

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ANTHONY DENILLO

Appellant

v.

STARWOOD HOTELS & RESORTS
WORLDWIDE, INC. D/B/A WESTIN
CONVENTION CENTER, PITTSBURGH

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1412 WDA 2013

Appeal from the Orders entered August 5, 2013
In the Court of Common Pleas of Allegheny County
Civil Division at No: GD-09-020333

BEFORE: PANELLA, MUNDY, and STABILE, JJ.

MEMORANDUM BY STABILE, J.:

FILED JUNE 24, 2014

Anthony Denillo appeals from two orders of the Court of Common Pleas of Allegheny County (trial court). The first order overruled his preliminary objections to Appellee Starwood Hotels & Resorts Worldwide, Inc. d/b/a Westin Convention Center, Pittsburgh's (Starwood) preliminary objections. The second order sustained Starwood's preliminary objections to Appellant's amended complaint, and dismissed this action with prejudice. After careful review, we affirm.

Appellant was a union member and employee at Starwood's convention center. On September 13, 2007, he was fired for refusing to consent to an on-site drug test. Appellant claimed that Starwood's drug-free workplace policy required any drug tests to be conducted off-site. On

November 5, 2009, Appellant filed a complaint asserting claims for (1) wrongful termination, (2) “violation of public policy;” and (3) detrimental reliance. Appellant contended that Starwood discriminated against him on the basis of sex, race, disability, and his status as recovering drug user. He further claimed that Starwood terminated him without justification and in violation of public policy. Appellant finally contended that he had relied to his detriment on representations that Starwood would treat him equitably and fairly, and that his termination was a “direct tortious breach of contract.” Complaint, 11/5/09, ¶ 50.

Starwood filed preliminary objections in the nature of a demurrer, arguing that Appellant—as a union employee—could not assert a claim for wrongful discharge. Starwood further argued that Appellant’s detrimental-reliance claim failed to plead sufficient facts and Appellant had failed to attach any writing on which to base a breach-of-contract claim.

The Honorable Judith L. A. Friedman entered an order sustaining Starwood’s preliminary objections. The order granted Appellant 60 days to file an amended complaint “along the lines discussed at argument on the videotape [sic] record.” Trial Court Order, 1/14/10.

On March 19, 2010, *i.e.*, 64 days later, Appellant filed an amended complaint raising the same three claims. The amended complaint added language invoking the Americans With Disabilities Act (ADA), the

Pennsylvania Human Relations Act, and the Public Employe Relations Act.¹ The amended complaint, however, lacked a certificate of service. Thereafter, the case lay dormant for over two years.

On December 11, 2012, Appellant notified Starwood of the filing of the amended complaint seventeen months prior, and provided a back-dated certificate of service. Starwood removed the case to the United States District Court for the Western District of Pennsylvania, invoking federal-question jurisdiction because of the amended complaint's reference to the ADA. Appellant filed a petition to remand. In response, the federal district court granted Appellant's petition and remanded the case to state court. ***See Denillo v. Starwood Hotel & Resorts Worldwide, Inc.***, No. 2:12-CV-1866, 2013 WL 2432343, 2013 U.S. Dist. LEXIS 78072 (W.D. Pa. June 4, 2013). The federal court concluded it had jurisdiction over the case, but that Starwood's notice of removal was untimely. 2013 WL 2432343, at *4-5; **see** 28 U.S.C. § 1447(c) (allowing remand for non-jurisdictional defects in a notice of removal if a petition to remand is filed within 30 days of removal).

Upon the case's return to the trial court, Starwood filed preliminary objections to the amended complaint. Starwood maintained that the law of the case doctrine required dismissal of the amended complaint because it

¹ 42 U.S.C. §§ 12101-12213; 43 P.S. §§ 951-63; and 43 P.S. §§ 1101.101-1101.2301, respectively.

was materially identical to the legally deficient original complaint. Starwood argued, in the alternative, that the amended complaint failed to state a claim upon which relief can be granted. Finally, Starwood raised technical defects of the amended complaint: (i) its untimeliness; (ii) the failure to properly serve; and (iii) the failure of counsel to sign or Appellant to verify.

In response, Appellant filed preliminary objections to Starwood's preliminary objections with a supporting brief. Appellant contended that (1) Starwood's preliminary objections were untimely because they were due in April 2010;² (2) Starwood waived the right to file preliminary objections because it filed a motion for summary judgment while the case was in federal court; (3) law of the case is an affirmative defense and cannot be raised in preliminary objections; (4) Starwood's preliminary objections were vague and legally deficient; and (5) Starwood failed to verify the preliminary objections.

The Honorable Robert J. Colville entered two orders that overruled Appellant's preliminary objections to Starwood's preliminary objections, sustained Starwood's preliminary objections, and dismissed the amended complaint with prejudice. Judge Colville stated that the coordinate jurisdiction rule barred him from revisiting Judge Friedman's order sustaining

² Appellant's counsel filed an affidavit in which his secretary declared that she mailed a copy of the amended complaint to counsel for Starwood on March 19, 2010.

the preliminary objections to the original complaint because the amended complaint was not materially different. Trial Court Opinion, 10/28/13, at 2. He also noted that the amended complaint was untimely filed, unverified, unsigned by counsel, and not properly served on Starwood according to the docket. *Id.* at 2-3.

On appeal, Appellant raises three issues:

1. Did [Starwood] have any right to file Preliminary Objections following remand to the Court of Common Pleas from the Federal District Court, where it had waived such issues in the Federal Court by filing a Motion for Summary Judgment, and failed to properly raise the issues argued in the Preliminary Objections?
2. Did the lower court err by finding that there was no basis that might sustain a cause of action in this case, and in making findings not only unsupported by the record, but contradicted by it, when it should have found there was a claim properly stated?
3. Did the lower court err by refusing to grant an opportunity to amend in this case where it is apparent that a contract claim has been stated, and that a claim may be set forth?

Appellant's Brief at 5.

[O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be

unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Richmond v. McHale, 35 A.3d 779, 783 (Pa. Super. 2012) (quoting **Feingold v. Hendrzak**, 15 A.3d 937, 941 (Pa. Super. 2011)).

Appellant first argues that the trial court erred in overruling his preliminary objections to Starwood's preliminary objections. He contends Starwood forfeited the right to file preliminary objections when it moved for summary judgment in federal court.

Initially, our review of this issue is substantially hampered. None of the documents filed while this case was in federal court are a part of the certified record, except for Appellant's remand petition and the federal court's remand order.³

We nevertheless reject Appellant's argument. Any trial court error overruling Appellant's preliminary objections to preliminary objections was harmless. As detailed below, Appellant's amended complaint is wholly without merit. Even if the trial court had sustained Appellant's preliminary objections to preliminary objections, ruled that Starwood waived the right to file preliminary objections, and required it to file an answer, the case still

³ In its supplemental reproduced record, Starwood included two documents it filed in federal court. Because those documents are not a part of the certified record, we cannot consider them. **See Rosselli v. Rosselli**, 750 A.2d 355, 359 (Pa. Super. 2000).

would have been properly dismissed on the pleadings because Starwood is entitled to judgment as a matter of law. **See, e.g., Wachovia Bank, N.A. v. Ferretti**, 935 A.2d 565, 570 (Pa. Super. 2007) (noting that a motion for judgment on the pleadings is similar to a demurrer).

Appellant argues incorrectly that Starwood waived certain defenses by actions it took in federal court. A party does not waive the defense of failure to state a claim if they fail to raise it in either a pre-answer motion in federal court or preliminary objections in a state trial court. **See** Fed.R.Civ.P. 12(h)(2); Pa.R.C.P.No. 1032(a). Thus, the proceedings in federal court are irrelevant to whether the amended complaint is legally sufficient.

Appellant next argues that the trial court erred in finding that his amended complaint failed to state a claim for breach of contract. He contends the drug-free workplace policy created a contract between him and Starwood.

Pennsylvania law squarely forecloses all claims pleaded in the amended complaint. Appellant cannot sue for wrongful termination because he was a union employee. **Phillips v. Babcock & Wilcox**, 503 A.2d 36, 38 (Pa. Super. 1986) (holding that union employees cannot sue for wrongful termination); **see also Henderson v. Merck & Co., Inc.**, 998 F. Supp. 532, 536-39 (E.D. Pa. 1998) (ruling that § 301 of the Labor Relations Management Act, 29 U.S.C. § 185, preempts state-law claims between an employer and a union employee for breach of contract). Even if he could sue for wrongful termination, Appellant cannot establish a claim for

“violation of public policy” based on Starwood’s drug-free workplace policy.⁴ ***Luteran v. Loral Fairchild Corp.***, 688 A.2d 211, 216 (Pa. Super. 1997) (holding that workplace handbooks and policies are not contracts unless they contain affirmative language indicating an intent to be contractually bound); ***Jacques v. AKZO Int’l Salt, Inc.***, 619 A.2d 748, 753 (Pa. Super. 1993) (“An employee handbook only forms the basis of an implied contract if the employee shows that the employer affirmatively intended that it do so.”).⁵ Finally, Appellant cannot state a claim for detrimental reliance on the drug-free workplace policy. Under Pennsylvania law, an employee cannot maintain a promissory estoppel claim based on provisions set forth in a non-contractual policy statement or handbook. ***Ruzicki v. Catholic Cemeteries Ass’n of the Diocese of Pittsburgh***, 610 A.2d 495, 498 (Pa. Super. 1992)

⁴ Appellant cannot maintain an action for “violation of public policy” for his termination because of race, sex, gender, disability, or his status as a former drug user. The Pennsylvania Human Relations Act “provides a statutory remedy that precludes assertion of a common law tort action for wrongful discharge based upon discrimination.” ***Clay v. Advanced Computer Applications, Inc.***, 559 A.2d 917, 918 (Pa. 1989).

⁵ We further cannot consider the drug-free workplace policy because Appellant failed to attach a copy to the amended complaint. ***See Weiley v. Albert Einstein Med. Ctr.***, 51 A.2d 202, 208 (Pa. Super. 2012) (noting that in considering preliminary objections in the nature of a demurrer, a court is limited to the complaint and any attachments). The workplace policy is a part of the certified record, Appellant having filed it the same day that his case was dismissed. If we could consider the contents of the policy, we note it expressly and unambiguously disavows the creation of any contractual rights.

(finding a similar claim “totally without merit”); **see also Paul v. Lankenau Hosp.**, 569 A.2d 346, 348 (Pa. 1990) (“An employee may be discharged with or without cause, and our law does not prohibit firing an employee for relying on an employer’s promise.”).

Appellant has made no attempt whatsoever to distinguish the above cases. Indeed, he cites only the Remedies Clause of the Pennsylvania Constitution. Pa. Const. art. I, § 11.⁶ To the extent Appellant argues that dismissing a case on preliminary objections violates the Remedies Clause, we find his argument frivolous.

Finally, Appellant argues that we should remand to allow him to file an amended complaint. We review the denial of leave to amend for an abuse of discretion. **The Brickman Group, Ltd. v. CGU Ins. Co.**, 865 A.2d 918, 926-27 (Pa. Super. 2004). “Although the trial court generally should exercise its discretion to permit amendment, where a party will be unable to state a claim on which relief could be granted, leave to amend should be denied.” **Id.** (internal citation omitted).

As we have noted above, the claims in Appellant’s amended complaint fail as a matter of law, and no set of facts entitle him to relief. Because any

⁶ Article I, Section 11 provides, in relevant part:

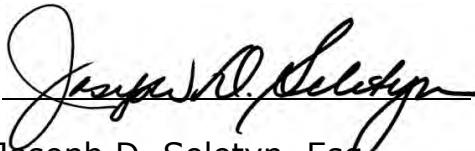
All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

further amendment would have been futile, the trial court did not abuse its discretion in dismissing Appellant's action with prejudice.

The trial court did not err in overruling Appellant's preliminary objections to Starwood's preliminary objections, sustaining Starwood's preliminary objections to the amended complaint, or in refusing to grant leave to amend. The law precludes the claims pleaded in the amended complaint.

Orders affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014