

STATE OF MICHIGAN
COURT OF APPEALS

ALEXANDER HAMILTON LIFE INSURANCE
COMPANY,

UNPUBLISHED
June 8, 1999

Plaintiff/Counter Defendant-Appellee,

v

No. 211221
Oakland Circuit Court
LC No. 94-468462 CK

LEE M. ZOHROB,

Defendant/Counter Plaintiff/Third-
Party Plaintiff-Appellant,

v

HOUSEHOLD INTERNATIONAL, INC., a foreign
corporation, DONALD CLARK, RICHARD HULL,
KENNETH ROBBIN, COLIN KELLY, JOSEPH
SAUNDERS, GARY GILMER, and RICHARD
HEADLEE, Jointly and Severally,

Third-Party Defendants-Appellees.

Before: White, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

This case involves a protracted procedural and factual history¹ in which an attorney, defendant/counter plaintiff/third-party plaintiff Lee Zohrob, working for an insurance company, plaintiff/counter defendant, was allegedly not promoted from the level of associate general counsel to general counsel because of her female status. In May of 1993, she agreed to settle her discrimination claim in return for plaintiff's purchase of accounts receivable belonging to the financially troubled corporation, former counter plaintiff/third-party plaintiff Instrument Sales & Services, Inc. ("IS&S"), whose sole shareholders were defendant and her husband, former counter plaintiff/third-party plaintiff Milad Zohrob.² The settlement contained IS&S' assertion that these accounts were good and collectible and that it would manage the collection efforts and remit the proceeds directly to plaintiff.

In October of 1993, the general counsel of Household International, Inc. (“Household”), third-party defendant and parent company of plaintiff, learned of the settlement and concluded that the settlement violated Household’s conflict of interest provision in its Statement of Business Principles.³ On November 8, 1993, the president of plaintiff informed defendant that she was to be terminated immediately for violation of Household’s conflict of interest disclosure requirements.

In January of 1994, plaintiff filed suit against Lee Zohrob, Milad Zohrob and IS&S alleging breach of fiduciary duty, fraud, conversion, et alia, and further requesting the lower court enter an order requiring defendants to submit an accounting of the outstanding accounts receivable and to appoint a receiver to oversee the collection of the accounts in question. Plaintiff claimed defendants were not remitting the proceeds from collection to plaintiff but were using the proceeds for their own benefit in violation of the settlement agreement.

In February of 1994, the Zohrobs and IS&S filed an amended answer and counter complaint. They alleged wrongful termination of Lee Zohrob, retaliatory discharge, breach of an employment contract, discriminatory failure to promote, conspiracy, interference with a contractual relationship, and intentional infliction of emotional distress. In the same month, the Zohrobs and IS&S also filed a third-party complaint against Household and several of its employees. Defendants alleged the same counts as outlined in their counter complaint against plaintiff. On February 3, 1995, the parties stipulated to the dismissal of all claims by counter plaintiffs/third-party plaintiffs Milad Zohrob and IS&S. On March 18, 1997, this Court in its unpublished per curium opinion affirmed the trial court’s summary disposition of defendant’s claim of wrongful discharge and retaliatory discharge under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*; MSA 3.548(101) *et seq*. On February 20, 1997, the trial court granted plaintiff’s motion for summary disposition as to the remaining counter and third-party claims. On April 3, 1998, the remaining parties stipulated to the dismissal of all remaining claims without prejudice and without costs to any party. Defendant appealed of right on April 27, 1998.

I

In July of 1994, the trial court ordered the appointment of a Court Appointed Expert (“CAE”) for the determination of several discovery matters raised by plaintiff. The order was entered after the trial court considered plaintiff’s motion for an accounting and imposition of a constructive trust. In determination of the parameters by which the CAE would act, the trial court stated:

IT IS HEREBY ORDERED Albert L. Holtz be appointed as an expert pursuant to MRE [sic] 2.706 to advise to Court as to Defendant Instrument Sales and Services, Inc.’s (“IS&S”) performance under the Settlement Agreement dated August 3, 1993, including IS&S’ record of, accounting for, and submission of, payments from account debtors,

IT IS FURHTER ORDERED that the expert will recommend to the Court whether a constructive trust to receive future payments from IS&S’ customers should be established and, if so, under what terms,

IT IS FURTHER ORDERED that the expert shall address all future discovery issues and recommend to the court the proper disposition; and

IT IS FURTHER ORDERED that the expert shall recommend to the Court which party, and to what extent, shall pay for his fees and expenses, based on the merits of the parties' position as to the issues being addressed by the expert.

On June 16, 1995, the CAE issued his report detailing his findings and recommendations to the trial court. Regarding IS&S' compliance with remittance procedures, the CAE stated in part:

A review of the accounting summaries provided by Plaintiff's counsel indicates that if the plain language of the contract is adopted by the Court, that IS&S is several hundred thousand dollars short in compliance with the agreement. If, on the other hand, Ms. Zohrob's interpretation of the contract is accepted by the Court, IS&S is some \$70,000.00 plus short of remittance requirements. Thus, under any theory, IS&S had not complied with the agreement. Defendant has further failed to provide undersigned with accounting data that contradicts Plaintiff's position. It is therefore my opinion that IS&S did not fully perform with regard to the settlement agreement dated August 23, 1993.

The CAE also indicated that a constructive trust should not be established due to the fact that no finding, at that time, had been made by the trial court or a jury. The CAE was inclined to recommend that a receiver be appointed by the trial court to determine what cash being held by IS&S could be transferred to plaintiff without causing financial hardship on IS&S. The CAE also stated that defendant should not be made privy to statistical data of plaintiff outlining the gender composition of plaintiff's workforce. This decision was later partially overturned by the trial court. Thus, defendant had access to the general statistical data of plaintiff's workforce.

Defendant's first claim on appeal is that it was reversible error for the trial court to appoint a CAE to effect discovery, hold hearings and make rulings in this case. We disagree. We review a trial court's decision to appoint an expert witness for an abuse of discretion. *In re Attorney Fees of Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990).

The Rules of Evidence govern the situations whereby the court may appoint an expert witness. The Rules state in relevant part:

The court may . . . appoint an expert witness of its own selection. A witness so appointed shall be informed of the witness' duties by the court in writing . . . A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. [MRE 706.]

Though the case law addressing the appointment of a CAE is sparse, defendant cites the leading case in her appellate brief. In *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 121; 559

NW2d 54 (1996), the order appointing the expert witness delegated power to “make findings of fact, conclusions of law and a final recommendation and proposed judgment as to the disposition of [the] matter . . .” In finding that the trial court had no constitutional authority to delegate specific judicial functions to an expert witness, this Court stated, “It is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens and to construe and apply the laws.” *Id.*, citing *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959).

In the instant case, the trial court gave the CAE specific guidelines governing his duties. The trial court ordered the CAE to advise the court as to defendant’s compliance with the procedures set forth in the settlement transaction. The CAE was to recommend to the court the practicality of the creation of a constructive trust and to determine which party bear the costs of the CAE’s services. Further, the CAE was to address all future discovery issues and recommend to the trial court the proper disposition. While the CAE may appear to have been given some of the duties of a special master, such action alone does not appear to subvert the meaning of MRE 706 by delegating judicial functions to an expert witness. *Carson, supra* at 123-124. In *Carson*, the expert witness was appointed to make findings of fact and conclusions of law, to review all motions, to require the production of evidence, to issue subpoenas, to conduct and regulate miscellaneous proceedings, and to examine documents and witnesses. *Id.* at 123. Here, the CAE examined defendant’s performance under the settlement agreement, reviewed the applicability of the use of a constructive trust, and made recommendations to the court regarding all future discovery requests. We are convinced that the evident overbreadth surrounding the appointment of the expert witness in *Carson* is not replicated in the very limited role that the CAE played in this case.

II

Next, defendant claims that the overall bias and prejudice exhibited by the trial court against defendant warranted his disqualification and removal from the case. We disagree. On February 19, 1997, the trial judge denied defendant’s motion for disqualification asserting that his actions were not motivated by bias or prejudice. On February 20, 1997, defendant appealed that decision to the chief judge of the Oakland Circuit Court. Judge Howard, substituting for the chief judge, found no evidence indicating the trial court’s rulings were premised on prejudicial motivations. This Court reviews an order denying the recusal of a trial judge for an abuse of discretion. *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 124; 420 NW2d 141 (1988).

Disqualification of a judge is governed by MCR 2.003. Accordingly, a trial judge may be disqualified if “[t]he judge is personally biased or prejudiced for or against a party or attorney.” MCR 2.003(B)(1). Absent actual and personal bias or prejudice, a judge will not be disqualified under this rule. *Cain v Dep’t of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). The challenged bias must have its origin in events outside the judicial proceeding. *Id.* at 495-496. A favorable or unfavorable predisposition that springs from facts or events occurring in a proceeding may deserve to be characterized as “bias” or “prejudice.” *Id.* at 496. However, these opinions will not constitute a basis for disqualification “unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Id.*, citing *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). After a thorough review of the lower court record, we find no evidence indicating a

personal and actual bias or prejudice on the part of the trial judge. Defendant relies primarily on the rulings of the trial court which on average were not in her favor. We find no specific instances where the trial court's rulings reflect a deep-seated favoritism for plaintiff or antagonism against defendant making a fair resolution impossible. *Id.*

III

Next, defendant claims the trial court erred in finding that defendant had failed to plead a breach of contract claim arising from the failure to promote her to general counsel in her counter complaint and third-party complaint. We disagree. Decisions concerning the meaning and scope of a pleading are reviewed by this Court for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Defendant asserts that her amended answer and counter complaint along with her third-party complaint adequately allege that plaintiff and third-party defendant Household breached their promise to promote defendant to the position of plaintiff's general counsel. After reviewing defendant's respective pleadings at issue, it is clear that defendant did not allege a separate claim for breach of plaintiff's and third-party defendant's promise to promote defendant. Thus, defendant's pleadings were not in conformance with MCR 2.113(E)⁴ to support her claim of breach of promise to promote. Defendant's minimal passing references to an alleged breach of a promise fails to allege a cause of action properly presented to the court. See *Hetes v Schefman & Miller*, 152 Mich App 117, 122; 393 NW2d 577 (1986). As such, the trial court did not abuse its discretion. We further observe that defendant did not seek to amend to properly allege breach of a contract to promote.

IV

Next, defendant asserts the trial court erred when it contradicted its March 1, 1995, opinion granting plaintiff's motion for summary disposition with its February 20, 1997, opinion granting counter and third-party defendants' motion for summary disposition in referencing defendant's claim for breach of promise to promote. Again, we find defendant's claim to be without merit and find that the trial court did not abuse its discretion. *Weymers, supra*, 454 Mich at 654.

V

Defendant next claims the trial court erred when it summarily disposed of defendant's claims of interference with a business contract, conspiracy and intentional infliction of emotional distress. We disagree.⁵ We review an order granting summary disposition de novo. *Travelers Insurance Co v Guardian Alarm*, 231 Mich App 473, 477; 586 NW2d 760 (1998).

Defendant asserts that the trial court's failure to recognize the separate identities of plaintiff and Household resulted in the improper granting of plaintiff's motion for summary disposition. In its opinion granting plaintiff's, counter defendant's and third-party defendants' motion for summary disposition, the trial court specifically noted that while defendant did not want to report directly to Household's general counsel, the man who was hired for the position was required to report to Household's general counsel. Also, plaintiff had no authority to promote defendant and any such decision was reserved to

Household's general counsel. As such, Household's reason for not promoting defendant, that she would not follow Household's chain of command, is bolstered by defendant's own admission that she was challenging Household's general counsel's authority. It was established that Household was the parent company of plaintiff and plaintiff acknowledged Household's control over the hiring and promoting of plaintiff's general counsel. Further, the hiring history of Household established that its general counsel did, in fact, have the sole authority to promote defendant.

VI

As to defendant's claim that the trial court erred in granting summary disposition against her conspiracy claim, we find no error on the part of the trial court. A civil conspiracy involves two or more persons acting in concert to accomplish an unlawful action. *Admiral Insurance Co v Columbia Casualty Insurance Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). A separate actionable tort must be proved to support a claim of conspiracy. *Early Detection Center, PC v New York Life Insurance Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). Since the trial court found no grounds for defendant's discrimination claim, the conspiracy claim properly failed. *Id.*

VII

Defendant also claims that plaintiff and Household tortiously interfered with her contract between herself and plaintiff. Regarding defendant's claim against plaintiff, it is well established that a party to a contract cannot tortiously interfere with its terms and obligations. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986). See also, *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). As to defendant's claim against Household, the trial court correctly found that Household did not perform a per se wrongful act or a lawful act for a malicious or unjustified purpose. *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994). Since Household was justified in terminating defendant, it is free from liability. As to defendant's claim of intentional infliction of emotional distress, since her claims above have been properly dismissed, we find that reasonable minds could not differ that the conduct of plaintiff and Household did not rise to the level of outrageous behavior necessary to support such a claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

VIII

Next, defendant claims that the trial court erred in dismissing defendant's claim of failure to promote based on reasons found in a personnel file of Household. We disagree. Defendant asserts that plaintiff's efforts to use information not contained in her personnel file in plaintiff's possession were in violation of the Bullard-Pawlecki Employee Right to Know Act, MCL 423.501 *et seq*; MSA 17.62(1) *et seq*. We review the interpretation of a statute de novo. *Howard v Clinton Charter Township*, 230 Mich App 692, 695; 584 NW2d 644 (1998).

Defendant claims that according to plaintiff's personnel file, she was a very capable employee deserving the promotion to general counsel. Further, defendant claims the reasons plaintiff gave for terminating her were not found in plaintiff's personnel file, but were located in Household's files which

were not accessible to defendant. Plaintiff asserts the reasons for defendant's termination were documented in Kenneth Robbin's affidavit. Kenneth Robbin is Household's general counsel. Plaintiff further asserts that it does not have to document the reasons for defendant's termination in her personnel file.

The purpose of the act is "to permit employees to review personnel records; to provide criteria for the review; to prescribe the information which may be contained in personnel records; and to provide penalties." PA 1978, No 397; see also *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215, 221; 514 NW2d 213 (1994). We find that this act in no way limits an employer to terminating or not promoting an employee for reasons specifically stated in a personnel file. Further, we note that as parent corporation to plaintiff, Household's operating procedures allow it to decline to promote defendant as the ultimate employer of defendant.

IX

Next, defendant claims the trial court erred in granting the motion for summary disposition against defendant's claim of gender-based discrimination. We disagree and review the order granting summary disposition de novo. *Travelers Insurance Co v Guardian Alarm, supra*, 231 Mich App at 477. Defendant may survive the motion for summary disposition by presenting sufficient admissible evidence to create a reasonable factual dispute that plaintiff's proffered reason was a pretext and that gender discrimination was the motivation behind plaintiff's actions. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 157; 579 NW2d 906 (1998).

To establish a prima facie case of discrimination, defendant must prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Id.* at 172-173. In the instant case, it appears defendant has articulated and established each element above. Defendant was obviously in a protected class, she suffered an adverse employment action as evidenced by her not being promoted, she appears to have the necessary skills for the position, and the circumstances raise an inference of discrimination. Thus the burden shifted to the opposition to establish a legitimate, non discriminatory reason for not promoting defendant. *Id.* at 173, citing *Texas Dep't of Community Affairs v Burbine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

Plaintiff submitted the affidavit of Kenneth Robbin, general counsel for Household. Mr. Robbin's affidavit sets out to explain the decision to not promote defendant to plaintiff's general counsel. Robbin stated that the decision to promote defendant was his to make and that he consulted with individuals employed by plaintiff in making that decision. Robbin also stated that defendant did not have adequate knowledge of non-insurance matters that plaintiff was involved in. Further, he stated that defendant did not report to him as assistant general counsel the way company guidelines had intended, and, therefore, felt that she would not be suited for the position of general counsel.

Robbin further stated in his affidavit that out of the six general counsel positions he has filled in his department, five have been filled by women. Also, over 54% of the legal positions within

Household's law departments are held by women. Defendant asserts that the male employee that was promoted to general counsel was not required to submit to the same promotion process that defendant participated in. The Robbin affidavit confirms that defendant was recommended for the position by Mr. Headlee. Robbin decided to chose someone else better qualified. His uncontradicted affidavit also reveals that Mr. Robbin has filled six general counsel positions uniformly requesting curricula vitae as was done in this case; that all candidates were asked to provide the same documentation as defendant and if there was a time when that procedure was not followed at Alexander Hamilton, Mr. Robin did not participate. We refer to paragraph 13 of his affidavit which states as follows:

I understand that, alleging that she was subjected to disparate treatment, Ms Zohrob testified that a male Alexander Hamilton employee was promoted without having to submit a resume [sic] or be interviewed by a head hunter, but she was required to do so. While Ms Zohrob was a candidate in the selection process at the request of Alexander Hamilton management and thus was asked to provide the same documentation as other candidates for the general counsel position, it is of course possible that Alexander Hamilton in the past promoted someone in another department from within without requiring such documentation or, indeed, without considering anyone else other than the internal candidate. However, this is something I would not know anything about, because I would not have participated in any such process - my only involvement with Alexander Hamilton staffing issues involve the law department due to the aforesaid reporting arrangement and, as I have stated, I was solely responsible for the decision not to promote Ms Zohrob.

The trial court did not err in relying on Mr. Robbin's affidavit and in granting the motion for summary disposition against defendant's claim of gender-based discrimination.

X

Next, defendant claims the trial court erred in granting summary disposition as to defendant's sexual discrimination claim prior to the completion of discovery. We disagree. After review of the lower court record, we are unable to agree with defendant that the trial court did not order plaintiff to produce the requested statistical data prior to the court's entry of its order dismissing the discrimination claim. The record indicates the trial court entered an order compelling production of these documents on July 20, 1995. Defendant's discrimination claim was not dismissed until the court entered its order granting summary disposition on February 20, 1997. Therefore, we find the trial court to have acted appropriately and defendant's claim to be without merit.

XI

Next, defendant claims that plaintiff's former legal counsel should have been disqualified in representing plaintiff when the same law firm represented defendant and her husband during their purchase of stock from IS&S.⁶ Defendant asserts the trial court's failure to do so amounts to reversible error. We disagree.

The determination of the existence of a conflict of interest is a question of fact that should be reviewed for clear error. MCR 2.613(C); *People v Doyle*, 159 Mich App 632, 641; 406 NW2d 893 (1987). Defendant asserts that plaintiff's former counsel obtained confidential information through the prior representation of Lee and Milad Zohrob when they acquired complete stock ownership in IS&S. Further, that plaintiff's former counsel subpoenaed from defendant documents the law firm prepared in conjunction with the stock purchase. The trial court ruled that plaintiff's counsel could not question defendant about the preparation of those documents. Defendant claims the trial court's failure to disqualify plaintiff's former counsel was in violation of the Michigan Rules of Professional Conduct. MRPC 1.9(a) and (c)(1) state:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

* * *

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 of Rule 3.3 would permit or require with respect to a client, or when the information has become generally known . . .

We note that the official Comment to MPRC 1.9 sheds light on what considerations should be given in judging the effect of a conflict of interest:

The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. . . *The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.* [Emphasis added.] [*In re Osborne*, 230 Mich App 712, 719; 584 NW2d 649 (1998)].

Defendant claims the stock purchase transaction in which plaintiff's former counsel represented the Zohrobs creates a conflict in the present case. We disagree. The prior representation involved the formalities surrounding the Zohrobs' acquisition of a company that later benefited from the settlement transaction surrounding defendant's discrimination claim. These occurrences have little to do with plaintiff's suit against defendant which arose from the sale of receivables from IS&S to plaintiff. Further, the trial court concluded that plaintiff would not be able to question defendant about the preparation and advice given to defendant by plaintiff's former counsel. As such, we find that plaintiff's former counsel

was not so involved in the representation of defendant as to create a conflict of interest in the instant case. The trial court did not err.

XII

Finally, defendant claims the trial court erred in failing to grant her motion for relief from judgment based on the discovery of new and compelling evidence showing plaintiff acted fraudulently. We disagree. A trial court's decision on a motion for relief from judgment is governed by MCR 2.612(C). This Court reviews a trial court's decision to deny the motion for an abuse of discretion. *Redding v Redding*, 214 Mich App 639, 642-643; 543 NW2d 75 (1995). After a thorough review of the lower court record, we are not convinced that defendant's "newly discovered evidence" is of any substantive value. The trial court did not abuse its discretion in denying defendant's motion for relief from judgment.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

¹ In *Alexander Hamilton Life v Zohrob*, unpublished opinion per curiam of the Court of Appeals, released March 18, 1997 (Docket No. 187615), this Court describes in great detail the history of this case.

² The receivables totaled \$334,885 and were to be purchased by plaintiff for \$300,000.

³ Household's Statement of Business Principles states in part:

[E]mployees must be free from conflicting interests in the performance of their duties for Household . . . As a general guideline, employees should avoid . . . holding a direct or indirect interest in a competitor company or in any firm or entity with which [Household] does business.

⁴ MCR 2.113(E)(3) states:

Each statement of a claim for relief founded on a single transaction or occurrence or on separate transactions or occurrences, and each defense other than a denial, must be stated in a separately numbered count or defense.

⁵ While neither the lower court's opinion or plaintiff's motion articulate the grounds for which summary disposition is to be granted, we conclude that the motion was made pursuant to MCR 2.116(C)(10).

⁶ Plaintiff's current counsel are former members of the prior law firm, Dickinson, Wright, Moon, Van Dusen & Freeman.