[Cite as *Swafford v. DECA Health, Inc.*, 2011-Ohio-2301.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jeffrey S. Swafford	Court of Appeals No. L-10-1175
Appellant	Trial Court No. CI09-4278
v.	
DECA Health, Inc., et al.	**DECISION AND JUDGMENT**
Appellee	Decided: May 13, 2011

* * * * *

Catherine H. Killam, for appellant.

G. Opie Rollison and Jennifer J. Dawson, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from the Lucas County Court of Common Pleas, appellant, Jeffrey Swafford, asks this court to consider the following assignment of error:

{¶ 2} "The trial court erred in granting summary judgment in favor of DECA, the employer in this case, as on the facts of the record a reasonable juror could [sic]

concluded that DECA induced its employee [sic] Mr. Swafford [sic] into committing the breach that allegedly gave cause to terminate him."

{¶ 3} DECA Health, Inc. ("DECA") provides billing and management services to physicians who have pain management practices and to ambulatory surgical centers. William G. James, Jr., M.D., is the sole owner and chief executive of DECA.

{¶ 4} On September 1, 2008, appellant was hired by Dr. James as the new president of DECA. Appellant entered into a written agreement under which his employment at DECA could not be terminated without cause until after one year from the commencement of the date of the agreement or January 1, 2010, "whichever is later." Pursuant the contract, Swafford's employment could, however, be immediately terminated with cause for, among other things, a breach of any of the terms of the employment contract. Under one of the terms of the contract, appellant agreed "to comply with all the rules and regulations of DECA * * *."

{¶ 5} As relevant to the case before us, Paragraph 10 of the agreement provides:

{¶ 6} "EMPLOYEE'S INABILITY TO CONTRACT FOR EMPLOYER.

{¶ 7} "Employee shall not have the right to make any contracts or commitments for or on behalf of DECA Health without first obtaining the express written consent of DECA Health."

{¶ 8} In addition, appellant's employment agreement contains the following paragraphs relevant to the modification of that contract:

{¶ 9} "12. COMPLIANCE WITH EMPLOYER'S RULES. Employee agrees to comply with all of the rules and regulations of DECA Health.

{¶ 10} "* * *

{¶ 11} "13.2 *Entire Agreement*. This agreement contains the entire agreement of the parties with respect to the subject matter hereof. No oral or written agreement or understanding, except an amendment duly adopted in accordance herewith, affects or amends the terms of this agreement. This Agreement supersedes any prior written or oral agreements between the parties.

{¶ 12} "13.3 *Amendment*. This agreement may be amended only by a writing signed by both parties hereto."

{¶ 13} It is undisputed that on January 28, 2010, appellant, acting on behalf of DECA, entered into a written consulting agreement with Tim Schramko, d.b.a. Schramko & Associates, L.L.C. ("Schramko"), "for the purpose of expanding the pain management services of DECA Health." It is also uncontroverted that appellant did not obtain express written consent from DECA, that is, Dr. James, prior to entering into this contract. Appellant argued, however, that he called Dr. James and obtained his oral consent to enter into the Schramko agreement. Dr. James denied that he gave that permission, either oral or written.

{¶ 14} In addition, on January 29, 2009, appellant took some samples of Cymbalta, an antidepressant, from one of the pain centers managed by DECA. According to Swafford, he was authorized by a Dr. Lee, who was previously employed at

one of these pain centers, to take the samples for the treatment of a heart condition. When, however, appellant was asked to present a prescription for this drug or any other current form of authorization before taking the samples, he failed to do so, but still took the samples.

{¶ 15} As a result of the alleged violations of Paragraphs 12, 13.2, and 13.3 of the employment agreement, DECA immediately terminated Swafford's employment, with cause. On May 15, 2009, appellant filed a complaint in the trial court asserting a claim of breach of contract/wrongful discharge against appellee and a claim of defamation against Michael Heifferon, the Chief Operating Officer of DECA. The latter claim was subsequently voluntarily dismissed, without prejudice, pursuant to Civ.R. 41(A).

{¶ 16} On March 10, 2010, appellee filed a motion for summary judgment supported by the depositions of the individuals involved in this controversy and Dr. James' affidavit. DECA set forth the following two bases for its motion: (1) appellant breached the employment agreement by entering into the contract with Schramko without express written consent, and (2) appellant violated Paragraph 12 of the agreement by taking Cymbalta samples without authorization. Appellant filed a memorandum in opposition to appellee's motion for summary judgment in which he urged that appellee either waived or was estopped from enforcing Paragraph 10 because a question of fact existed on the issue of whether Dr. James verbally gave him permission to enter into the Schramko contract. In addition, Swafford argued that questions of fact existed as to

whether his action in taking the Cymbalta samples violated any written DECA rule or regulation and/or if this rule or regulation was actually enforced.

{¶ 17} On May 26, 2010, the trial court granted DECA's motion for summary judgment. In doing so, the court relied on the fact that appellant failed to obtain express written consent from DECA before entering into the contract with Schramko. It did not address the issue of the alleged unauthorized taking of Cymbalta samples. Moreover, appellant does not raise this issue on appeal.

{¶ 18} In his sole assignment of error, Swafford again contends that the trial court erred in granting summary judgment to appellee because a question of fact exists as to whether Dr. James induced appellant into signing the contract with Schramko. Therefore, appellant argues DECA is either estopped from asserting a lack of written authorization in entering into that contract and/or waived its right to enforce literal compliance with that portion of the employment contract.

{¶ 19} An appellate court reviews summary judgment rulings de novo, applying the same standard as the trial court. Under Civ.R. 56(C), summary judgment is appropriate only when (1) no genuine issue as to any material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. Nevertheless, once the

movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 20} Appellant first argues that the doctrine of equitable estoppel is applicable to this cause because it was Dr. James who induced him into breaching his employment agreement by entering into a contract with Schramko without DECA's prior written consent. Equitable estoppel is an affirmative defense that occurs when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment. *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, ¶ 7, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.* (1994), 71 Ohio St.3d 26, 34. In order to demonstrate equitable estoppel, the proponent must prove four elements: (1) the opposing party made a factual misrepresentation, (2) it was a misleading misrepresentation, (3) it induced actual reliance that was reasonable and in good faith, and (4) it caused detriment to the relying party. *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 379.

{¶ 21} Here, even if we assume Dr. James verbally granted appellant permission to sign a contract with Schramko, Swafford could not reasonably rely on that "permission" because his employment contract not only expressly states that appellant could not enter into a contract without first obtaining the express written consent of DECA Health, but also clearly requires that the terms of that employment contract could

be amended "only by a writing signed" by both Swafford and DECA. In other words, under that agreement, Dr. James lacked the authority to orally amend appellant's employment contract, including Section 10. See *Kelley v. Ferraro*, 188 Ohio App.3d 734, 2010-Ohio-2771, ¶ 39; *Chiaverini v. Jacobs*, 6th Dist. No. L-06-1360, 2007-Ohio-2394, ¶ 24. Thus, even if Dr. James orally "induced" appellant to enter into the Schramko contract, appellant, who is presumed to have read and understood his employment agreement, could not reasonably rely on that inducement. *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, ¶ 10, citing *Haller v. Borror Corp*. (1990), 50 Ohio St.3d 10, 14.

{¶ 22} Appellant also argues, as he did below, that DECA waived "literal compliance" with the terms of his employment agreement because a party, to wit, Dr. James, to the contract engaged in a course of conduct inconsistent with that compliance by orally telling Swafford to enter into the contract with Schramko. Again, we must disagree. As set forth in *Kelley v. Ferraro*, supra, at ¶ 39:

{¶ 23} "Ohio law is very clear that a contract that expressly provides that it may not be amended, modified, or waived except in a writing executed by the parties is not subject to oral modification. *Freeman-McCown v. Cuyahoga Metro. Hous. Auth.* (Oct. 26, 2000), 8th Dist. Nos. 77182 and 77380; *Rosepark Properties, Ltd. v. Buess*, 167 Ohio App.3d 366, 2006-Ohio-3109, ¶ 38; *Chiaverini, Inc. v. Jacobs*, 6th Dist. No. L-06-1360, 2007-Ohio-2394, ¶ 24."

{¶ 24} Based upon the foregoing, and taking as true the allegation that Dr. James orally told appellant to enter into the contract with Schramko, that oral statement could not waive Paragraph 10, which required Swafford to obtain "the express written consent of DECA" before he entered into a contract with Schramko. Thus, the trial court did not err in granting summary judgment to DECA, and appellant's sole assignment of error is found not well-taken.

{¶ 25} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant, Jeffrey Swafford, is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE