

STATE OF MICHIGAN
COURT OF APPEALS

RALPH KINNEY,

Plaintiff-Appellant,

v

ROBERT FICANO, COUNTY OF WAYNE,
WAYNE COUNTY EMPLOYEES
RETIREMENT BOARD, and AZZAM ELDER,

Defendants-Appellees,

and

BENNIE NAPOLEON,

Defendant.

UNPUBLISHED

March 25, 2014

No. 311358

Wayne Circuit Court

LC No. 10-013323-CZ

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's orders granting summary disposition in favor of defendants-appellees. We affirm.

In 1986, plaintiff began working for Wayne County. In 2003, he was appointed to the position of assistant county executive by defendant Robert Ficano, the Wayne County Executive. Plaintiff's employment with the county ended in 2007, after he was accused of submitting false time reports and being excessively absent from work. Plaintiff sought to obtain extended benefits pursuant to Wayne County Resolution No. 94-903. The resolution provided, in pertinent part, that employees who had at least eight years of county service and separated from employment with Wayne County after January 1, 1994, would be entitled to the same insurance and health care benefits in retirement. These extended benefits were conditioned on the employee having served in certain positions within the county. Wayne County refused to approve the payment of extended benefits for plaintiff under Resolution No. 94-903, apparently because Ficano had not certified plaintiff's eligibility.

Plaintiff filed a five-count complaint against defendants¹ on November 15, 2010, alleging retaliatory discharge in violation of public policy, tortious interference with a contract, breach of fiduciary duty, and two claims of breach of contract. In two separate orders, the circuit court granted summary disposition in favor of defendants-appellees with respect to all claims.

Plaintiff first argues that the circuit court abused its discretion by concluding that he had not pleaded constitutional claims in his complaint. The circuit court's decision concerning the meaning and scope of the pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Plaintiff contended that counts III, IV, and V of his complaint stated constitutional claims. The circuit court disagreed, ruling that counts III, IV, and V were nonconstitutional in nature and sounded exclusively in tort. Thereafter, the circuit court proceeded to grant summary disposition in favor of defendants-appellees with respect to these claims on the basis of governmental immunity. See MCR 2.116(C)(7). The circuit court also dismissed with prejudice "all claims that could have been included in [counts III, IV, and V]," ordering plaintiff to refrain from arguing additional claims that were not enumerated in his complaint.

Plaintiff asserts that counts III, IV, and V of his complaint set forth constitutional takings claims pursuant to Const 1963, art 10, § 2, and procedural due-process claims pursuant to Const 1963, art 1, § 17. He contends that these purported constitutional claims were predicated on defendants' denial of his request for insurance and health care benefits under Resolution 94-903. We disagree. The specific allegations and facts contained in counts III, IV, and V were not couched in constitutional terms; nor did the text of the complaint allege any unconstitutional deprivations of property or due process. The circuit court correctly determined that plaintiff had not pleaded constitutional claims.

Plaintiff next argues that the circuit court abused its discretion by denying his motion to amend the complaint. He contends that the court was required to grant him leave to amend the pleadings as a matter of right under MCR 2.116(I)(5). We disagree. This issue is not properly presented for appellate review because it is not set forth in plaintiff's statement of the questions presented. MCR 7.212(C)(5); *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001). At any rate, however, we reiterate that the circuit court granted summary disposition of counts III, IV, and V pursuant to MCR 2.116(C)(7). Accordingly, plaintiff was not entitled to amend the pleadings as a matter of right under MCR 2.116(I)(5).

In addition, we note that plaintiff's proposed amendment would have been futile. Plaintiff explains that he did not seek to add any new facts or allegations to the text of the complaint, but sought only to amend *the titles* of counts III, IV, and V to reflect that he was asserting violations of the Michigan Constitution. It is well settled that the courts read a plaintiff's complaint as a whole, looking beyond mere titles and procedural labels to determine the exact nature of the claims. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582;

¹ Bennie Napoleon was named as a defendant in plaintiff's complaint, but the parties stipulated to his dismissal before the hearing on defendants' motion for summary disposition. Thus, Napoleon is not a party to this appeal.

808 NW2d 578 (2011); *Belleville v Hanby*, 152 Mich App 548, 551; 394 NW2d 412 (1986). In this case, the learned circuit judge was more than capable of looking beyond plaintiff's chosen procedural labels and determining whether counts III, IV, and V contained any constitutional claims. He properly determined that they did not. Allowing plaintiff to amend the titles of counts III, IV, and V would have been plainly futile given that the circuit court had already looked beyond those titles to examine the substantive allegations in the body of the complaint. See *PT Today, Inc v Comm'r of Fin & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). We perceive no error.

Plaintiff next argues that he pleaded a claim of breach of express contract pertaining to Resolution No. 94-903 but that the circuit court failed to consider this claim. This argument is not preserved for appellate review because it was not specifically raised in the circuit court. See *Klapp v United Ins Group Agency*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Issues raised for the first time on appeal are ordinarily not subject to review. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010).

Nevertheless, even if plaintiff did plead a claim of breach of express contract pertaining to Resolution No. 94-903, it is beyond factual dispute that plaintiff was not entitled to benefits under the resolution. Our Supreme Court has recently held that Wayne County Resolution No. 94-903 "extends . . . insurance and healthcare benefits only to appointees who were (1) confirmed by the county commission and (2) not members of a board or commission." *Hardaway v Wayne Co*, 494 Mich 423, 429; 835 NW2d 336 (2013). Plaintiff freely admits that he was never confirmed by the county commission. Accordingly, he is not entitled to benefits under Resolution No. 94-903. *Id.*

Lastly, plaintiff argues that the circuit court erred by granting summary disposition in favor of defendants-appellees with respect to his claim alleging breach of a just-cause employment contract. Again, we disagree.

"[C]ontracts for permanent employment are for an indefinite period of time and are preemptively construed to prove employment at will." *Bracco v Mich Tech Univ*, 231 Mich App 578, 595; 588 NW2d 467 (1998) (citation omitted). To establish mutual assent to create a just-cause employment relationship, an oral statement concerning job security must be "clear and unequivocal" and "must be based on more than an expression of an optimistic hope of a long relationship." *Id.* at 595-596 (citation omitted).

Plaintiff relies on statements that Ficano allegedly made to him during a meeting at a Big Boy restaurant in 2006. Plaintiff testified at his deposition that, in exchange for his dismissal of a lawsuit that he had filed, Ficano represented that plaintiff would have a job as an appointee as long as Ficano was the county executive and as long as plaintiff did not "screw up."² But these

² In a subsequent affidavit, plaintiff averred that (1) he demanded a just-cause employment contract during the meeting at Big Boy, and (2) Ficano expressly promised that, in exchange for plaintiff's withdrawal of the lawsuit, he would have a just-cause employment contract as long as Ficano was the Wayne County Executive. A plaintiff may not contrive an issue of fact by

statements amounted to a generalized expression of hope for the future and were not definite enough to constitute “a clear and unequivocal” offer of job security. *Id.*; see also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 656; 513 NW2d 441 (1994). Furthermore, it is beyond factual dispute that no just-cause agreement was ever placed in writing. Indeed, plaintiff knew he was an at-will employee, even after the 2006 meeting with Ficano. Viewing the evidence in a light most favorable to plaintiff, no reasonable person could conclude that Ficano’s statements to plaintiff at the Big Boy restaurant demonstrated a clear and definite intent to create a just-cause employment contract with plaintiff. *Id.* at 655-656.

In light of our foregoing conclusions, we need not address the remaining arguments raised by the parties on appeal.

Affirmed. Defendants-appellees, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

submitting an affidavit that contradicts his or her earlier deposition testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001). We do not consider those portions of plaintiff’s subsequent affidavit that conflict with his earlier sworn testimony.