

STATE OF MICHIGAN
COURT OF APPEALS

DAVE OSER,

Plaintiff/Counter-Defendant-
Appellant,

v

CLEAR!BLUE MANAGEMENT, LLC,¹

Defendant/Counter-Plaintiff-
Appellee,

and

TODD SMITH,

Defendant/Counter-Plaintiff.

UNPUBLISHED

September 26, 2006

No. 269195

Oakland Circuit Court

LC No. 05-064575-CK

Before: Cavanaugh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's² motion for summary disposition in this case involving the alleged breach of an employment contract. We affirm.

Plaintiff sued defendant in February 2005, claiming a breach of an employment contract.³ The complaint alleged, among other things, that defendant terminated plaintiff without good cause and therefore owed plaintiff six months' worth of his annual salary, or \$90,000.

¹ While the parties stipulated below that the proper name of this party is "Clear!Blue Management, Inc.," the caption was inadvertently left as originally written and remained "Clear!Blue Management, LLC," in the final order being appealed.

² The term "defendant" in this opinion refers to the corporate defendant.

³ An additional claim was dismissed and is not at issue in this appeal. Also, we note that plaintiff acknowledged that defendant was entitled to fire him without good cause; he merely claimed that if defendant did so, plaintiff was entitled to severance pay under the terms of the employment
(continued...)

In 2003, plaintiff was working for a company called BBDO. His primary responsibility was to plan and manage advertising for Chrysler dealership cooperative groups. Plaintiff met Todd Smith because Smith was an employee at Chrysler, and the two men became friends. Smith and some others were discussing forming a new advertising agency, Clear!Blue, Inc. (Clearblue), and they eventually did form the company. According to plaintiff's deposition testimony, plaintiff informed them that he was feeling somewhat unchallenged at BBDO and that he might like to make a career change. He talked with Todd Smith, who became Clearblue's chief executive officer, about possibly joining Clearblue.

Plaintiff testified that he met with Mike Webster and Mike Rosenau, Clearblue employees, in June 2003. Webster indicated that Clearblue needed more business and asked plaintiff if he would like to be a "hunter," i.e., someone responsible for pursuing new accounts. According to plaintiff, he replied that "hunting" was not his background and that he and Smith had not been discussing the possibility of plaintiff's joining Clearblue in that capacity. Plaintiff indicated that Webster was tentative about hiring someone like plaintiff, whose specialty was managing as opposed to "hunting." Plaintiff admitted, however, that "everybody in every organization has some type of selling capabilities and responsibilities that could go up and down a scale" Plaintiff testified that Rosenau telephoned him after the meeting and told him to not be overly concerned about Webster's comments because plaintiff's primary responsibility would be managing accounts as opposed to generating new business.

Eventually, plaintiff left his job at BBDO and became a Clearblue employee. Plaintiff and Smith signed a "deal points" document on November 20, 2003. It identified plaintiff's "key responsibilities" at Clearblue as follows:

Lead strategic management of Sports Marketing sector (and other TBD sectors)[.]

Work with Clear!Blue team to grow other business, particularly for DaimlerChrysler.

Help direct new business development process as part of Clear!Blue leadership team.

Perpetuate Clear!Blue culture[.]

Have fun.

Under "compensation," the document indicated that "[f]urther clarification on phantom equity status in the event of death is forthcoming."

The document also stated:

You may terminate your employment with Clear!Blue at any time and for any reason whatsoever simply by notifying Clear!Blue thirty (30) days prior to the

(...continued)
contract.

date of termination. Likewise, Clear!Blue may terminate your employment at any time for good cause, and for any reason whatsoever, with or without cause upon thirty (30) days advance notice. If your employment is terminated without good cause, you will be given severance payment equal to six months salary at the rate of your then current regular base salary in six (6) equal monthly installments This employment relationship cannot be changed except in writing signed by a Clear!Blue officer. A copy of this contract will be provided to you prior to the commencement of your employment with Clear!Blue.

The memo went on to state:

This letter forms the complete and exclusive statement of your employment agreement with Clear!Blue, although you will be expected to sign a more detailed Employment Agreement prior to your start date. The employment terms in this letter supersede any other agreements or promises made to you by anyone, whether oral or written.

Plaintiff testified that although he was hired to manage a “sports” division at Clearblue, that division was never actually formed. Indeed, within the first month of plaintiff’s employment with Clearblue, the three main projects that he was expected to manage failed to materialize. Plaintiff testified that he accepted the fact that his role as a “sports division” manager would have to change as a result. He admitted that he agreed in January 2004 to try to generate new business for Clearblue and that this “was now a condition of [his] terms of employment” Plaintiff also acknowledged that, in accordance with the deal points document, he was obligated to “[h]elp direct and develop” new business. Moreover, plaintiff admitted that an advertising agency sometimes needs to make changes and is entitled to demand that its employees adapt to those changes. Plaintiff acknowledged that his role at Clearblue changed “to leading the new business development area.” When asked whether he did generate new business for Clearblue, plaintiff responded that “[w]e generated business at Delphi” and that he was very involved with gaining the business of Karmanos Cancer Institute (KCI), which signed with Clearblue after plaintiff left the company. He also admitted, however, that gaining the business of KCI was “a team effort.”

Plaintiff additionally testified that he was in pursuit of business from Anheuser-Busch while at Clearblue. He was given the names and telephone numbers of two individuals there. Plaintiff testified that he made three or four telephone calls trying to contact them but had trouble in doing so. He stated that he “went a different route” and contacted other individuals connected with Anheuser-Busch. Plaintiff stated that he believed that Clearblue had an unrealistic expectation with regard to the amount of time it takes to generate new business.

According to plaintiff, sometime in July 2004 or August 2004, Terry Davis, a Clearblue advisor, told plaintiff that Smith was getting frustrated about the lack of new business and that he wanted plaintiff to take a pay cut. Moreover, in May, plaintiff met with Rosenau, who expressed concern that plaintiff was not generating new business. Plaintiff testified that he responded that “we’ve only been doing this for three months, it’s going to take some time, we’re just meeting people and building relationships.” Smith also met with plaintiff and expressed concern about the lack of new business. Smith asked plaintiff to write something setting forth what he had been

doing at Clearblue. Plaintiff stated that he gave Smith a “one-pager of companies we were working with, talking to.”

Plaintiff was terminated from Clearblue on August 30, 2004. Smith informed him “[t]hat enough new business was not being generated and it was [plaintiff’s] responsibility.” When plaintiff was asked by defendant’s attorney why he thought that Clearblue did not have just cause to fire him, the following colloquy ensued:⁴

A. Because I was not hired originally – I did not accept an offer from Clearblue to be solely evaluated, graded, whatever adjectives you want to use, on generating new business.

Q. But over time that changed, correct?

A. Yes, it did; for me to stay employed there, yes, it did.

Q. So for you to stay employed, you had to generate new business, correct?

A. That was my responsibility and function.

Q. And you were terminated because you failed to generate sufficient new business; is that correct?

A. Whatever that was defined as, yes, in an eight-month period.

Plaintiff also stated that “I had only been there eight months and what I was being asked to do and what I was performing doesn’t happen in eight months, so I never actually felt as though I would be fired.” When again asked about his efforts with regard to new business, plaintiff said, “We got projects from Delphi we do, one big area that is where [sic] I was spending a lot of time. I was also part of the Karmanos Cancer Institute business. Those are two that come to mind.”

Smith testified that he perceived problems with plaintiff’s job performance around April 2004 and communicated his dissatisfaction with plaintiff during a performance review on June 1, 2004. Smith testified that he told plaintiff that he needed to put together “a methodical business development strategy. . . .” Smith indicated that Davis tried to mentor plaintiff to help him achieve success but that nothing viable materialized. Plaintiff presented a plan sometime around August 25, 2004. Smith characterized the plan as “pathetic” and “nothing more than a catch-all list[.]” Smith testified that he had numerous conversations with plaintiff about improving his performance and that plaintiff “would . . . look like a deer in the headlights where he would say, you know, I don’t know what to do. I don’t know how to move forward with anything different.”

⁴ At one point during his deposition, when plaintiff was asked by defendant’s attorney if Clearblue terminated him for good cause, plaintiff answered, “I don’t know.”

Smith testified that at one point plaintiff missed a deadline to get back to a client, “which in our business is suicide.” According to Smith, there was another instance in which plaintiff failed to put together an adequate plan for a specific potential client. Smith stated, “Just identifying somebody and the fact that they have a budget is not enough[.]” Smith added that plaintiff spent “quite a bit of time” while at work on the Internet and on eBay and that plaintiff relied “on other resources within the company” to put together computer reports and documents.⁵

In February, plaintiff was given some work related to Delphi. Clearblue lost the Delphi business eventually. Smith testified that plaintiff was a factor in losing it because he “didn’t follow up[]” properly “[w]ith the clients.” In an affidavit, Smith indicated that at the June 1, 2004, meeting, plaintiff admitted that “he was not fulfilling his job duties adequately and admitted that he ‘was not on his game.’” Smith also indicated that plaintiff said during the meeting that Smith was “‘being a dick.’” Smith also stated in the affidavit that plaintiff “never procured a single new client or piece of business” for Clearblue during his employment there and that Smith was a close friend of a KCI director and was himself responsible for procuring the KCI account. Smith testified that, with regard to a potential business opportunity with Anheuser-Busch, plaintiff failed to follow up adequately with contacts at the beer company.

Smith admitted that there is no set “time line” for when new business should be secured after a potential client is first contacted.

Defendant eventually moved for summary disposition under MCR 2.116(C)(10). After considering the parties’ briefs and oral arguments, the trial court ruled that the deal points document constituted a valid contract. However, it noted that plaintiff signed a “Receipt of Employment Guide” on December 2, 2003. The court noted that this document stated that plaintiff’s employment could be terminated at will, at any time. The court granted defendant’s motion for summary disposition, concluding as follows at the end of its opinion:

Thus, the court is satisfied that this Receipt, signed after the Deal Points letter and signed by a Clear!Blue officer, supercedes the Deal Points letter to the extent that it is different from it. However, the court finds that the Deal Points letter and the Receipt of Employment Guide constitute a clear and unambiguous statement of at will employment and Plaintiff could be terminated at any time with or without cause. Thus, because Plaintiff has failed to refute this evidence, the claim of Breach of Contract for termination without just cause must be dismissed.

On appeal, plaintiff initially argues that the trial court erred in concluding that the severance clause from the deal points memo was not enforceable.

⁵ Plaintiff testified that he is “average” in terms of general computer skills but “[l]ess than average” in using PowerPoint. He stated that “[i]t was never clearly defined that I had to have strong computer skills” at Clearblue. Plaintiff admitted that he sometimes surfed the Internet for non-job-related purposes during work, but he stated that the activity was not excessive.

We review de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). This Court, like the trial court, must look at the record as a whole and, giving the nonmoving party the benefit of the doubt, determine if the record creates an open issue on which reasonable minds could differ. *Id*; *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). The moving party has the initial burden of supporting its position that there is no genuine issue regarding a material fact by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist. *Id*. "Where the burden of proof at trial on a dispositive issue rests on the nonmoving party, that party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 574 NW2d 314 (1996). If the opposing party fails to present documentary evidence showing that there is a genuine issue of material fact, summary disposition is appropriate. *Id* at 362-363.

We agree that the trial court erred in concluding that the deal points memo was not enforceable. Defendant contends that the "receipt of employment guide" signed by plaintiff "superceded" the deal points memo and "effectively terminat[ed] the severance provision set forth in the Deal Points letter." This assertion is without merit. Indeed, the receipt of employment guide did not alter the terms of the severance provision in the deal points memo. Instead, it merely reiterated information that was already contained in the deal points memo, i.e., it reiterated that defendant could terminate plaintiff without cause. The receipt of employment guide did not alter the obligation of defendant to pay severance, however, if it terminated plaintiff without good cause.

Defendant also argues that the deal points memo did not constitute a valid contract because it was merely an "agreement to agree" and did not sufficiently state the material terms of the contract. We do not agree. The deal points memo stated that "[t]his letter forms the complete and exclusive statement of your employment agreement with Clear!Blue, although you will be expected to sign a more detailed Employment Agreement prior to your start date" (emphasis added). A more detailed employment agreement was never signed by the parties. Moreover, the only unclear term in the deal points memo concerned the issue of plaintiff's entitlement to phantom equity in Clearblue. The fact that this one issue was left to be "sorted out" at a later date does not invalidate the contract. See, generally, *Updike Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). It is abundantly clear that plaintiff and defendant intended the deal points memo to constitute a valid and enforceable contract.

Because the deal points memo was a valid and enforceable contract, its severance clause must be enforced. The pertinent question, then, is whether defendant terminated plaintiff "without good cause." Defendant claims that it had good cause to terminate plaintiff, and we agree.

We initially note that the phrase “good cause” was not defined in the deal points memo. Thus, we should interpret it according to its plain and ordinary meaning.⁶ *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004). This phrase generally means “a substantial reason amounting in law to a legal excuse” or a reason put forward in good faith that is not arbitrary, unreasonable, irrational, or irrelevant. *Franchise Management Unlimited, Inc v America’s Favorite Chicken*, 221 Mich App 239, 246-247; 561 NW2d 123 (1997) (internal citation and quotation marks omitted).

The evidence established that defendant had good cause to terminate plaintiff. Indeed, Smith indicated that plaintiff (1) failed to present a viable business development strategy in August, even though he had been asked to do so; (2) responded that he did not “know what to do” when Smith talked with him about improving his performance; (3) missed a deadline to get back to a client; (4) did not follow up properly with Delphi or Anheuser-Busch clients; (5) admitted that he was not fulfilling his duties adequately; and (6) never secured a new client or piece of business for Clearblue.

Plaintiff admitted that procuring new business had become a primary part of his employment with Clearblue. However, he claimed that he needed more time to bring in new business. Yet even if this is true, it does not excuse plaintiff’s failure to present a viable business development strategy and to follow up properly with clients. Plaintiff also claimed that he generated new business with Delphi and that he helped to gain the business of KCI. Again, however, this does not excuse plaintiff’s failure to present a viable business development strategy and to follow up properly with clients. Moreover, Smith indicated that plaintiff actually contributed to Clearblue’s loss of Delphi as a client by failing to follow up with the company and that Smith himself was responsible for procuring the KCI business because he had a contact there. As noted earlier, “[w]here the burden of proof at trial on a dispositive issue rests on the nonmoving party, that party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto, supra* at 362-363. In light of Smith’s more detailed testimony, we simply cannot conclude that plaintiff’s bald assertions that he gained new business from Delphi and KCI amounted to the setting forth of “specific facts showing that a genuine issue of material fact exists.” *Id.*

After our review of the record, we conclude that defendant, as a matter of law, had good cause to terminate plaintiff. Accordingly, we affirm the trial court’s order, albeit on alternative grounds.⁷

⁶ Plaintiff argues that the definition of “for cause” in the proposed final employment agreement should be used here. However, this document was never signed by the parties. Moreover, we note that we would reach the same conclusion today even if the definition advocated by plaintiff were used. Indeed, plaintiff essentially “material[ly] fail[ed] . . . to perform [his] duties and responsibilities,” and defendant thus had good cause to fire him under the definition advocated by plaintiff.

⁷ We do not reverse a trial court’s order if the court reached the right result for the wrong reason. (continued...)

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter

(...continued)

Taylor v Laban, 241 Mich App 449, 458; 616 NW2d 229 (2000).