

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOSEPH BILLERA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
DeSALES UNIVERSITY,	:	
	:	
Appellee	:	No. 2417 EDA 2012

Appeal from the Order entered on August 7, 2012
in the Court of Common Pleas of Lehigh County,
Civil Division, No. 2011-C-0025

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, JJ.:

FILED JUNE 05, 2013

Joseph Billera ("Billera") appeals from the Order granting summary judgment in favor of DeSales University ("the University"). We affirm.

The pertinent facts of this case are as follows:

[Billera], a photography instructor, was employed at [the] University from 1981 until 2008. At all times, [Billera] held the title of Part-Time Lecturer in the Department of Performing and Fine Arts. He had contracts of varying length, with the final contract being from August 27, 2008[,] until December 22, 2008.

The subject litigation focuses on the aftermath of [Billera]'s involvement with a student project during the Fall 2008 semester. In September 2008, [Billera] gave a student permission to submit black and white nude photography for a project. The student asked and received permission to use the university TV/Film studio. During the photography session, the model used for the nude portraiture passed out while posing. According to [Billera's] Second Amended Complaint, [the University's] Fine Arts Department Chairperson ("Chairperson") reprimanded [Billera] for poor judgment with regard to his supervision of the project. On

either December 22 or December 23, 2008,^[fn] the Chairperson told [Billera] that [the University] would not be renewing his contract because of his poor judgment and improper supervision of the student project. [Billera] appealed the decision, and in March, 2009, the Faculty Review Committee reviewed [Billera's] appeal and upheld [the University's] decision.

[fn] [Billera] and [the University] appear to disagree on the date in question.

[Billera's] Second Amended Complaint, filed July 14, 2011, alleges Breach of Contract, and sets forth at least two different theories as to which contracts were breached. [Billera] claims that the Faculty Handbook ("Handbook") established a contract that was breached when [the University] did not afford [Billera] certain rights enumerated therein. [Billera] also claims [the University] breached a contract with [Billera] for the Spring 2009 semester. In [the University's] Motion For Summary Judgment, [the University] posits that [Billera] attempts to state a claim for Breach of Contract under a third theory, namely that [the University] breached its contract with [Billera] for the Fall of 2008. [] The [trial court] noted that, if [the University] alleges this, it is not stated explicitly in the Complaint. Furthermore, [Billera's] reply brief to [the University's] Motion For Summary Judgment does not address this theory. And finally, [Billera's] counsel acknowledged at argument that [Billera had] completed and was paid the full amount owed under his contract for the Fall 2008 semester. []

[] [The University] request[ed] Summary Judgment, claiming [Billera] ha[d] failed to establish a breach of a duty for any of these alleged contracts. [The University] argue[d] first that [Billera's] contract for the 2008 Fall semester could not have been breached, because all essential terms under the contract were met; most notably, [Billera had] completed the duration of his contract and received full payment as promised therein. [The University] also state[d] that the contract was at-will, and therefore did not entitle [Billera] to any automatic renewal or the issuance of a new contract. [The University] further argue[d] that the Handbook cannot be a contract because it does not contain "unequivocal provisions" that [the University] intended to be bound by it, and because [Billera]

never even reviewed it during his tenure, a fact [Billera] admits. Finally, [the University] argue[d] that [Billera] was not presented with a contract for Spring 2009 and that [Billera] has failed to identify the essential terms of any alleged contract for Spring 2009.

[Billera's] reply brief^[fn], in relevant part, focuse[d] on whether the Handbook was a contract under which [the University] was obligated, but failed, to extend [Billera] certain rights, including due process. [Billera] note[d] that he attempted to view the Handbook before it was online, but was not permitted to review it and was told by the Registrar's Office that it was for full-time faculty members. After the Handbook was online, he had "no reason to reference it" and was never instructed to read it. [Billera] also recite[d] facts alleged in [Billera's] Complaint and state[d] [that Billera] and [the University had] entered into either an express or implied contract for Spring 2009.

^[fn] [Billera] did not file a proper Answer to the Motion for Summary Judgment by [the University], and instead opted to simply file [a] Brief In Response to [the University's] Motion for Summary Judgment. The [trial court], in its discretion, accepted this as a reply.

Trial Court Opinion, 8/7/12, at 1-3 (footnotes in original).

The trial court granted the University's Motion for summary judgment. Billera then filed this timely appeal, raising the following issue: "Whether or not the trial court erred by granting [the University's] Motion for summary judgment?" Brief for Appellant at 4.

In his appellate brief, Billera has set forth a number of sub-issues relating to the above-stated issue of trial court error in granting the Motion for summary judgment. Several of those issues were not raised prior to the present appeal.

Pursuant to the Pennsylvania Rules of Appellate Procedure, “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a). “Issue preservation is foundational to proper appellate review.” ***In re F.C. III***, 2 A.3d 1201, 1211-12 (Pa. 2010) (citations omitted).

In the instant case, Billera did not raise the following sub-issues in the trial court: the existence of an oral contract or a unilateral contract, promissory estoppel, and equitable estoppel. Having failed to raise those sub-issues in the trial court, Billera has waived those claims, and we will not address them. Pa.R.A.P. 302(a).

Billera contends that the trial court erred in holding that a contract for the Spring 2009 semester did not exist. He asserts that he had either an express or implied contract with the University to teach during the Spring 2009 semester. Therefore, Billera contends that the trial court erred in granting the University’s Motion for summary judgment.

Our standard of review of an order granting or denying a motion for summary judgment is as follows:

We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court’s order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court’s order will be reversed only

where it is established that the court committed an error of law or abused its discretion.

Abrams v. Pneumo Abex Corp., 981 A.2d 198, 203 (Pa. 2009).

A party may make motion for summary judgment under the following circumstances:

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

[W]here a motion for summary judgment has been made and properly supported, parties seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial.

Marks v. Tasman, 589 A.2d 205, 206 (Pa. 1991); ***see also*** Pa.R.C.P.

1035.3(a) (providing that the adverse party to a motion for summary judgment “may not rest upon the mere allegations or denials of the pleadings but must file a response ... identifying (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion[,], or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or ... (2) evidence in the record establishing the facts essential to the cause of action ...”).

“In order for a court to find that a contract exists there must be proof of an offer, acceptance, and consideration.” **Mundie v. Christ United Church of Christ**, 987 A.2d 794, 801 (Pa. Super. 2009). An implied contract arises “when there is an agreement, but the parties’ intentions are inferred from their conduct in light of the circumstances.” **AmeriPro Search, Inc. v. Fleming Steel Co.**, 787 A.2d 988, 991 (Pa. Super. 2001).

To establish a cause of action for breach of contract, a plaintiff must plead “(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages.” **Pennsy Supply, Inc. v. American Ash Recycling Corp. of Pa.**, 895 A.2d 595, 600 (Pa. Super. 2006) (citations omitted). “While not every term of a contract must be stated in complete detail, every element must be specifically pleaded.” **Id.**

Billera contends that the trial court should have found evidence of an implied contract based on the copies of his past contracts with the University. Billera also alleges that the University had offered him an express written contract in December 2008, which he had signed and returned to the University, but that he had not received a copy of the executed contract.

In its Motion for summary judgment, the University attached copies of Billera’s past contracts for the Spring semesters of 2004-2008. Motion for Summary Judgment, Exhibit C. Each written contract contained a cover

letter dated January 9th, 10th, 11th, or 14th from Karen Doyle Walton, Provost/Vice President for Academic Affairs, stating the following:

Enclosed is your contract for the Spring 20__ semester. If you have any questions about the terms of your contract, I would be happy to discuss them with you. Please read carefully the Faculty Regulations on the reverse side of the contract; then sign the original and the copy and return them all to me as soon as possible. We will return one copy for your files when the contract has been fully executed.

Id. Each contract contained, *inter alia*, the beginning and ending dates of the contract, the salary to be paid, and the date upon which salary payments would commence. **Id.** Each contract contained a signature line for the faculty member/lecturer and for the Provost. **Id.** Attached to each contract were the University's Regulations for Part-Time Faculty. **Id.**

In addition to the prior contracts of Billera, the University also attached to its Motion for summary judgment copies of contracts for the Spring 2009 semester for other faculty member/lecturers. **Id.**, Exhibit N. Those contracts were similar to the contracts previously signed by Billera, and all were dated January 8, 2009. **Id.**

This evidence contradicted Billera's assertion that he received and signed a contract for the Spring 2009 semester in December 2008. The evidence produced by the University showed that Billera's previous contracts for the spring semester were offered to him in January of the year at issue. The University's evidence also established that contracts for other faculty

members for the Spring 2009 semester were mailed to them in January 2009.

In his Response to the Motion for Summary Judgment, Billera alleged in an Affidavit that (1) Dr. Bell sent him an email "regarding teaching two courses" during the Spring 2009 semester; and (2) Billera's two courses of Photography and Photojournalism "were originally on the Spring 2009 schedule but were removed after the fact." **Id.** Billera did not attach any documents to support these two allegations.

Billera also attached to his Response to Motion for Summary Judgment a letter dated January 31, 2009, from him to Rev. Daniel Gambit of the University, in which Billera indicated that, "[o]n December 23, I was informed during a meeting with Rev. Bernard O'Connor, Dr. Karen Walton and Dr. John Bell [of the University] that my contract would not be renewed." **Id.**

The above evidence offered by Billera fails to establish the existence of an express or implied contract for him to teach during the Spring 2009 semester. In fact, the January 31, 2009 letter specifically contradicts Billera's claim that he had a contract for the Spring 2009 semester. **See id.** (stating that the University would not offer Billera a contract for the Spring 2009 semester).

Billera offered no other evidence in his Response to the Motion for Summary Judgment that would establish a genuine issue of material fact

concerning whether he had an express or implied contract to teach during the Spring 2009 semester. Further, the record supports the trial court's determination that Billera did not set forth the required essential terms of the alleged contract for the Spring 2009 semester. **See** Trial Court Opinion, 8/7/12, at 6-7. Billera alleged that he received an offer of employment from the University for the Spring 2009 semester, which he accepted, but he failed to allege or provide evidence concerning the duration of the contract, or the salary he would be paid. Accordingly, he failed to set forth the required elements of offer, acceptance and consideration with regard to his alleged contract. As Billera failed to set forth evidence of either an express or implied contract, the trial court did not err in granting summary judgment on this basis.

Billera next contends that the trial court erred in granting the University's Motion for summary judgment by usurping the function of the jury. He asserts that he testified in his deposition to signing a contract for the Spring 2009 semester and mailing it back to the University. Billera asserts that he pled the essential terms of this contract by averring that it was identical to his previous contracts as to salary and other contract terms. However, Billera has not set forth in his appellate brief the place in the record where he made these averments. **See** Brief for Appellant at 15.

The Pennsylvania Rules of Appellate Procedure require that an appellant set forth, in the Argument section of his appellate brief, a

reference to the place in the record “where the matter referred to appears.” Pa.R.A.P. 2119(c). Where an appellant makes a bald assertion in his appellate brief and does not present any citation to the record to support the claim, the claim is waived. **J.J. DeLuca Co., Inc. v. Toll Naval Assoc.**, 56 A.3d 402, 413 (Pa. Super. 2012); **Commonwealth v. Beshore**, 916 A.2d 1128, 1140 (Pa. Super. 2007) (holding that the failure to properly develop an argument in an appellate brief, including proper citation to the record, results in waiver; this Court will not “scour the record to find evidence to support an argument”).

The trial court determined that Billera did not prove the existence of a Spring 2009 contract because he failed to plead or provide proof of the essential terms of such contract. **See** Trial Court Opinion, 8/7/12, at 7. Billera argues that the trial court did not mention any of the evidence Billera submitted to prove the existence of the 2009 contract, *i.e.*, student statements that the courses Billera was to teach were removed from the Spring 2009 schedule; Dr. Bell’s statement in an email that he was assigning Billera his two courses for Spring 2009; a copy of the Spring 2009 schedule containing Billera’s name for those two courses; the fact that Billera taught at the University for 27 consecutive years; and Billera’s statement that he signed both 2009 contracts and handed them to Dr. Walton’s secretary. Billera fails to cite to the record with regard to the above evidence, and,

except for his allegation of 27 years of consecutive employment with the University, we have been unable to locate such evidence in the record.

Here, Billera has failed to cite to the place in the record where he presented evidence of the essential terms of the alleged Spring 2009 contract. Therefore, he is not entitled to relief on this claim. Further, as we previously determined, the record supports the trial court's conclusion that Billera did not set forth the essential terms of the alleged Spring 2009 contract. **See** Trial Court Opinion, 8/17/12, at 7.

Billera also contends that he was denied his rights pursuant to the faculty Handbook. Billera asserts that the University did not comply with the written procedures stated in the faculty Handbook. Billera argues that the University conceded that Billera had due process rights and reviewed his termination through a faculty committee. On consideration of this claim, the trial court determined that Billera did not sustain his burden of proving that the faculty Handbook constituted a contract between him and the University. **See** Trial Court Opinion, 8/7/12, at 5-6.

The presumption under Pennsylvania law is that all employment is at-will, and, therefore, an employee may be discharged for any reason or no reason....

...

A handbook is enforceable against an employer if a reasonable person in the employee's position would interpret its provisions as evidencing the employer's intent to supplant the at-will rule and be bound legally by its representations in the handbook. The handbook must contain a clear indication

that the employer intended to overcome the at-will presumption....

...

It is well-settled that “to find that ... a handbook has legally binding contractual significance, the handbook or an oral representation about the handbook must in some way clearly state that it is to have such effect.”

...

^[fn3] [] ([O]nce it is determined that the handbook created an implied contract altering the at-will relationship, it must be shown that there was a valid offer and acceptance)....

It is basic contract law that one cannot suppose, believe, suspect, imagine or hope that an offer has been made. It is not sufficient to show that the employer had a policy. It must be shown that it offered the policy as binding terms of employment....

Luteran v. Loral Fairchild Corp., 688 A.2d 211, 214-16 (Pa. Super. 1997)

(citations omitted, footnote in original).

In the present case, Billera presented evidence of a letter to him dated March 18, 2009, in which the Faculty Review Committee of the University stated that, even though Billera was not a full-time faculty member, he had a “right to due process.” **See** Plaintiff’s Brief in Response to Defendant’s Motion for Summary Judgment, Letter from Faculty Review Committee to Billera, March 18, 2009. Assuming *arguendo* that this letter raised an issue of material fact as to the existence of a contract under the faculty Handbook, Billera nevertheless has failed to set forth evidence that the University breached that contract. The Faculty Review Committee’s letter indicates

that the Committee met twice and reviewed Billera's case at length. ***Id.*** The Committee also indicated that it had reviewed Billera's letter to the Faculty Review Committee and had considered Billera's allegations. ***Id.*** The Faculty Review Committee concluded that the University had decided not to renew Billera's contract, not on the basis that he had done something morally inappropriate, but because he had exercised "poor judgment" with regard to the student project involving nude photography. ***Id.***

Billera claims that the University breached its Handbook contract by failing to follow its promised internal procedure for disposing of academic misconduct claims and by conducting the process in a flawed, biased, and unfair manner. Billera cites the following evidence in support of this claim: Billera's Affidavit, numerous student emails, Billera's letter of appeal to Fr. Gambet, emails from Dr. Bell regarding Billera's inclusion to teach two courses for Spring 2009, Dr. Bell telling Billera on December 23, 2008, that the University was not going to honor his contract for Spring 2009, and a copy of the University's Spring 2009 schedule with his name on it for two courses. We note that the record does not contain all of these items of evidence. Upon review of the remaining items, we conclude that the evidence does not establish that the University breached the alleged faculty Handbook contract.

Our review of the record demonstrates that Billera has failed to specify how the Faculty Review Committee's review of his case violated the Due

Process section of the faculty Handbook, as set forth in Billera's Second Amended Complaint. Thus, we conclude that, even if Billera raised an issue of material fact as to whether the faculty Handbook constituted a contract, he has failed to provide evidence establishing a breach of that contract. Therefore, he has failed to prove an essential element of his cause of action. Accordingly, the trial court did not err in granting the University's Motion for summary judgment. **See *Young v. Com., Dept. of Transp.***, 744 A.2d 1276, 1277 (Pa. 2000) (holding that the failure of a non-moving party to adduce sufficient evidence on an issue essential to its case, and on which it bears the burden of proof, establishes the entitlement of the moving party to judgment as a matter of law).

Finally, Billera contends that the case of ***Ferrer v. Trustees of the Univ. of Pa.***, 825 A.2d 591 (Pa. 2002), establishes that the University breached the alleged contract under the faculty Handbook.

In ***Ferrer***, the Pennsylvania Supreme Court held that the tenured professor was entitled to bring a breach of contract claim by asserting that the university in that case had failed to comply with procedures established by a contractual agreement between the parties. ***Id.*** at 609.

In the instant case, Billera is entitled to bring such a claim; however, our review of the record demonstrates that the trial court correctly determined that Billera did not provide evidence to prove that the University in this case had breached a contract with Billera.

J-S08044-13

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambitt", written over a horizontal line.

Prothonotary

Date: 6/5/2013