

STATE OF MICHIGAN
COURT OF APPEALS

RITE MEDIA ENTERPRISES, INC.,

Plaintiff-Appellee,

v

ROBERT W. DUNDON and JOANNE LAVOIE,

Defendant/Counter-Plaintiffs/Third
Party Plaintiffs-Appellants,

and

RITE MEDIA ENTERPRISES, INC., RITE
MEDIA, INC., RITE MEDIA OF MICHIGAN,
L.L.C., and RICHARD GENAITIS

Counter-Defendants/Third-Party
Defendants-Appellees.

UNPUBLISHED

June 5, 2003

No. 231888

Wayne Circuit Court

LC No. 97-735135

Before: Whitbeck, C.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

In this action alleging breach of contract, defendants, Bob Dundon and Joanne Lavoie, appeal as of right from the trial court's order granting summary disposition in favor of plaintiff counter-defendant and third-party defendants. Additionally, defendants appeal from a judgment awarding damages in the amount of \$50,000 in favor of plaintiff following a jury trial in a separate breach of contract action. Last, defendants appeal from the trial court's order denying defendants' motion to disqualify the trial judge. We affirm.

I. Facts and Procedure

Defendants and Richard Genaitis had been friends for approximately thirty years. Genaitis offered defendants a business opportunity in Michigan with a company called Rite Media, Inc. Rite Media, Inc. sold outdoor advertising on highway billboards. Defendants claim their employment with Rite Media, Inc., was for a five-year term with benefits including health, dental and automobile insurance. Genaitis offered Lavoie the position of sales manager and

Dundon the position of general manager in the company. The employment contract was not in writing because defendants did not believe that a written contract was necessary.

In September 1996, defendants arrived in Michigan to prepare for the purchase of Rite Media, Inc. and to look for a place to live. On approximately November 1, 1996, Genaitis received a call from defendant Lavoie indicating that defendants had found a home in Romulus, Michigan, that they wanted to purchase. In order to close on the house quickly, defendants participated in a “no docs” mortgage,¹ which required defendants to make a \$50,000 down payment on the purchase of the home. As an additional requirement of the “no docs” mortgage, the \$50,000 could not be the product of any type of loan.

Genaitis gave defendants \$50,000 as a down payment for the house. Genaitis testified that the \$50,000 was a loan predicated upon the sale of the home defendants owned in Louisiana or by a second mortgage on either the Michigan or Louisiana home. Genaitis admitted that he did not memorialize the loan to defendants in writing because they were his “close friends.” Defendants claimed that the \$50,000 was part of a relocation allowance. Defendants bought the house, and Genaitis paid defendants the cost of moving their personal effects and furniture from Louisiana to Michigan.

On November 15, 1996, defendants started employment with Rite Media, Inc. On January 1, 1997, the company was officially opened for business. In June 1997, Genaitis hired John Caianiello. Caianiello’s contract stated that he was general manager of Rite Media, Inc. Caianiello testified that he was not a replacement for defendants, but rather, was hired to aid in the area of sales because defendants needed help. On July 11, 1997, defendants sent Genaitis a letter of resignation.

Genaitis testified that notwithstanding his multiple requests for the repayment of the \$50,000, defendants refused to repay the loan. Plaintiff filed suit to recover the \$50,000 on breach of contract grounds in October 1997. In December 1997, defendants filed a counterclaim and third-party complaint for compensation and benefits allegedly owed under the employment contract due to a breach of contract. The trial court summarily dismissed all of defendants’ counterclaims and cross-claims. In 1998, Genaitis transferred to plaintiff, Rite Media, Inc., the debt owed to him by defendants. The case proceeded to trial on the question whether defendants had to repay to Rite Media, Inc., the \$50,000 provided to them in conjunction with defendants’ purchase of a home. The jury returned a \$50,000 verdict in favor of plaintiff. This appeal followed.

II. Analysis

A. Summary Disposition

On appeal, defendants first argue that the trial court erred in granting plaintiff’s and third-party defendants’ joint motion for summary disposition regarding defendants’ claims of breach

¹ A “no docs” mortgage is one where the mortgagor is approved for a real estate loan without providing any documentation to the mortgagee that verifies the employment or financial capacity of the mortgagor.

of contract. We disagree. Plaintiffs filed their motion for summary disposition pursuant to MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and is reviewed de novo on appeal. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Veenstra, supra* at 164; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10), if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto, supra* at 362.

1. Breach of Employment Contract

Generally, employment contracts in Michigan are terminable at the will of either the employer or the employee. *Lytle v Malady*, 456 Mich 1, 12 (Riley, J.), 48 (Cavanagh, J.); 566 NW2d 582 (1997); *Toussaint v BCBSM*, 408 Mich 579, 596; 292 NW2d 880 (1980); *Bracco v Michigan Technological Univ*, 231 Mich App 578, 598; 588 NW2d 467 (1998). The presumption of an at-will employment contract may be overcome by either an express contract for a definite term, or by a provision forbidding discharge without just cause. *Lytle, supra* at 13; *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993); *Bracco, supra* at 598.

Defendants initially alleged in the trial court that they entered into an express contract for a definite term of five years. Plaintiff pleaded by way of affirmative defense that defendants' alleged contract for five years' employment was void under the statute of frauds. The trial court dismissed defendants' breach of employment contract claim, concluding the alleged five-year employment contract was void under the statute of frauds because there was no writing documenting the employment agreement.

On appeal, defendants argue the trial court erred by failing to recognize promissory estoppel as an exception to the statute of frauds. Defendants further argue their causes of action were saved by the equitable doctrine of promissory estoppel.² We need not determine whether defendants' breach of employment contract claims are void under the statute of frauds or saved under the equitable doctrine of promissory estoppel. We conclude the evidence viewed in a light most favorable to defendants fails to establish that defendants were either offered or promised employment for a term of five years.³

² Plaintiffs claim for equitable estoppel is misplaced. Equitable estoppel is a defense, and is not a cause of action in itself. *Marrero v McDonnell Douglas Capital Corp.*, 200 Mich App 438, 444; 505 NW2d 275 (1993). Therefore, we decline to address plaintiff's claim of equitable estoppel.

³ A contractual promise that is not enforceable under the statute of frauds may nonetheless become binding on the promisor if there is evidence that the promisee reasonably relied to his detriment on a definite and clear promise and it would be unjust not to enforce the promise. See
(continued...)

Both defendants testified that they were promised that if they worked really hard for five years they could retire, along with Genaitis, and let someone else do the work. No reasonable person in defendants' position would interpret this statement to be a promise or offer for employment for five years. At best, this is a statement that both employees and employer will prosper if the business succeeds. The statement relates to incentives to work hard and compensation in the event the business succeeds. Significantly, this statement is silent in relation to any guarantee of employment for a term of five years. There is simply no evidence of any promise or offer of employment that would create a factual issue sufficient to overcome the presumption of an at-will employment contract. Thus, the trial court reached the correct result. Summary disposition on defendants' breach of employment contract was properly granted.

2. Constructive Discharge

Defendants also appeal dismissal of their claim of constructive discharge. A claim of constructive discharge is not an independent cause of action. Rather, constructive discharge relates to the issue of damages. If established, constructive discharge rebuts an employer's claim that the employee voluntarily terminated the employment relationship. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994); *Fischhaber v GMC*, 174 Mich App 450, 454-455; 436 NW2d 386 (1988).

A claim of constructive discharge has no legal significance if the employee fails to establish the existence of something greater than an at-will employment relationship. *Jacobs v St Clair County*, 163 Mich App 230, 234; 414 NW2d 161 (1987); *Rasch v East Jordan*, 141 Mich

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Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc, 254 Mich App 608, 613-616 658 NW2d 494 (2003) (recognizing and criticizing use of the equitable doctrine of promissory estoppel to circumvent the legislative mandate of the statute of frauds). However, a claim of promissory estoppel fails as a matter of law if the evidence leads to the single conclusion that the alleged promise lacks clarity or definition. No reasonable person should rely to his or her detriment on an alleged promise that is indefinite or unclear. *Novak v Nationwide Ins Co*, 235 Mich App 675, 689; 599 NW2d 546 (1999).

Similar evidence is needed to support a claim that defendants were parties to a five-year employment contract. We start our analysis of such claims with the rebuttable presumption that the employment relationship is terminable at the will of either party. *Toussaint, supra* at 596. Modification of an at-will employment relationship requires mutual assent. *Rood, supra* at 117-118. An employer's offer must be clear and unequivocal to overcome the presumption of employment at will. *Rowe v Montgomery Ward & Co*, 437 Mich 627, 645 (Riley, J.), 662 (Boyle, J.); 473 NW2d 268 (1991); *Bracco, supra* at 596. Thus, whether defendants' claim is viewed as a breach of express contract or a claim of promissory estoppel, there must be objective evidence from which a reasonable person could conclude that there was an offer or promise of employment for a term of five years. As more fully discussed in this opinion, we conclude no such evidence was presented in this case.

App 336, 340; 367 NW2d 856 (1985). The employment relationship in this case was at-will. Therefore, defendants' claim for constructive discharge fails as a matter of law.

3. Fraud and Fraud in the Inducement

“The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew 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. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery.” [*Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993), quoting *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), and *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).]

Michigan also recognizes a cause of action for fraud in the inducement. “Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.” *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639-640; 534 NW2d 217 (1995). Further, if a party enters into a contract due to fraud in the inducement, the contract becomes voidable at the option of the defrauded party. *Begola Services, Inc, supra* at 640; *Whitcraft v Wolfe*, 148 Mich App 40, 52; 384 NW2d 400 (1985).

Defendants allege that Genaitis made a variety of material misrepresentations relating to a definite term of employment for five years with lucrative compensation and an attractive employee benefit package, all intended to induce defendants to leave Louisiana. In order to prevail on a claim for fraud, defendants must present evidence that Genaitis made a false representation that he knew was false at the time he made the representation. *Scott, supra* at 446 n 3. As previously stated, the evidence does not support the conclusion that a promise of employment for a definite term was extended to defendant.

Moreover, when defendants moved to Michigan, plaintiff assisted them to obtain housing and provided them with employment through the date defendants resigned. This record does not support the conclusion that plaintiff's representations to defendants relating to defendants' prospects for employment in Michigan were false at the time such representations were made to defendants. Defendants' fraud claims were properly dismissed.

B. Directed Verdict and JNOV/New Trial.

Defendants next assert on appeal that the trial court erred in denying defendants' motions for directed verdict and judgment notwithstanding the verdict (JNOV) or new trial. We disagree. This Court reviews de novo motions for a directed verdict and JNOV. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party to determine whether issues of material fact exist upon which reasonable minds can differ. *Wilkinson, supra* at 391. A

directed verdict and JNOV should be denied when no factual question exists on which reasonable jurors could differ. *Derbabian, supra* at 702; *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000). Further, whether the statute of frauds bars a contract claim is reviewed de novo on appeal. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

Defendants contend that they contracted with Genaitis personally, and consequently, plaintiff cannot file suit against them. Further, defendants claim that even if plaintiff did have an interest in the debt owed by defendants, the interest was not until 1998, the complaint was filed in 1997, and therefore, the wrong party was named in the complaint. However, defendants offer on appeal no legal authority prohibiting the transfer of a debt that would support its position that plaintiff is not a party in interest. “A party may not leave it to this Court to search for authority to sustain or reject its position.” *Speaker-Hines v Treasury Dep’t*, 207 Mich App 84, 90-91; 523 NW2d 826 (1994). Moreover, pursuant to MCR 2.201 plaintiff is clearly a real party in interest, and even if plaintiff was not a real party in interest at the time of the initial filing of the complaint, MCR 2.202(B) allows for substitutions for a transfer or change of interest.

Defendants further allege that there can be no breach of contract because plaintiff has not offered evidence of the existence of a contract. A contract is made when both parties have accepted or executed it. *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). The essential elements of a contract are parties (1) competent to contract, (2) a proper subjects matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). A meeting of the minds is necessary on all essential terms to form a binding contract. *Universal Leaseway System, Inc v Herrud & Co*, 366 Mich 473, 478; 115 NW2d 294 (1962). To determine whether a meeting of the minds existed during the time of the execution of the contract, an objective standard, rather than a subjective standard, is used. *Kamalath, supra* at 548. “A meeting of the minds is judged by . . . looking to the express words of the parties and their visible acts.” *Id.*, quoting *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990).

Under the principles governing contracts, an acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose. [*In re Costs and Attorney Fees*, 250 Mich App 89, 96-97; 645 NW2d 697 (2002), quoting *Kraus v Gerrish Twp*, 205 Mich App 25, 45; 517 NW2d 756 (1994), aff’d in part and remanded in part on other grounds 451 Mich 420; 547 NW2d 870 (1996).]

Viewing the evidence in the light most favorable to the non-moving party, the record properly supports the judgment. The evidence adduced at trial demonstrated that Genaitis orally proposed an agreement for \$50,000 to defendants. Genaitis testified that defendants in exchange for the \$50,000 were to timely repay Genaitis either from the proceeds of the sale from defendants' Louisiana home, or by a second mortgage on either the Michigan or Louisiana home. Defendants received the money and used it as a down payment for their house in Michigan. Defendants do not dispute the fact that Genaitis executed a \$50,000 personal check and received a bank draft, which he in turn sent directly to the title company closing on defendants' Michigan home. However, what is disputed is whether defendants were required to repay the \$50,000,

because it was a loan, or was it rather a relocation allowance as defendants suggest, that was not required to be paid back to plaintiff.

Genaitis testified that the \$50,000 was predicated on the timely repayment of the loan by either the sale of the home that defendants owned in Louisiana, or by a second mortgage on either the Michigan or Louisiana property. The mortgage broker, Mickey King testified that if the \$50,000 was a loan, then defendants would not have qualified for the “no docs” mortgage. Lavoie testified that Genaitis authorized her to write a letter to the mortgage company, and authorized her to sign his name establishing that the \$50,000 was not a loan. Genaitis testified that he never authorized Lavoie to write a letter to anyone signing his name, nor did he authorize anyone to deny that the \$50,000 was a loan. King testified that if she knew that Lavoie wrote the letter, and signed Genaitis’ name, she would not have approved the mortgage.

Upon reviewing the evidence in the light most favorable to the nonmoving party, reasonable minds can differ when viewing the parties’ words and actions as to whether an oral contract for a loan in the amount of \$50,000 was entered into between plaintiff and defendants. The jury found that a contract did exist between the parties, and that plaintiff sustained damages in the amount of \$50,000. Upon reviewing the evidence, it cannot be said that no factual question exists on which reasonable jurors could differ as to the existence of a contract. *Derbabian, supra* at 702; *Morinelli, supra* at 260-261. Therefore, the trial court did not err in denying defendants’ motion for JNOV or new trial.

Defendants additionally contend that if a contract was found to exist between plaintiff and defendants, the contract is void because it falls within the statute of frauds. This claim lacks merit. Although defendants correctly claim that a mortgage is an interest in land within the meaning of the statute of frauds, defendants are mistaken in their assertion that the contract entered into between plaintiff and defendants was a mortgage contract.

The statute of frauds provides, in pertinent part:

In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

(e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate. [MCL 566.132(1).]

The contract entered into between plaintiff and defendants was for \$50,000, that defendants were to timely repay. However, the \$50,000 contract did not necessarily require the eventual execution of a mortgage. Therefore, the statute of frauds is not applicable to the \$50,000 contract between defendants and plaintiff.

C. Judicial Impartiality

Last, defendants claim that the trial court erred in denying defendants’ motion to disqualify the trial judge. We disagree. When this Court reviews a motion to disqualify a judge, the trial court’s findings of fact are reviewed for clear error. MCR 2.613(C). “[T]he

applicability of the facts to relevant law is reviewed de novo.” *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001). A motion to disqualify a judge is made pursuant to MCR 2.003. MCR 2.003(B) states, in pertinent part:

A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) The judge is personally biased or prejudiced for or against a party or attorney.

(2) The judge knows that he . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

A strong presumption of impartiality exists when a judge is challenged on the basis of bias. *Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Thus, as a general rule, absent a showing of actual bias or prejudice, a trial judge will not be disqualified. *Armstrong, supra* at 597; *People v Houston*, 179 Mich App 753, 756; 446 NW2d 543 (1989). Additionally, unless a “deep-seated favoritism or antagonism” is demonstrated “that would make fair and impartial judgment impossible,” then disqualification is not warranted. *Cain, supra* at 496, quoting *Liteky v United States*, 510 US 540, 550; 114 S Ct 1147; 127 L Ed 2d 474 (1994).

Defendants have failed to overcome the heavy presumption of judicial impartiality. Defendants have not pointed to any specific fact or instance in the record demonstrating bias or prejudice. Defendants’ motion for disqualification and claim on appeal is the product of defendants’ dissatisfaction with the trial court’s granting of summary disposition in favor of plaintiff. However, ruling against a party does not constitute bias by the lower court. *Armstrong, supra* at 597; *Band v Livonia Assoc*, 176 Mich App 95, 118; 439 NW2d 285 (1989). Further, the trial court did not err in granting summary disposition. Moreover, Judge MacDonald fully disclosed that she was a class member in a certified class action, represented by the law firm of Macuga, Swartz, and Liddle and defense counsel affirmatively stated that they had no problem ethically or judicially with her presiding over the instant case. Therefore, the trial court did not err in denying defendants’ motion to disqualify.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra