STATE OF MICHIGAN

COURT OF APPEALS

GLORIA A. DOPP,

Plaintiff-Appellee,

v

CAPITAL BANCORP, LTD, and OAKLAND COMMERCE BANK,

Defendants-Appellants.

UNPUBLISHED

No. 173001

Oakland Circuit Court
No. 93-451910

Before: Gribbs, P.J. and Marilyn Kelly and White, JJ.

WHITE, J. (concurring in part and dissenting in part).

Following defendants' acquisition of plaintiff's employer, United Savings Bank (United), plaintiff brought this action to enforce a written agreement that provided that she would receive fifteen months' compensation if her employment terminated under certain circumstances within two years of a change in control of the bank. The parties brought cross-motions for summary disposition. The circuit court granted plaintiff's motion for summary disposition as to liability and denied defendants' motion, which argued that the agreement was unenforceable under the Michigan Banking Code, MCL 487.301 *et seq*.; MSA 23.701 *et seq*. The circuit court subsequently denied defendants' motion for reconsideration and granted plaintiff's motion for summary disposition as to damages. I would affirm the circuit court's denial of defendants' motion for summary disposition, reverse the circuit court's grant of summary disposition and damages to plaintiff, and remand.

I

Plaintiff was employed by United from approximately August 15, 1983, until July 6, 1992, in capacities including Senior Vice-President and Chief Financial Officer, and was also a member of the board of directors of United's subsidiary, Mortgage Connection, Inc. In mid-1990, United began exploring the possibility of finding a prospective purchaser, which prompted plaintiff to express serious concerns about her job security and future with United.

Following negotiations, plaintiff and United entered into the subject written agreement on May 23, 1991, which by its terms was effective from January 1, 1991 until December 31, 1995. The agreement provides that if a "trigger event" occurs within two years of a change in control, the bank shall pay plaintiff certain benefits. "Trigger event" is defined in the agreement as meaning

> . . . the termination of the employment by the Company or by Employee, voluntarily or involuntarily, of Employee for any one or more of the following reasons, causes, or changes [in pertinent part]:
>
> a. The total compensation of Employee is reduced.
>
> b. Employee is assigned to duties inconsistent with or lesser than the duties, responsibilities, or status of Employee immediately prior to the Date of Change of Control.
>
> c. Employee is required to change the location of the job or office more than fifty (50) miles from the location or job of the Employee immediately prior to the Date of Change of control.
>
> d. Company discontinues any employment retirement plan or employee welfare benefit plan . . . including, but not limited to . . . benefit or compensation plans, . . . life insurance plans, or health, accident or disability plans, in which Employee was a participant immediately prior to the Date of Change in Control, without replacing the discontinued plan with a plan providing substantially similar benefits, or Company takes or permits any action that adversely affects the participation in, or reduces the benefits from, any such plans.
>
> e. Company discontinues or reduces any material fringe benefit to which Employee was entitled or actually received immediately prior to the Date of Change of Control.
>
> f. Company terminates the employment of Employee for any other reason other than just cause.
>
> g. A successor of Company, or an assignee of all or substantially all of the assets or business of Company, fails or refuses to specifically assume in writing the obligations of Company under this Agreement.

Defendant[1] acquired United in July 1992. Prior to the acquisition being final, defendants' chairman, Joseph D. Reid, wrote plaintiff a letter, dated June 8, 1992, which stated that, in accordance with ¶ 1(g) of the agreement dated May 23, 1991, defendants assumed in writing the obligations of that agreement. Reid's letter also stated that the letter was written confirmation of Oakland Commerce Bank's (OCB) desire to continue plaintiff's employment.

On August 18, 1992, plaintiff met with Reid and discussed her duties. On August 25 and 30, plaintiff sent Reid letters stating that she was resigning her employment due to the diminution in her duties, responsibilities, benefits and compensation. On September 6, plaintiff sent another letter providing additional details of the diminution of her duties and responsibilities, and stating that she found it necessary to reaffirm her decision to resign, effective September 15, 1992. The letter also stated that she trusted OCB would honor the terms of the subject agreement. Reid responded to plaintiff's letters on September 1, 8 and 10, assuring plaintiff that the bank was committed to ensuring that her duties remain consistent with those enjoyed prior to the change of control.

Plaintiff filed this suit seeking enforcement of the agreement, and alleged that the following "trigger events" resulted in her terminating her employment: revocation of her membership on the bank's executive, personnel and investment committees, exclusion from monthly board meetings, revocation of her authority to sign on all corporate bank accounts and perform wire transfers, revocation of membership on the board of directors of Mortgage Connection, Inc., defendants' subsidiary, reduction of her staff by 50%, discontinuation of her short-term disability coverage and dental insurance, and a reduction in life insurance benefits by approximately 75%.

Both parties moved for summary disposition, and the circuit court granted plaintiff's motion. Defendants then filed a motion for reconsideration, attaching for the first time the affidavit of Joseph D. Reid, which averred that no "trigger event" had occurred. The circuit court denied defendants' motion for reconsideration, and later granted plaintiff's motion for summary disposition as to damages. This appeal ensued.

II

Defendants first argue that the circuit court erred in granting plaintiff's motion for summary disposition and denying defendants' motion for summary disposition because the agreement is unenforceable pursuant to the Michigan Banking Code, MCL §§ 487.301 *et seq*.; MSA §§ 23.710(1) *et seq*., as contravening the bank's authority to terminate officers at will and define bank officers' duties. I disagree.

Defendants rely on MCL 487.451(5); MSA 23.710(151)(5):

> Subject to the limitations and restrictions contained in this act or in a bank's articles, the bank may engage in the business of banking and a business related or incidental thereto, and for that purpose, without specific mention thereof in its articles, a bank has the powers conferred by this act and the following additional corporate powers:
>
> * * *
>
> (5) To elect or appoint directors who shall appoint from their members a president who shall perform such duties as may be designated by the board, and who shall serve as the chairperson of the board, unless the board designates another director to be

> chairperson in lieu of the president. The board shall appoint 1 or more vice-presidents, a cashier, and other officers as the board deems necessary, who may or may not be members of the board, shall define their duties, shall dismiss the officers or any of them at pleasure, and shall appoint other officers to fill their places. [Emphasis added.]

Plaintiff does not dispute that this provision has been consistently interpreted to allow a bank to discharge an officer without incurring liability for breach of contract or wrongful termination, but argues that the agreement is not an employment contract and this suit is not one for wrongful termination. On this issue, the circuit court held:

> The court is satisfied that the Michigan law is governed by the statute, the banking law and it's apparently the same throughout the country and there's no question that the bank is prohibited from entering into any implied contract or express contract not to discharge. But what I'm looking at right now is a situation where we've got an agreement that is not an employment contract but rather it appeared to the Court to be a severance pay agreement. And so far we could find no Michigan law holding that you cannot have a severance agreement under the statute.
>
> * * *
>
> The Schmidt courts [sic] reasoning is persuasive. Severance pay, like life insurance, stock options, profit sharing, and other benefits is part of the compensation package. Unless the severance pay was being used to inhibit the banks [sic] power to terminate at will it would not violate the statute. And I find no evidence that it was used as such.
>
> * * *
>
> The contract called for a said amount of severance pay to be paid upon any event triggering the obligation to pay severance pay. That event did not necessarily require a breach of any contract and I think that's spelled out real clearly when you read through the triggering events. So I do find that the Michigan Banking law does not prohibit this severance pay agreement. …

The trial court was referring to *Schmidt v Park Avenue Bank, NA*, 147 Misc 2d 1043, 558 NYS 2d 779 (1990), which it found persuasive. The *Schmidt* court held that an agreement containing a provision under which the plaintiff would receive severance pay upon dismissal did not contravene the National Bank Act.[2] The plaintiff, a former bank vice-president, and the bank had entered into an employment agreement by which the plaintiff was employed by the bank as executive vice-president and deputy to the CEO at an annual salary of $110,000. The agreement further provided that if the plaintiff's employment was terminated for any reason other than cause, the plaintiff would be paid $110,000 over a twelve month period. *Id.* at 1044. The bank argued that the provision entitling the plaintiff to his salary if terminated without cause violated the National Banking Act, 12 USC § 24. *Id.* The *Schmidt* court stated:

> The issue of whether a national bank may enter into employment contracts of definite duration and, therefore, may be held liable for wrongful discharge has been addressed by several courts since the National Bank Act was enacted during the Civil War. The provision of the National Bank Act providing for the dismissal of officers at the pleasure of the Bank has been consistently interpreted to allow a national bank to discharge an officer without incurring liability for breach of contract or wrongful termination. However, the cases cited by defendant which were decided after the 1971 regulations were enacted are silent as to the Bank's assertion that an agreement providing for severance pay upon dismissal without cause violates federal law.
>
> * * *
>
> …12 C.F.R. 7.5220 [enacted in 1971 pursuant to 12 USC § 24, subd 5] which empowers a national bank to enter into reasonable employment contracts with its officers has been consistently upheld since its enactment in 1971, and, therefore should be given great weight.
>
> This case does not involve an action based upon wrongful termination. It is undisputed that the Bank was entirely free at any time to terminate plaintiff's employment, without risking liability for wrongful discharge or breach of contract based upon the termination. Therefore, I reject defendant's argument that agreements in which bank officers accept pecuniary consideration upon dismissal "bargain away [a bank's] right, granted by statute, to discharge (its) officers 'at pleasure'" I conclude that the golden parachute provision is a proper component of the parties' contract. [*Id.* at 1046. Citations omitted.] [See also *Stockwell v Citizens National Bank*, 655 So2d 1220 (Fl App 1995) (holding that the trial court erred in dismissing claim to enforce severance benefits provision of employment contract, relying in part on CFR 7.5220, and also on conclusion that National Bank Act does not address whether a national bank must pay discharged officer termination benefits for which the parties contracted.)

The cases defendants rely on are inapplicable, as they stand for the proposition that a bank officer is prohibited from seeking to recover damages for wrongful discharge or breach of an employment contract. *Zatkin v Commonwealth Bank*, 163 Mich App 171; 414 NW2d 371 (1987)(employment contract under which employment is terminable only for just cause held unenforceable under Banking Code); *Little v American State Bank*, 263 Mich 645; 249 NW 22 (1933)(employment contract for definite term not terminable at the pleasure of board of directors held prohibited by predecessor statute to Banking Code, 1929 CL 11901); *Rohde v First Deposit National Bank*, 127 N H 107; 497 A 2d 1214 (1985)(breach of employment contract suit by bank officer was properly dismissed as contravening National Bank Act); *Alfano v First Nat'l Bank of Highland*, 111 AD2d 960; 490 NYS2d 56 (1985)(wrongful discharge action by former national bank officer dismissed as unenforceable under National Banking Act, § 24, as restricting bank's power to

dismiss an officer at-will). In contrast, the instant case is neither a wrongful discharge case nor a suit alleging breach of an agreement to provide continued employment.

The instant agreement does not violate the Michigan Banking Code because it does not preclude defendants from terminating its officers at will, or altering the duties of officers. In fact, an appendix to the agreement expressly states that the board may terminate plaintiff's employment at any time, but that a termination other than for cause would not prejudice plaintiff's rights under the contract. Further, the language of the agreement indicates that the parties regarded the severance pay as compensation for past employment and continued employment during the period of uncertainty, and not as a payment in lieu of future wages. See pages 9-10, *infra*.

In construing a statute, the ordinary meaning of the language employed must be assumed if the language is clearly expressed. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844(1992). MCL 487.151; MSA 23.710(151) clearly allows banks to define officers' duties and to dismiss officers at the pleasure of the board without incurring liability for breach of contract or wrongful discharge. However, as the circuit court noted, the statute does not preclude agreements that provide for severance pay upon termination of the employment relationship.

III

Defendant further argues that if this Court finds that the agreement is not rendered invalid by the Michigan Banking Code, the agreement's liquidated damages provision is nevertheless unenforceable as an unreasonable penalty. The circuit court held, and I agree, that the agreement does not provide for liquidated damages and does not exact an illegal penalty:

> This is not a liquidated damages clause. Liquidated damages are a set amount of damages to be paid upon a breach of the contract. We do not have this here.
>
> The contract called for a set amount of severance pay to be paid upon any event triggering the obligation to pay severance pay. That event did not necessarily require a breach of any contract and I think that's spelled out real clearly when you read through the triggering events…. I find that the severance pay agreement is not a liquidated damages provision. …

A contractual provision for liquidated damages is an agreement by the parties fixing the amount of damages in case of a breach of the contract. *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986). This remedy is particularly applicable where the actual damages are uncertain and difficult to ascertain, or are purely speculative in nature. The distinction between a valid liquidated damages clause and an illegal penalty depends on the relationship between the amount stipulated in the liquidated damages clause and the subject matter of the cause of action. *Id.*

In contrast, the purpose of the subject agreement was to reward plaintiff for her past service and accomplishments as an employee, and her continued service during a period of uncertainty, in the

event of her employment terminating under certain circumstances within two years of a change of control. There was no purpose to fix the amount of damages in case of a breach of contract. The agreement specifically provided:

> Employee has made significant contribution to and has been instrumental in the development of Company; and
>
> Company desires to recognize the value of the long term services and other accomplishments of Employee; and
>
> Company desires to reward prior and encourage future dedication of Employee and desires to help eliminate some of the uncertainties which might be associated with a change in control; and
>
> The parties desire to set forth their respective rights and obligations in the event of termination of employee's employment under the circumstances set forth herein.

The agreement contains neither a liquidated damages clause or an illegal penalty. The agreement contains no promise of continued employment and provides only that, should a "trigger event" occur within two years of a change in control, plaintiff will be paid cash equal to fifteen months' compensation, in recognition of past services rendered and a commitment to render future services during a period of uncertainty.

IV

Defendants' third argument is that even if the agreement is enforceable, defendants are not liable to plaintiff under the agreement because no "trigger event" occurred. Alternatively, they argue that there are genuine issues of material fact regarding whether a trigger event occurred, and therefore summary disposition should not have been granted. I agree with the second contention.

Plaintiff asserts, and the circuit court concluded, that defendants did not sufficiently contest that a trigger event had occurred when initially defending against plaintiff's motion for summary disposition. The majority agrees. I conclude, however, that while defendants could and should have been more diligent in presenting and arguing their position to the court, their brief and argument sufficiently raised the defense that no trigger event occurred.

Defendants' brief in support of their motion for summary disposition asserted that plaintiff began negotiating a new employment contract with defendants; that defendants provided plaintiff with a draft agreement which did not meet her demands, but which provided benefits in excess of those she received at United; that on July 30, Reid sent plaintiff a letter inquiring into the status of her draft agreement;[3] that plaintiff responded that she would like to meet and discuss the June 30 draft;[4] that while immediately after the takeover all employees were asked to assume a variety of temporary duties to maintain the bank's operations, on August 18, 1992, Reid and the bank president met with plaintiff and assured her

that she was a valuable employee and that her role and duties at the bank would be the same as before the takeover; that in response, plaintiff advised the bank that she did not feel she needed an employment agreement; that to defendants' surprise plaintiff then wrote Reid the August 25[5] and August 30[6] letters announcing her resignation due to altered duties and responsibilities; and that Reid responded on September 1, 8, and 10, explaining that the bank was committed to ensuring that her duties remain consistent with those she enjoyed before the takeover. The September 1 letter stated:

> Please accept this letter as an acknowledgment of your letter dated August 25 which you hand delivered to me at your office. As I indicated to you then, I was shocked to receive this communication in view of all that had been discussed regarding your future. As I indicated to you then, I had no desire for you to resign because of the working relationship which we had developed and because of the hardship it would impose upon Oakland Commerce Bank and Mortgage Connection, Inc. going forward.
>
> I also acknowledge receipt of your letter dated August 30, 1992 announcing your resignation. Presumably, in part, for [sic] reason that your previous responsibilities, such as strategic planning, budgeting, capital compliance and personnel have been shifted to Capitol Bancorp Ltd.
>
> I would ask you to reconsider if this is the basis of your decision. It is important to all of us that you continue with your responsibilities in the area of strategic planning, budgeting and capital compliance. Indeed, if you are interested, you may continue to have responsibility in the area of personnel. There is no effort or plan to in any way affect your responsibility as an officer.
>
> As you know, we have gone through a rather difficult adjustment period over the past seven weeks satisfying regulatory concerns, reshaping the financial statements to comply with bank reporting requirements, addressing the capital requirements imposed by the bank regulatory agencies, attempting to draft a "budget" which would provide some benchmark in getting us through the balance of this fiscal year and identifying the strategic objectives which would help make Oakland Commerce Bank successful. At the outset many people have been directly involved in this process because of the monumental nature of the undertaking. There is no intention to relieve you of these responsibilities.
>
> We are committed to ensuring that any duties assigned to you be consistent with the duties which you enjoyed prior to the change of control. Moreover, I have personally been involved to ensure that you do not receive duties which might otherwise be deemed lesser in the scope of their responsibility than those duties you previously assumed.[7]

Reid sent additional letters on September 8,[8] and September 10.[9] Defendant's brief argued:

> Assuming arguendo that Plaintiff's Complaint survives the arguments set forth above, Plaintiff's Complaint still must fail because Plaintiff cannot demonstrate the existence of any material breach. In fact, it is undisputed that Plaintiff was told repeatedly that the terms and conditions of her employment would remain the same and that her concerns would be addressed to her satisfaction. Plaintiff, as an officer of the Bank, cannot ignore the Bank's numerous approaches in this regard and now sue the Bank for "breach" of the Agreement.

While defendants did not employ the language "no trigger event occurred" and couched their argument in terms of a denial that a material breach had occurred, the import of defendants' argument is clear. Defendants asserted that whatever changes occurred were temporary due to the change-over, and that plaintiff was repeatedly assured that her duties and position, as well as the terms and conditions of her employment, would remain unchanged. Further, while plaintiff's allegations were supported by affidavit, and Reid's affidavit was not submitted until the filing of a motion for reconsideration, defendant's motion for summary disposition was supported by copies of the many letters referred to in defendants' brief.

In ruling on the motions initially, the court addressed the statutory and liquidated damage arguments at some length and then stated:

> The court finds the Defendant has offered no other tangible evidence or defense to it's [sic] breach and therefore I will grant summary disposition as to liability to the plaintiff.

I conclude, however, that the letters were documentary evidence that a record could be developed that would leave open an issue upon which reasonable minds could differ and that the court erred in granting plaintiff's motion. *Kivela v Treasury Department*, 200 Mich App 545, 553; 505 NW2d 11 (1993); *Linebaugh v Berdish*, 144 Mich App 750; 754; 376 NW2d 400 (1985). Specifically, the letters point to the existence of genuine issues of material fact regarding the materiality of any change in job duties and whether plaintiff's voluntary termination was for that reason. Although the court did not so state, it may have regarded the letters as insufficient to counter plaintiff's sworn allegations in her affidavit. However, given that the main focus was on the validity of the agreement itself, the court should have expressly required further evidence, or that defendants support the letters' allegations in an affidavit, and given defendants an opportunity to produce the required additional support, if the court deemed the letters insufficient in light of plaintiff's affidavit. [10]

V

Lastly, defendants argue that plaintiff is barred from seeking compensation under the agreement because her alleged dishonesty and breach of fiduciary duty provided just cause for terminating her employment. Defendants argue this issue under three headings in their supplemental brief on appeal, and under four headings in their initial brief addressing the grant of summary disposition as to damages. The gist of defendants' argument is that plaintiff had a duty to communicate to the bank that she regarded the bank's actions as trigger events, and that instead she lulled the bank into believing that it

was in compliance with the agreement, secretly harboring an intent to quit, and then announced that trigger events had occurred. Defendants argue this is misconduct providing good cause for termination, thereby barring plaintiff from recovering under the agreement.

To the extent this argument relates to the questions whether any change in plaintiff's duties was of sufficient duration and intent to constitute a trigger event, and whether plaintiff's voluntary termination was for this reason, I conclude that summary disposition was improper, as discussed above.

However, to the extent the argument is presented as a separate basis for denying plaintiff relief, operative even if it is concluded that there was a material change in plaintiff's duties or compensation and that her resignation was for this reason, I conclude this "after-acquired evidence" argument was not timely raised, being asserted only when the circuit court had reached the issue of damages, and, further, that the circuit court properly rejected the argument that plaintiff had a duty to notify the bank that it was about to take action that would constitute a trigger event leading to potential liability under the agreement and that such action might cause her to choose to invoke her rights under the agreement.

The circuit court stated:

> Defendant cites cases holding that the bank officer owes a duty of good faith and fidelity to the bank. Therefore, it's Defendant's [sic] position that Plaintiff should of [sic] warned the bank before it committed a trigger event. Plaintiff's breach of this duty is the alleged cause for firing which would preclude compensation. Defendant has supplied the necessary conclusionary affidavit that had it known of Plaintiff's failure to warn of the impending trigger event it would of [sic] fired her for cause.
>
> Defendant's [sic] argument fails for one main reason, there is no evidence to suggest that Plaintiff knew that the bank was going to change her job responsibilities before it did so. Plaintiff can't be guilty of bad faith or infidelity for failing to warn the bank of something for which she had no advanced knowledge. The Court does not believe that the—there's been any showing of after acquired evidence of wrongful conduct.

VI

I would affirm the circuit court's denial of defendants' motion for summary disposition, reverse the grant of summary disposition and damages to plaintiff, and remand.

/s/ Helene N. White

[1] Plaintiff's complaint alleged that defendant Oakland Commerce Bank is a state chartered commercial bank and a wholly owned subsidiary of defendant Capitol Bancorp, Ltd.

[2] The National Bank Act contains similar language, 12 USC § 24, subd 5, to the Michigan Banking Code, § MCL 487.451; MSA § 23.710(151):

> § 24. Corporate powers of associations
>
> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * *
>
> **Fifth**. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties . . . dismiss such officers or any of them at pleasure, and appoint others to fill their places.

[3] Reid's July 30 letter to plaintiff stated:

> Please advise as to the status of the Draft Employment Contract previously forwarded to you.

[4] Plaintiff's August 11 letter to Reid stated:

> In response to your letter dated July 30, 1992, I would like to meet with you and/or discuss by telephone the Draft Employment Contract that was given to me on June 30, 1992.
>
> Pursuant to you [sic] letter dated June 30, 1992, I was under the impression that you would be contacting me to discuss this matter; therefore, I apologize for the misunderstanding and the resulting delay.

[5] Plaintiff's August 25 letter to Reid stated:

> Thank you for meeting me on August 18, 1992, to discuss my draft employment contract with Oakland Commerce Bank. I understand the importance of your needing to assemble a committed management team going forward.
>
> After much thought and consideration, I have concluded that my current job function and responsibilities are inconsistent and incompatible with those of my position prior to the change in ownership.

Therefore, pursuant to your letter dated June 8, 1992, I trust you will honor the terms of the agreement entered into between United Savings Bank, or it's [sic] successor, and myself dated May 23, 1991.

I have enjoyed the opportunity to contribute to and be a part of this organization for the past nine years and wish you success in the future with Oakland Commerce Bank.

You will have my full cooperation in handling this matter smoothly and with the least amount of disruption to my staff as possible.

[6] Plaintiff's August 30 letter to Reid stated:

Following up our discussion and my letter dated August 25, 1992, it is with regret that I respectfully submit my resignation from Oakland Commerce Bank and Mortgage Connection, Inc., effective September 15, 1992.

Under the new ownership structure, my previous responsibilities such as strategic planning, budgeting, capital compliance and personnel have been shifted to Capitol Bankcorp, Ltd. In addition, certain authorities relating to such matters are wire transfers and issuing checks have diminished. Under these circumstances, I feel it necessary to pursue my career goals elsewhere.

You will have my full cooperation and assistance through my departure date.

[7] The letter continues:

Gloria, it might be helpful to sit down and discuss this issue. As you know, we have never discussed this matter before. I am certain that the assignment of responsibility can be maintained consistent with your past employment experience. You are an important member of the organization. We need you to continue to carry out your responsibilities.

I would ask you to consider meeting with Jim Kaye, Chuck Fink and myself to resolve the concerns expressed in your August 30 letter. It would be unfortunate for all of us if you were to resign without the benefit of any discussion. Please advise.

[8] Reid's September 8 letter to plaintiff stated:

It has just come to my attention that you previously served on the Board of Directors of Mortgage Connection, Inc. I am sorry that I did not realize this last month when the newly constituted board was installed. I invite you to consider serving as a member of the Board of Directors of Mortgage Connection, Inc. Our next regular scheduled meeting is Thursday, September 10, 1992 at 3:00 p.m. at the offices of Mortgage Connection.

> In addition, if possible, I would like to discuss with you the content of your most recent letter. Unless your decision is irrevocable, I believe these discussions may be mutually beneficial.

[9] Reid's September 10 letter begins by acknowledging plaintiff's September 6 letter to Reid.

Although not mentioned in defendants' brief, plaintiff had sent Reid a letter dated September 6, in response to Reid's September 1 letter. Plaintiff's letter stated:

> The following is offered in response to your letter of September 1, 1992, and to further clarify my position with respect to my resignation from Oakland Commerce Bank (OCB) and Mortgage Connection, Inc., (MCI). Contrary to the position taken in your letter, many decisions made by the management of Capitol Bancorp, Ltd., (CBL) have, in fact, significantly impacted my duties and diminished my responsibilities as an officer of OCB and MCI.
>
> Prior to the Capitol Bancorp, Ltd., acquisition on 7-6-92, I was actively involved in management of the organization at the highest levels. In addition to attending all monthly United Savings Bank (USB) board meetings, I was a full member of the MCI Board of Directors and the USB executive, personnel, and investment committees. As you are aware, subsequent to the acquisition, I no longer function in any of these capacities.
>
> Prior to the acquisition, I also shared primary responsibility for strategic planning, policy formulation, personnel mattes and the development/implementation of corporate wide procedures and internal controls. As you know, 40% of the Bank's staff and 50% of the financial staff were terminated by CBL personnel on June 15, 1992. Not only have these cuts resulted in serious operations deficiencies throughout the organization, the selection and execution of these staff cuts were done with minimal input from me despite my thorough knowledge of the organization. Furthermore, my repeated requests for assistance in mitigating the resulting damages have gone unheeded by both Lee Hendrickson and Jim Kaye.
>
> Additionally, inefficiencies in operations arose when all wire transfer and check-signing authorities were taken from me on July 6, 1992. It was only after a great deal of badgering on my part that these authorities were returned to me with specific restrictions.
>
> Under the previous ownership structure, I held full responsibility for budgeting, financial reporting and forecasting, and regulatory capital compliance for both USB and MCI. Subsequent to the acquisition, these responsibilities were placed with CBL personnel. For example, while I understand the necessity of a certain amount of centralization, policy matters such as accounting procedure, financial statement presentation, and

application of Generally Accepted Accounting Principles are now dictated from Lansing. Accordingly, my role in the budgeting and financial reporting process has been reduced to one of a secondary nature.

In light of the facts discussed and examples presented above, it is evident that a significant reduction in my job responsibilities has occurred. I, therefore, find it necessary to reaffirm my decision to resign my position effective September 15, 1992. Following this, I trust that OCB will honor the terms of the agreement entered into between United Savings Bank (subsequently Oakland Commerce Bank) and myself on May 23, 1991.

I deeply regret any ensuing hardship this decision may cause, however, my decision is final.

Reid's September 10 letter stated:

Thank you for your letter of September 6, 1992, in response to mine of the same date.

Please be advised that you are invited to attend all of the monthly meetings of Oakland County Commerce Bank. As I indicated in my September 6 correspondence to you, I invite you to serve as a full member of the Board of MCI. Finally, you are invited to serve on the Executive, Personnel and Investment Committees of Oakland Commerce Bank and MCI. There has never been a decision to remove you from any of these responsibilities.

Primary responsibility for development of strategic planning, policy formulation, personnel matters, including the development and implementation of corporate-wide procedures and internal controls shall remain with you to the extent that they have previously existed. Again, there is no desire to remove these responsibilities from you and no effort has been made to do so. You have indicated that you held "full responsibility" for budgeting, financial reporting and forecasting, and regulatory capital compliance for both Oakland Commerce and MCI. Again, these responsibilities remain part of your duties subject, of course, to the direction of each of the Boards of Directors. These responsibilities have never been placed with personnel of CBL. Personnel of CBL are there to provide assistance to Oakland Commerce Bank and MCI. Their role is not supervisory. It never has been established as supervisory. There is no intention of making it supervisory. Your comments relative to statement presentation and application of generally acceptable accounting principles are not dictated from Lansing. It is true that your lack of familiarity with statement preparation for banks as opposed to savings banks required the assistance of the corporate office. Your role in the budgeting and financial reporting process is to be retained at the same

level as it pre-existed subject, of course, to the direction of the respective Boards of Directors.

Gloria, there has never been any indication of a reduction in your job responsibilities emanating from this office or any other.

In an effort to ensure that your job responsibilities are retained consistent with your employment experience at the former United Savings Bank, I am appointing a special committee comprised of Jay Fishman, the former Chairman of United Savings Bank and currently a member of the Board of Directors of both Oakland Commerce Bank and Capitol Bancorp Ltd., and Louis Allen, former President of both United Savings Bank and MCI and currently a member of the Board of Directors of Capitol Bancorp Ltd., to accept the responsibility for addressing your job responsibilities in order to be absolutely certain that your duties are consistent with and equal to duties, responsibilities and status which you have enjoyed as an employee of United Savings Bank.

It remains the desire of Capitol Bancorp to honor the terms of your agreement dated May 23, 1991. WE WILL DO EVERYTHING AND ANYTHING NECESSARY IN ORDER TO PRESERVE BOTH THE LETTER AND THE SPIRIT OF OUR COMMITMENT TO YOU REGARDING THE CONTINUATION OF YOUR DUTIES AND RESPONSIBILITES AS DEFINED IN THE AGREEMENT. We have no intention nor desire to reduce or otherwise impose upon you duties inconsistent from those which you previously experienced.

Working with Jay Fishman I am certain that whatever concerns you harbor, can be resolved.

By copy of this letter I am directing both Chuck Fink and Jim Kaye to make certain that your job duties and responsibilities are not diminished or made inconsistent with your previous employment experience in any material way. Please be assured I have never instructed them otherwise.

Gloria, your departure from both MCI and Oakland Commerce Bank will cause substantial hardship to our customers, other employees within these companies, and, of course, to our shareholders. You remain an important ingredient of our future. For this reason I would respectfully request you to reconsider your decision to resign.

I am confident that your good faith and mine can operate to clear the air on any confusion that you presently feel. At the very least, I wish you would consider meeting with Chuck Fink, Jim Kaye and me for the purpose of addressing your concerns. Since we have never really had an opportunity to discuss your September letters, I believe it would help. We have nothing to lose by talking.

> Gloria, if you are seeking to renegotiate your contract, I am prepared to discuss it with you. If you are seeking a brief leave of absence for any reason, I am prepared to discuss this with you. [Emphasis in original]

[10] Defendants did finally submit Reid's affidavit with their motion for reconsideration. The court then determined that the affidavit, which addressed each potential trigger event and denied that any such event occurred, was conclusory and sought to adopt a position "diametrically opposite" to the one argued on the original consideration of the motions. However, I regard the affidavit as an elaboration and amplification of defendant's earlier expressed position, and not an expression of an inconsistent position. Further, the affidavit is sufficiently specific to defeat the motion and require that plaintiff submit more than her own allegations.

I understand the circuit court's dissatisfaction with defendants' handling of the motions below. There is no reason why Reid's affidavit could not have been submitted in a timely fashion. In fact, I find defendants' presentation of the facts in their brief on appeal somewhat disingenuous. On pages ten and eleven, in the statement of facts, defendants discuss plaintiff's timely submitted affidavit in support of her motion for summary disposition. Defendants then state:

> In contrast, Defendant presented evidence that none of the defined "trigger events[”] ever occurred, including specifically that:
>
> 1. Dopp's total compensation was never reduced;
>
> 2. Dopp was never assigned to duties inconsistent with or lesser than her prior duties;
>
> * * *
>
> 4. No employee retirement plan or welfare benefit was discontinued without providing substantially similar benefits.
>
> 5. There was no discontinuation or reduction in any material fringe benefit to which Dopp was entitled or actually received immediately prior [sic] the acquisition occurred; and
>
> * * *
>
> See affidavit of Joseph Reid attached hereto as Exhibit V.

Defendants fail to acknowledge, however, that Reid's affidavit was not submitted to the circuit court until the motion for reconsideration was filed.

Nevertheless, I conclude that defendants' initial brief and the letters attached thereto sufficiently established the existence of genuine issues of material fact to require that the court give defendants an opportunity to file an affidavit and submit further evidence if deemed necessary.