

STATE OF MICHIGAN
COURT OF APPEALS

DAVID S. POOLE,

Plaintiff-Appellant,

v

CENTURY COMMUNICATIONS
CORPORATION; CENTENNIAL CELLULAR
CORPORATION; MICHIANA METRONET INC.;
PHILLIP MAYBERRY; LUCAS J. CARUSO; and
JOHN COCCIMIGLIO,

Defendants-Appellees.

UNPUBLISHED

November 18, 1997

No. 189814

Kalamazoo Circuit Court

LC No. 94-000255-CZ

Before: White, P.J., and Cavanagh and Reilly, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10).¹ We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

I

Plaintiff first argues that the trial court erred in holding that plaintiff's claim under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, was barred because plaintiff was an at-will employee. However, plaintiff has taken the trial court's statement out of context. The trial court was referring to plaintiff's breach of contract claim under Counts I and II of plaintiff's amended complaint, not plaintiff's discrimination claim.

It is a settled tenet of Michigan law that employment contracts for an indefinite term produce a presumption of employment at will absent distinguishing features to the contrary. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 383; 563 NW2d 23 (1997). Plaintiff does not allege that there was a just-cause

employment contract. Rather, he argues that he was wrongfully terminated on the basis of his race, contrary to the provisions of the CRA. However, an employee's contractual and statutory rights are of a distinctly separate nature. *Florence v Dep't of Social Services*, 215 Mich App 211, 215; 544 NW2d 723 (1996). Absent an employment contract, there can be no cause of action for breach of contract. Accordingly, the trial court did not err in granting defendants' motion for summary disposition on plaintiff's breach of contract claim.

II

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition on the counts of fraud and misrepresentation. Plaintiff complains that the court did not accept plaintiff's well-pleaded allegations as true. After reviewing the record, we find no error requiring reversal.

The elements of fraudulent misrepresentation are as follows: (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. *Kuebler v Equitable Life Assurance Soc'y of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996).

The trial court did not err in granting defendants' motion for summary disposition. Plaintiff's allegations of fraud are directed toward defendants' statements regarding promises that he would be considered for future promotions and advancements. However, an action for fraudulent misrepresentation must be predicated upon a statement pertaining to a past or existing fact. See *Baker v Arbor Drugs, Inc.*, 215 Mich App 198, 208-209; 544 NW2d 727 (1996). Furthermore, plaintiff has presented no evidence that defendants believed those statements to be untrue when they were made. See *Hi-Way Motor Co v Int'l Harvester Co.*, 398 Mich 330, 338-339; 247 NW2d 813 (1976).

Moreover, we conclude that plaintiff failed to establish that a genuine issue of material fact exists regarding his claim of fraudulent misrepresentation. In his amended complaint, plaintiff alleges that defendants promised him that he "would be justly considered for all promotions or advancements." However, there is no dispute that plaintiff was considered for the position of sales manager and was denied the promotion because of his superior's concerns regarding his self-motivation, his lack of management skills, and his failure to consistently complete his paperwork. The essence of plaintiff's objection appears to be that he did not *receive* the promotion; however, plaintiff does not allege that defendants fraudulently promised him that he would be promoted. Therefore, giving the benefit of reasonable doubt to plaintiff, there was no issue upon which reasonable minds could differ, and the trial court properly granted summary disposition to defendants on plaintiff's claims of fraud.

III

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition on his CRA claim. Plaintiff, who is black, alleges that defendants discriminated against him on the basis of race under a theory of disparate treatment.

To prove disparate treatment, the plaintiff must show that the plaintiff was a member of the class entitled to protection under the act and that he was treated differently than persons of a different class for the same or similar conduct. *Meagher v Wayne State Univ.*, 222 Mich App 700, 711; 565 NW2d 401 (1997). After a prima facie case is made out by the plaintiff, the burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for its actions. If the defendant meets this burden of production, the plaintiff must prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a mere pretext. *Id.*

We conclude that plaintiff has failed to establish a prima facie case of racial discrimination. Plaintiff alleged that defendants discriminated against him by giving other white employees a month to prove their skills as sales manager, while giving plaintiff only a day. The parties agree that plaintiff's opportunity to serve as temporary sales manager was cut short. However, except for unsubstantiated

allegations of racism, plaintiff has offered no evidence to contradict the trial court's finding that there was no genuine factual dispute that the contest had been terminated prematurely only because upper management learned of it, deemed it inappropriate, and put a stop to it. Moreover, neither of the two white employees who participated in the contest was chosen to fill the position. Plaintiff therefore has not established that he was treated differently than persons of a different class for the same or similar conduct, and therefore has not made a prima facie case. Moreover, even if plaintiff had presented a prima facie case, he has presented no evidence to rebut defendants' contentions that he did not receive the promotion because of his superior's belief that he did not possess the necessary skills and that he was fired for insubordination.² Therefore, the trial court properly granted summary disposition in favor of defendants on the count of racial discrimination.

IV

Next, plaintiff argues that the trial court erred in deciding questions of fact that should have gone to a jury. However, while plaintiff lists four issues regarding which he claims the trial court made inappropriate factual findings, he has pointed to no record evidence that would establish a genuine issue of material fact regarding any of them. Accordingly, we find no error requiring reversal.

V

Plaintiff argues that the trial court erred in dismissing Counts VII and VIII of plaintiff's amended complaint, which alleged "agency." We disagree. Plaintiff has failed to show that the individual defendants acted with the authority of, or at the direction of, the company defendants.

Plaintiff also challenges the trial court's statement, "Since there's nothing that's actionable by the principal there would be no actionable claims against the agents." However, after reviewing the transcript, we conclude that the trial court inadvertently transposed the words "principal" and "agents," and intended to state that, there being no claims against the individuals, there could be no claims against the companies on whose behalf they allegedly acted. Accordingly, we find no error requiring reversal.

VI

Finally, plaintiff challenges the trial court's denial of costs to plaintiff as a result of the trial court's earlier order setting aside the default against defendants Metronet, Caruso, and Mayberry. Plaintiff relies on MCR 2.603(D)(4). However, MCR 2.603(D)(4) provides:

An order setting aside the default must be conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, *except as proscribed in MCR 2.625(D)*. [Emphasis added.]

MCR 2.625(D)(3) provides that if "jurisdiction was in fact not acquired, costs may not be imposed." In this case, the trial court set aside the default against defendants because plaintiff had failed to properly serve process on defendants, and therefore, personal jurisdiction had not been acquired against those defendants. See MCL 600.701; MSA 27A.701. The trial court did not abuse its discretion in denying plaintiff's motion for costs.³

Affirmed.

/s/ Helene N. White

/s/ Mark J. Cavanagh

/s/ Maureen Pulte Reilly

¹ In its order, the trial court stated that it was granting defendants' motion for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10). However, because the trial court stated that it considered documentary evidence in addition to the pleadings, the grant of summary disposition must in fact have been pursuant to MCR 2.116(C)(10). See MCR 2.116(G)(5); *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995).

² Plaintiff claims on appeal that defendant Caruso discriminated against him by firing him for insubordination when the white employees who engaged in identical behavior were not fired. The white employees that plaintiff refers to are the accounting and customer service personnel who received the credit application form on which plaintiff had written that the activation fees were to be waived. Plaintiff has not identified any members of the sales staff who were not fired for noting on paperwork that the activation fees were to be waived without receiving approval from the manager. Accordingly, plaintiff has not shown that that he was treated differently than similarly situated persons of a different class for the same or similar conduct.

³ Plaintiff also asserts that defendants failed to submit an affidavit as required by MCR 2.603(D)(1); however, pursuant to that rule, no affidavit was required because the trial court granted the motion to set aside the default based on the lack of jurisdiction.