powertrain Systems division (CPPS) effective May 1, 2006. Plaintiff's two-year contract provided that he could be terminated for cause and defined "cause" as, among other things, "the willful and continued failure (after written notice from Comau Pico) by Homer Harrison to substantially perform his primary duties and obligations to Comau Pico Powertrain Systems." Plaintiff's immediate supervisor was COO John Newman. On September 25, 2006, Newman met with plaintiff to discuss his job performance. Newman put his concerns about plaintiff's performance in a memo to plaintiff dated September 27, 2006. Over the next month, Newman met with plaintiff several more times and on November 2, 2006, sent plaintiff a second memo regarding his job performance. Newman expressed concern with plaintiff's failure to generate accurate financial forecasts and meet customer expectations, lack of preparation for meetings, insubordination and repeated excuses for his poor performance.

On November 9, 2006, two of defendant's employees met with two representatives of Ford, Scott Bybak and Larry Martin. At the meeting, Martin indicated that over the past six months, Ford employees had noticed a change in the way defendant did business and the change was "not good." Martin explained that defendant "lacked management support," it was no longer clear who the "go to" person was at the defendant company, plaintiff did not have Ford's confidence and did a "terrible job of presenting the CPPS test group," defendant's management

could not answer questions at meetings, plaintiff's performance during meetings was particularly poor, and defendant needed a stronger "front end" person. On November 13, 2006, Newman terminated plaintiff's employment.

On April 5, 2007, plaintiff filed suit against defendant for breach of contract. Specifically, plaintiff alleged that defendant did not have cause to terminate him under his employment contract. Plaintiff sent out notices of deposition for two of defendant's employees: Newman and Mark Pehrson, one of plaintiff's subordinates. When defendant cancelled their depositions, plaintiff filed a motion to compel. Following a hearing on the motion, plaintiff filed a proposed order for entry under the "seven-day rule." Defendant objected and moved to settle the language of the order. The trial court did not issue a decision on defendant's motion or an order clarifying its ruling.

Although discovery was not scheduled to close until February 22, 2008, the trial court heard oral arguments on defendant's motion for summary disposition on January 16, 2008. Plaintiff argued, among other things, that he should be allowed to take the depositions of Newman and Pehrson. On January 22, 2008, the trial court issued an opinion and order granting defendant summary disposition. The court made no mention of the discovery issue. Plaintiff now appeals as of right.

II. Plaintiff's Breach of Contract Claim

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. According to plaintiff, material questions of fact existed regarding his breach of contract claim and the trial court failed to consider the evidence in the light most favorable to the non-moving party. We disagree.

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we must consider all of the evidence submitted by the parties in the light most favorable to the non-moving party. *Id*. at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. The non-moving party may not rely on mere allegations or denials, but must go beyond the pleadings to set forth specific facts showing a genuine issue of fact for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

Plaintiff's employment contract provided that he could be terminated for cause and defined "cause" as, among other things, "the willful and continued failure (after written notice from [defendant]) by [plaintiff] to substantially perform his primary duties and obligations to [CPPS]." As required by the contract, plaintiff's supervisor, Newman, provided plaintiff with two written memos detailing the company's dissatisfaction with his performance. Plaintiff admitted at his deposition that he received both memos and that Newman spoke to him on numerous occasions about improving his performance. Although plaintiff stated in his affidavit that Newman spoke to him only once, "a party may not raise an issue of fact by submitting an

affidavit that contradicts the party's prior clear and unequivocal testimony." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997).[1]

In both memos to plaintiff, Newman stated that he had at least three primary concerns with plaintiff's performance, including his "ability to make accurate forecasts, making excuses when forecasts are not met, and preparedness." In his second memo, Newman added that customers repeatedly complained about plaintiff's performance and plaintiff had taken actions completely contrary to his instructions in regard to the "GM ancillary program." At his deposition and in his affidavit, plaintiff provided a number of excuses for his failure to generate accurate forecasts, including that it took time to learn defendant's forecast system, the information he received to generate the forecasts was dated and inaccurate, all of the forecasts were prepared with the help of his staff, and in his opinion, the company should have used a different method for generating forecasts. But, plaintiff admitted that he was ultimately responsible for all of the forecasts made during his employment, regardless whether his staff assisted him in generating them, he was repeatedly reminded of his responsibility to generate accurate forecasts, and for every month of his employment, CPPS missed the previous month's forecast. Clearly, plaintiff was either unable or unwilling to generate accurate forecasts using the method required by defendant. Plaintiff also admitted that he might have appeared unprepared because he disagreed with the forecasting method used by defendant, that he was warned about his lack of preparation for meetings, and that various customers had complained to Newman about his performance. In regard to the GM ancillary program, plaintiff admitted that defendant was projected to make a nine percent profit on the deal, but actually lost 17 percent. It is unclear whether plaintiff disregarded a specific order from Newman regarding the program.[2]

With the exception of the facts surrounding the GM ancillary program, it is beyond material factual dispute that plaintiff repeatedly failed to generate accurate forecasts, adequately prepare for meetings, and alleviate customers' concerns. Defendant informed plaintiff on numerous occasions, verbally and in writing, that his performance was unacceptable. Plaintiff was given the opportunity to improve and failed to do so. Regardless of any excuses plaintiff has offered for his poor performance, viewing the evidence in the light most favorable to him, there is no material factual dispute that plaintiff failed to substantially perform primary duties and obligations to defendant after receiving written notice from defendant as to the same. Thus, although the trial court did not include a standard of review in its opinion and order, we affirm the court's conclusion that defendant had just cause to terminate plaintiff's employment and was

---

[1] Defendant's affidavit is dated November 9, 2007, more than a month after he completed his deposition testimony.

[2] Newman stated in his second memo that plaintiff took actions completely contrary to his instructions regarding the program, but plaintiff claimed in his deposition and affidavit that this did not occur.

entitled to summary disposition.[3]

III. Discovery

Plaintiff further argues that the trial court should have issued an order compelling the depositions of Newman and Pehrson and that it erred in granting defendant's motion for summary disposition before discovery was complete. We review a trial court's decision regarding discovery for an abuse of discretion. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 200; 732 NW2d 88 (2007); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

As this Court stated in *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004),

> Although incomplete discovery generally precludes summary disposition, summary disposition may nevertheless be appropriate if there is no disputed issue before the court or if further discovery does not stand a fair chance of finding factual support for the nonmoving party. A party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists.
>
> Although Michigan's discovery rules should be construed broadly, Michigan's commitment to open and far-reaching discovery does not encompass "fishing expeditions." [*Id*. at 476-477 (quotation marks, brackets, and citations omitted).]

Plaintiff argues that the trial court's "inaction" with regard to his motion to compel the depositions of Newman and Pehrson prejudiced him and "prevented him from discovering further evidence which may have supported his opposition to the Motion for Summary Disposition." According to plaintiff, the "Court's actions allowed the delay tactics and gamesmanship on the part of the [defendant's] attorney to harm [him] unfairly and to weaken his ability to prosecute his case." Although plaintiff argues that the trial court's failure to compel the depositions of defendant's employees and "premature" grant of summary disposition precluded him from uncovering evidence that *may* have supported his claims, he has failed to provide any independent evidence that a material factual dispute existed in this case. "Without any assertion regarding what facts are disputed or likely to be uncovered by further discovery, allegedly incomplete discovery will not bar summary disposition." *Id*. at 477. Plaintiff's

[3] Because there is no material factual dispute that plaintiff failed to substantially perform primary duties and obligations to defendant, providing defendant with just cause to terminate plaintiff's employment, we need not address defendant's alternative argument that it was entitled summary disposition on the basis of after-acquired evidence of plaintiff's willful misconduct.

assertion that further discovery would have produced support for his breach of contract claim is nothing more than conjecture. "Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition." *Id*. Thus, the trial court properly granted summary disposition to defendant, notwithstanding the allegedly incomplete discovery.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio