COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0215 **Cir. Ct. No. 00CV009844**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JOE TYNAN,

PLAINTIFF-APPELLANT,

V.

JBVBB, LLC, ABFM CORPORATION AND ABQC CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Reversed and cause remanded for further proceedings; affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Joe Tynan appeals from a judgment entered when the trial court granted summary judgment to Tynan's former employer, JBVBB, LLC, ABFM Corporation and ABQC Corporation. He also challenges an order dismissing his misrepresentation claim. Tynan claims the trial court erred in

granting summary judgment because there were material issues of fact as to whether an oral employment contract existed between Tynan and his employer. Because we agree that material issues of fact do exist, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion. Because we agree that Tynan failed to adequately set forth a claim for misrepresentation in his complaint, we affirm the order dismissing the misrepresentation claim.

I. BACKGROUND

¶2 This case involves a dispute between three defendant companies, JBVBB, LLC, ABFM Corporation and ABQC Corporation, (collectively, "the company") and the plaintiff, Tynan. In 1998 and 1999, ABFM and ABQC were operating at substantial losses. JBVBB provided oversight services to ABFM and ABQC. JBVBB was owned by Joel S. Lee, William R. Nimtz and Michael Wacker. In 1999, Lee and Nimtz sought a business executive to help turn around the fortunes of ABFM and ABQC. In July 1999, Tynan was hired as a consultant and provided services as such until November 4, 1999.

¶3 While working as a consultant, Tynan considered joining the company as an employee to work toward restoring profitability. Tynan and Lee began discussing specific terms of an employment contract in October 1999. On October 7, 1999, Lee gave Tynan an initial written proposal. During that month, Lee and Tynan negotiated the terms of employment, both orally and via written correspondence. By the end of October, Tynan accepted the offer of employment. It was agreed that Tynan would be hired as "Group Vice-President" in charge of the two operating businesses and have overall responsibility for restoring profitability. According to Tynan, it was agreed that: he would receive a base

salary of $200,000 per year; he would receive incentive bonuses, equity growth bonuses, and fringe benefits comparable to the president of ABFM; he could not be terminated without ninety days' advance written notice without just cause; and, if terminated, he would receive severance pay. In the discussions between Tynan and Lee, both expressed hope that the company could be turned around in about five years at which time Tynan would retire.

¶4 Tynan asserts that by November 2, 1999, Lee's son, Attorney Dan Lee, had completed an initial draft of a formal employment contract. The contract term was to commence January 1, 2000. Because Tynan would be starting work before January 1, 2000, an "interim letter agreement" covering November and December 1999, was drafted and signed. Tynan asserts that the purpose of the letter was to make clear he would not be eligible for any bonuses during the final two months of 1999. The letter stated that it expired on December 31, 1999, and specifically stated that it did not constitute an employment agreement.

¶5 Tynan began work in early November 1999, and continued his employment until October 31, 2000. On that date, he received his monthly wages, together with a letter from Lee informing him that he was being terminated, and that by cashing the wage check, Tynan would be releasing all claims against the defendants. Tynan did not cash the check. Rather, he returned it, and requested that the company provide him with pay and benefits due under the employment contract. At Lee's request, Tynan summarized, via letter dated November 1, 2000, what Tynan believed was due and owing, including ninety days' written notice, severance pay, medical benefits, payment for outplacement services, and incentive and equity bonuses. Lee responded by denying the request on the basis that, according to Lee, no written employment contract existed.

¶6 On November 22, 2000, Tynan filed a summons and complaint alleging claims for breach of contract, breach of the duty of good faith, promissory estoppel and misrepresentation. The defendants moved to dismiss all four claims. On March 27, 2001, the trial court dismissed only the misrepresentation claim on the basis that Tynan failed to plead with specificity that representations made by the company were false.

¶7 Subsequently, the defendants moved for summary judgment on the remaining three claims. On October 31, 2002, the trial court granted the motion in favor of the defendants and dismissed Tynan's complaint. The trial court concluded that no contract existed, that Tynan was an at-will employee, and that he could be terminated at any time for any reason.

¶8 Tynan now appeals.

II. DISCUSSION

¶9 This case arises from the grant of summary judgment. We review the granting of motions for summary judgment *de novo*, applying the same methodology and standards as the trial court. *See* WIS. STAT. § 802.08 (2001-02);[1] ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. ***Id.***

¶10 Here, Tynan asserts that there are disputed issues of material fact regarding whether an oral contract existed, as evidenced by the written documents

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

regarding his employment with the company. The company responds that there was no oral or written employment contract, but simply continued negotiations. The company contends that Tynan was simply an at-will employee as evidenced by the written at-will agreement.

¶11 Having reviewed the relevant materials, we conclude that there are disputed issues of material fact with respect to whether an oral employment contract existed between Tynan and the company. Specifically, there are issues of fact regarding whether there was a requisite meeting of the minds. These issues need to be resolved by a fact finder. Accordingly, granting summary judgment was premature and we must reverse that judgment and remand for further proceedings.

¶12 Wisconsin recognizes oral employment contracts. ***Ashleson v. LIRC***, 216 Wis. 2d 23, 31, 573 N.W.2d 554 (Ct. App. 1997). For an oral contract to exist, there must be a mutual meeting of the minds and intention to contract. ***Theuerkauf v. Sutton***, 102 Wis. 2d 176, 183, 306 N.W.2d 651 (1981). Whether the parties entered into an oral contract presents a question of fact. ***Gerner v. Vasby***, 75 Wis. 2d 660, 661-62, 250 N.W.2d 319 (1977). Moreover, when a dispute exists as to the intent of the parties to the agreement, a question of fact is presented and summary judgment should not be granted. ***Peninsular Carpets, Inc. v. Bradley Homes, Inc.***, 58 Wis. 2d 405, 416, 206 N.W.2d 408 (1973).

¶13 Here, Tynan presents a variety of information suggesting that the parties reached a meeting of the minds and intended to contract. He points out that there were repeated negotiations between himself and Lee, that he was told Lee would bind the company to any contract the two worked out, that all material terms were agreed upon, that Attorney Lee had been asked to draft the written

contract memorializing the agreement, that he had been paid and provided benefits in accord with the oral agreement from January 2000 until his termination, and that the interim agreement covering November to December 1999, does not affect the oral contract. He points directly to the language within the interim agreement, which states that it covers only November 1 to December 31, 1999, and *expires* on December 31, 1999, and that it "shall automatically cease to have effect" on December 31, 1999.

¶14 In response, the company suggests that there was no meeting of the minds. Rather, the company argues that the terms of employment discussed were never agreed to and that negotiations were ongoing throughout the time of Tynan's employment. In support of this position, the company points to the initial employment proposal, the counterproposals, the fact that Tynan told others that he was continuing to negotiate a contract with the company and the fact that he signed the at-will agreement covering November to December 1999.

¶15 In this appeal, we are not deciding whether there actually was a meeting of the minds and an intention to contract. Rather, we determine only whether Tynan has raised a jury issue on whether the parties agreed to the terms of Tynan's employment agreement. Given the evidence presented, we conclude that he has. Tynan avers that the material terms were agreed to before he began his employment. He also points to the company's corporate habit or routine in support of his argument. He notes that the terms included in his agreements were substantially similar to those contained in other executive employee agreements. He states that throughout his employment, the company paid him the salary and provided him with the insurance benefits agreed to in October 1999, evidencing a meeting of the minds. He also cites Lee's acknowledgement of the existence of

the agreement by assuring Tynan in June or July 2000, that Lee would "honor the contract, even if his partners would not."

¶16 In contrast, the company sets forth numerous facts and arguments suggesting that there was not a meeting of the minds. Resolution of this dispute is an issue of fact for the jury, not a matter of law for this court. Thus, we reverse the judgment and remand for further proceedings consistent with this opinion. Because we have reached this decision, it is necessary for us to address the other three claims Tynan raised: breach of duty of good faith; promissory estoppel; and misrepresentation.

¶17 The breach of duty of good faith is intricately tied to the resolution of the breach of contract claim and whether a contract existed. Tynan argues that the company breached its duty of good faith by failing to comply with the terms of the contract. Accordingly, this claim must be addressed again depending upon the decision of the fact finder as to the breach of contract claim.

¶18 The promissory estoppel claim is also tied in part to the contract claim and is pled in the alternative. All of the arguments related to this claim are factual, and therefore must also be addressed by the fact finder.

¶19 The misrepresentation claim was dismissed following a motion to dismiss on the basis that Tynan failed to plead the claim with the requisite specificity. The trial court found that Tynan's statement in his complaint that "the representations *may have been* untrue" does not satisfy the requirement that a party injured by misrepresentation allege that the statement made was, in fact, *false*. We agree with the trial court's analysis of this claim.

¶20 WISCONSIN STAT. § 802.03(2) requires that all claims of fraud or mistake be stated with particularity. Misrepresentation, thus, must be pled with particularity. A claim for misrepresentation may be intentional or negligent but, in either case, requires at least three elements: (1) a representation of fact was made by the defendant; (2) the representation of fact must be false; and (3) the plaintiff believed the representation and relied on it to his or her detriment. *See* ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.***, 153 Wis. 2d 589, 593 n.2, 451 N.W.2d 456 (Ct. App. 1989). As noted by the trial court, Tynan's complaint did not assert that the representation was false; rather, it alleged that the representation "may have been untrue." We agree with the trial court that this allegation fails to satisfy the particularity-pleading requirement. Tynan failed to allege with any specificity that the representations regarding the sale or retention of the company were, in fact, false. Tynan did not allege, for example, that the company did in fact sell, or try to sell, any of its assets or divisions. Therefore, he failed to plead an adequate claim for misrepresentation. Accordingly, we affirm the trial court's dismissal of the misrepresentation claim.

By the Court.—Judgment reversed and cause remanded for further proceedings; order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.