# Court of Appeals, State of Michigan

## ORDER

Martin B Marcus v GFG Employment Services Inc

Docket No. 284042

LC No. 2007-086327-CK

Brian K. Zahra
Presiding Judge

Peter D. O'Connell

Kirsten Frank Kelly
Judges

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The Court orders that the April 16, 2009 opinion is hereby VACATED. A new opinion is attached.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 28 2009
Date

Sandra Schultz Mengel
Chief Clerk

# STATE OF MICHIGAN

# COURT OF APPEALS

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MARTIN B. MARCUS,

Plaintiff-Appellant,

v

GFG EMPLOYMENT SERVICES INC, d/b/a GARDEN FRESH SALSA INC, GARDEN FRESH SALSA CO INC, BASHA FOODS, FRESHLANE TRANSIT, GARDEN FRESH SALSA II, GOURMET INTERNATIONAL FOODS, and GFG II EMPLOYMENT SERVICES INC,

Defendants-Appellees.

UNPUBLISHED
April 28, 2009

No. 284042
Oakland Circuit Court
LC No. 2007-086327-CK

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Before: Zahra, P.J., and O'Connell and K. F. Kelly, JJ.

PER CURIAM.

In this employment dispute, plaintiff, in pro per, alleges that defendant GFG Employment Services, Inc. breached the employment contract and converted wages that plaintiff should have been paid contrary to MCL 600.2919a. The trial court granted defendant's motion for summary disposition. We affirm.

## I. Basic Facts

On July 25, 2005, defendant entered into an employment contract with plaintiff when defendant hired plaintiff as a staff assistant at a pay rate of $10.00 per hour. Plaintiff's duties consisted of driving trucks and making deliveries of defendant's products. The employment contract contained the following language with respect to compensation:

> As compensation for the services provided by me under this Agreement, GFG will pay me $10.00 [per hour]. This amount shall be paid weekly, no later than 7 days after the payroll period that ended on the preceding Friday. Upon termination of this Agreement, payments under this paragraph shall cease; provided, however, that I shall be entitled to payments for periods or partial periods that occurred prior to the date of termination and for which I have not yet been paid, and for any commission earned in accordance with GFG's customary procedures, if applicable. Accrued vacation will be paid in accordance with state

> law and GFG's customary procedures. This Section of the Agreement is included only for accounting and payroll purposes and should not be construed as a minimum or definite term of employment.

The contract also contained an integration clause, which stated:

> This Agreement contains the entire agreement of the parties and there are no other promises or conditions in any other agreement whether oral or written. This Agreement supersedes any prior written or oral agreements between the parties.

In addition, plaintiff was provided an employee handbook. The handbook contained defendant's employee policies and outlined benefits to be provided and procedures to be followed with respect to performance evaluations and raises. The handbook provided, in relevant part:

> Supervisors and employees are strongly encouraged to discuss job performance and goals on an informal, day-to-day basis. A formal written performance evaluation may be conducted at the end of 90 days of employment.
>
> * * *
>
> The performance of all employees is generally evaluated according to an ongoing 12-month cycle, beginning on the date of hiring.
>
> Merit-based pay adjustments may be awarded by GFG Employment Services, Inc. in an effort to recognize truly superior employee performance. The decision to award such an adjustment is dependent on numerous factors . . . .

Plaintiff contends that he was an "excellent" and "superior" employee, but he was never given a raise. After nearly two years, plaintiff's employment with defendant ended on July 5, 2007.

Several months later, plaintiff filed a complaint alleging breach of contract and statutory conversion, and seeking exemplary damages. According to plaintiff, defendant breached the employment contract because defendant failed to provide plaintiff with any performance evaluations during his two years of employment and did not give plaintiff a five-dollar raise. In plaintiff's view, it was these same funds that he was owed that defendant illegally converted in violation of MCL 600.2919a. Based on these facts, plaintiff alleged that he is entitled to exemplary damages in the amount of $4,000,000.00. Defendant moved for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10) and the trial court granted the motion. This appeal followed.

## II. Standards of Review

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the trial court did not rely on any evidence outside the pleadings, we consider the trial court's motion to be based on MCR 2.116(C)(8). A motion based on MCR 2.116(C)(8) is properly granted if the party has failed to state a claim upon which relief can be granted. "Such claims must be so

clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008) (internal quotation marks omitted). We review only the pleadings, in the light most favorable to the nonmoving party, accepting the factual allegations in the complaint as true. *Id*. Further, the interpretation of a contract is a question of law that this Court reviews de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

III. Breach of Contract

Plaintiff first contends that the trial court erred by dismissing his breach of contract claim. In plaintiff's view, defendant breached the employment contract by failing to provide plaintiff with performance evaluations and a five-dollar raise. It is plaintiff's theory that the employee contract incorporates certain provisions of defendant's employee handbook, i.e., those provisions referring to performance evaluation. We disagree.

Generally, a party breaches a contract if it fails to perform a promise, duty or obligation required under the contract. See *Schware v Derthick*, 332 Mich 357, 364, 51 NW2d 305 (1952). Here, however, defendant has not failed to perform any part of the employment contract it entered into with plaintiff. Nothing in the contract confers upon defendant the obligation to evaluate plaintiff after 90 days and every 12 months thereafter, as plaintiff alleges. The only clause in the contract relating to compensation makes no reference to pay raises and nothing in the contract references a duty to undertake performance evaluations. Thus, it cannot be said that defendant has breached the employment agreement.

Further, plaintiff's argument that the employment contract incorporates certain segments of the employee handbook is unavailing. The employment agreement contains an integration clause that declares in express terms that the contract contains the entire agreement between the parties. When parties indicate in a contract that the contract is to be a full and complete integration of their agreement, the courts of this state have given this expressed declaration full effect. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 493-499; 597 NW2d 411 (1998). And, absent some grounds for setting aside such a declaration, such as fraud, we will not consider ancillary understandings or agreements. *Id*. In other words, an explicit integration is conclusive of the parties' agreement and outside evidence, such as the employee handbook in this case, will not be considered. *Id.* For this reason, plaintiff's reliance on the employee handbook is misplaced: Nothing in the employee contract explicitly indicates an intention to incorporate provisions from the employee handbook or any other extrinsic document. Because the employee contract is a fully integrated agreement and does not obligate defendant to undertake performance evaluations or give plaintiff a raise, defendant, when viewing the pleadings in the light most favorable to plaintiff, did not breach the contract. Plaintiff has failed to state a claim upon which relief can be granted. Thus, we cannot conclude that the trial court erred when it granted defendant summary disposition.

IV. Conversion

Plaintiff next argues that the trial court should not have dismissed his statutory conversion claim because defendant converted the funds it owed him. The alleged converted funds are the same funds that plaintiff alleges defendant owed him in the form of a five-dollar raise. Because plaintiff's breach of contract claim fails, his conversion claim, which derives

from his contract claim, must also necessarily fail. The trial court did not err by dismissing the count.

V. Exemplary Damages

Lastly, plaintiff claims that he is entitled to $4,000,000.00 in exemplary damages because defendant's breach and related conduct caused him "emotional distress, anxiety, mental anguish, embarrassment, anger, inability to sleep and loss of appetite." We cannot agree. Exemplary damages are not recoverable based on a breach of contract; there must be some separate allegation and proof of tortious conduct independent of the contract's breach. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 420-421; 295 NW2d 50 (1980). Because plaintiff has failed to allege any separate tortious conduct, we conclude that plaintiff has failed to show that he is entitled to compensation for hurt feelings. *Valentine v Gen American Credit, Inc*, 420 Mich 256, 263-264; 362 NW2d 628 (1984). The trial court did not err by dismissing plaintiff's request for exemplary damages.[1]

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

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[1] Plaintiff also argues on appeal that if this Court determines that the trial court properly dismissed his complaint pursuant to MCR 2.113(F) because he failed to file the employee handbook with his complaint, that we should nonetheless deem the handbook filed and his noncompliance to have no effect. We consider plaintiff's argument to be irrelevant. Although the trial court noted plaintiff's failure to file the handbook, it nonetheless proceeded as if the handbook had been properly attached.