FILED by Macomb County Circuit Court
10/24/2019

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

JUSTIN HODGE,
Plaintiff,

vs. Case No. 2019-1037-CB

DWM HOLDINGS, INC.,
Defendant.
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OPINION AND ORDER

Defendant DWM Holdings, Inc. ("DWM") filed a Motion for Summary Disposition under MCR 2.116(C)(7), (8) and (10) in lieu of an answer to Justin Hodge's ("Mr. Hodge") Complaint.

I. Background

Plaintiff Mr. Hodge seeks a severance payment that he alleges became due when DWM terminated his employment. The parties do not dispute that by letter dated August 15, 2016 DWM offered Mr. Hodge employment as Chief Operating Officer of DWM. ("Offer Letter") See attachment to Complaint; DWM's Exhibit 1. The parties also do not dispute that DWM thereafter employed Mr. Hodge as an at-will employee until his termination on December 27, 2018. Complaint ¶61, DWM's Motion at 5 and Exhibit 4.

The parties further agree that in late 2017 and early 2018, DWM's Chief Executive Officer Ryan MacVoy discussed with Mr. Hodge potential terms for retaining Mr. Hodge as COO long term. Complaint ¶55. In January 2018, Ryan MacVoy sent to Mr. Hodge an email entitled "Partnership" with a list of discussion topics. DWM's Exhibit 3. In March 2018, Ryan MacVoy sent to Mr. Hodge another email with an attached bullet-point document entitled "Deferred Compensation Plan Agreement" and the message "We will review the attached and below during our Partnership Discussion

meeting today." DWM's Exhibits 5 and 6. Mr. Hodge subsequently sent an email to Ryan MacVoy dated March 16, 2018, with the subject "RE: Partnership Discussion Meeting" stating "As a follow up to our conversation last week, I have reviewed your proposal and accept the deferred compensation plan as laid out." DWM's Exhibit 7. Mr. Hodge's March 16th email to Ryan MacVoy further states, "A couple of areas for potential improvement in the future would be to amend the bonus . . . [t]hese are not deal breakers and I'm in agreement with your current offer." *Id.*

Mr. Hodge alleges that he and DWM entered into a Deferred Compensation Plan Agreement ("DCP Agreement") which, according to Mr. Hodge, obligates DWM, in the event of termination without cause, to pay the cash value of his interest in DWM's phantom stock or $630,000, whichever is greater. Mr. Hodge also avers, as an alternative claim, that DWM breached the terms of the August 2016 Offer Letter by failing to pay him a severance benefit of $105,000. Mr. Hodge additionally asserts a promissory estoppel claim.

Mr. Hodge filed his Complaint on March 19, 2019 alleging: breach of the deferred compensation plan agreement (count I); breach of 2016 employment contract (in the alternative) (count II); and promissory estoppel (in the alternative) (count III). The Court heard oral argument on DWM's motion on July 15, 2019 and took the matter under advisement.

II. Standards of Review

Motions for summary disposition based on the statute of frauds fall under MCR 2.116(C)(7). When reviewing a motion under MCR 2.116(C)(7), the Court accepts all well-pleaded allegations as true and construes them most favorably to the plaintiff.

Beauregard-Bezou v Pierce, 194 Mich App 388, 390-391; 487 NW2d 792 (1992). The Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties. *Harrison v Director, Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992); MCR 2.116(C)(7); MCR 2.116(G)(5). A movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material

fact, the moving party is entitled to judgment as a matter of law. *Id.* The court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

III. Arguments, Law and Analysis

A. Breach of the DCP Agreement (Count I)

DWM argues that Mr. Hodge cannot establish the existence of an enforceable contract under count I of his Complaint because the parties did not have a "meeting of the minds." Specifically, DWM characterizes the DCP Agreement as an unsigned, bullet-point list of potential terms, which included undefined provisions that the parties intended to discuss and develop further. According to DWM, the language of the purported DCP Agreement itself as well as the parties' communications and subsequent actions demonstrate that the parties did not intend for the DCP Agreement email to create a binding agreement.

To establish a breach of contract, a plaintiff must show "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages a s a result of the breach." *Miller-Davis Co v Ahrens Consruction., Inc,* 296 Mich App 56, 71; 817 NW2d 609 (2012). "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of

obligation." *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 101; 878 NW2d 816 (2016).

A contract requires mutual assent or a meeting of the minds on all the essential terms. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). "A mere expression of intention does not make a binding contract." *Kamalnath v Mercy Memorial Hosp Corp,* 194 Mich App 543, 549; 487 NW2d 499 (1992) (citation omitted). The burden is on the plaintiff to prove the existence of the contract sought to be enforced. *Id.* "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 13; 824 NW2d 202 (2012) citation omitted.

As an initial matter, summary disposition under MCR 2.116(C)(10) is rarely appropriate before the completion of discovery. *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Here, DWM filed its motion in lieu of an answer before discovery even occurred.

Further, after considering the evidence DWM presented, a question of material fact exists as to whether the parties had a sufficient meeting of the minds on the essential terms of the alleged DCP Agreement. In support of its argument that no meeting of the minds occurred, DWM first relies on the substance of the text of the purported DCP Agreement. Specifically, DWM argues that essential terms remained undefined including termination with cause, the definition of "egregious act", and the terms of the buyout clause. DWM also relies on written communications between the parties as evidence of lack of mutual assent. For example, Mr. Hodge's January 16,

2018 email specifically referred to the list of terms as "thoughts/discussion points" and a "plan." DWM's Exhibit 3, 7. Likewise, DWM maintains the email discussions noted the need for a separate policy and that an attorney would have to draft the phantom stock agreement. *Id.* Additionally, DWM argues that under the terms of the Offer Letter, any promise for employment for a specified period of time contrary to the at-will relationship requires the signature of DWM's President. DWM's Exhibit 2.

In terms of the parties' behavior, DWM relies on the Affidavit of Ryan MacVoy to show that from the date of Mr. Hodge's purported acceptance of the DCP Agreement in March 2018 until his termination on December 27, 2018, Mr. Hodge's employment continued as usual under the terms of the Offer Letter—no phantom stock agreement or employment agreement was created, no attorney reviewed it, and Mr. Hodge's salary remained the same. DWM's Exhibit 4.

In Response, Mr. Hodge maintains that he expressly accepted the terms of the DCP Agreement by email dated March 16, 2018 and therefore the parties had a meeting of the minds on the essential terms of the DCP Agreement. Mr. Hodge's Exhibit E. According to Mr. Hodge, Ryan MacVoy, CEO of DWM, drafted the DCP Agreement and sent it to Mr. Hodge for approval. Later that day, according to Mr. Hodge's Affidavit statements, Ryan MacVoy drove to DWM's 10 Mile Road plant to shake hands and offer congratulations. Mr. Hodge's Exhibit F. Mr. Hodge also states that Ryan MacVoy announced Hodge's new status of part owner of DWM during a management staff meeting. *Id.*

In response to DWM's position that the DCP Agreement contained undefined terms, Mr. Hodge argues that the law does not require contracts to define all terms—

furthermore, Michigan case law defines the phrase "just cause." The failure to implement a phantom stock plan, according to Mr. Hodge, is evidence of a breach, not the failure to create a contract.

At this point, DWM's motion for summary disposition on count I of Mr. Hodge's Complaint is denied. The question of whether the DCP Agreement became an enforceable contract as a result of the mutual assent of the parties requires factual development. The parties initially present conflicting evidence of their intent with regard to the DCP Agreement by their different reading of the writing itself as well as their subsequent acts. The DCP Agreement specifically bore the title "Agreement" to which Mr. Hodge responded, "I have reviewed your proposal and accept the deferred compensation plan as laid out." Mr. Hodges' Exhibit E. Together with Mr. Hodge's Affidavit of congratulations and an announcement, Mr. Hodge presented sufficient evidence to create a question of material fact as to whether the parties' mutually assented to the terms of the DCP Agreement. As such, the motion on count I is denied.

B. Statute of Frauds

DWM next argues that the Statute of Frauds bars enforcement of the alleged DCP Agreement. The Statute of Frauds requires agreements to be written and signed where the agreement, "by its terms, is not to be performed within 1 year from the making of the agreement." MCL 566.132(1)(a). "If there is *any possibility* that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend." *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 509–10; 525 NW2d 905 (1994) emphasis

in original.

Here, DWM refers to several provisions in the alleged DCP Agreement that it argues could not have been performed within one year of the making of the Agreement. Specifically, the DCP Agreement provides for 10% of phantom stock over a 10-year period; the promise to consider additional phantom stock after the 10-year period; the distribution of stock liquidation distributed equally over 5 years; and the equal distribution of certain funds over the remaining five years for termination without cause. DWM's Exhibit 1.

However, even though the parties may have contemplated a long-term employment arrangement, the alleged DCP Agreement does not provide for an employment term. Moreover, both parties agree that Mr. Hodge was and remained an at-will employee; therefore DWM could terminate his employment at any time. As such, while the parties may have anticipated that the agreement would continue over a year, and it is possible that the contract could extend for years, the agreement could also possibly have been completed in less than a year by way of resignation or termination.[1] Consequently, the Statute of Frauds does not bar enforcement of the DCP Agreement.

C. Arbitration

DWM next argues that an arbitrator must decide the question of enforceability of

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[1] Even if upon termination or resignation, some part of Mr. Hodge's compensation could not be performed within one year, a question of fact would remain as to whether that portion of the agreement was severable. "Where a portion of a contract within the statute of frauds is severable from a part of the contract outside the statute, the severable portion alone will be rendered unenforceable." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 537; 473 NW2d 652 (1991) citation omitted. "The primary consideration in determining whether a contractual provision is severable is the intent of the parties." *Profl Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998).

the DCP Agreement because the document in question indicates that the questions of termination or contract disputes would be resolved by a third-party arbitrator. DWM's Exhibit 6.

"The decision to submit disputes to arbitration is a consensual one. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 97; 323 NW2d 1 (1982). The Uniform Arbitration Act provides that "on a motion of a person showing an agreement to arbitrate, and alleging another person's refusal to arbitrate under the agreement" the Court shall "proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." MCL 691.1687(1)(b).

"The existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator." *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74, 492 NW2d 463 (1992). The Court of Appeals set forth a three-part test for determining arbitrability: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." *In re Nestorovski Estate*, 283 Mich App 177, 202; 769 NW2d 720 (2009).

Applying these principals to the matter at hand, whether the parties agreed to be bound by an arbitration provision in the purported DCP Agreement is a question for the Court and not the arbitrator. The Court has determined that questions of material fact exist as to whether the parties had a meeting of the minds with regard to the DCP

Agreement and its various terms. Furthermore, DWM argues that no meeting of the minds occurred. Accordingly, DWM's motion as it relates to arbitration must be denied.

D. Breach of 2016 Employment Contract (Count II)

DWM also moves for summary disposition of Count II of Mr. Hodge's Complaint. In Count II Mr. Hodge alleges, as an alternative theory, that under the terms of the Offer Letter, he is entitled to six months' severance pay as a result of termination without cause. DWM argues that the Offer Letter did not contain any severance benefit for termination without cause. Instead, DWM maintains, the provision regarding severance was inextricably tied to the sale of the company.

"Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters Ins Co v Kneeland*, 464 Mich. 491, 496; 628 NW2d 491 (2001). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written." *In re Egbert R. Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003).

"A contract is ambiguous when two provisions irreconcilably conflict with each other. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 467; 663 NW2d 447 (2003). A contract is also ambiguous when its "words may be reasonably understood in different ways." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

In this case, the Offer Letter states, in relevant part,

> 7. In the event of a Company sale, you will be eligible for 1.5% of the sale price, not less than three times your annualized salary, or $630,000 total compensation;

> The Company will seek the term of twelve months of continued operations oversight during the negotiation of a potential sale;
>
> In the event of employment termination, you will have the option of six months' severance pay based on market conditions;

DWM's Exhibit 1. DWM relies on grammatical construction and argues that after an introductory clause of "in the event of a Company sale", three terms followed all separated by semi-colons. Therefore, DWM concludes, Mr. Hodge would only have the option of six months' severance pay if the company was sold and Mr. Hodge was terminated.

Mr. Hodge argues in Response that the introductory clause "in the event of a Company sale" does not relate to the third term, which has its own introductory clause of "in the event of employee termination." According to Mr. Hodge, if the phrase "in the event of a Company sale" were intended to qualify the remaining terms, it would end with a colon, as occurred in the preceding paragraphs relating to position, start, date, base salary, bonus plan, car allowance, and benefits. Further, Mr. Hodge contends that DWM's reading is illogical because it would offer the option of choosing between at least $630,000 or six months' pay, which would be $105,000.

The Court concludes that paragraph 7 is susceptible to two contradictory, though plausible readings. On one hand, the first three sentences of paragraph 7 are indented indicating an intent for them to be read together. Also, the second sentence of paragraph 7 would make little sense standing alone, again requiring a reading of the sentences as all relating to the introductory clause contemplating a company sale. In that case, DWM's reading of paragraph 7 limiting the payment of severance to termination in the context of a company sale is plausible.

On the other hand, given the anomalous use of a semicolon rather than a colon, and the awkward reading of two introductory clauses, Mr. Hodge also proffers a plausible reading of the Offer Letter. In light of the facial ambiguity of the text, the Court concludes that factual development is necessary regarding the parties' intent. Therefore, DWM's motion for summary disposition on Count II is denied.

E. Promissory Estoppel (Count III)

Finally, DWM argues that Mr. Hodge cannot sustain a promissory estoppel claim based on an offer for at-will employment. Further, according to DWM, Ryan MacVoy's statement that he was "extremely confident that we can nail down a mutually beneficial agreement to create a long term partnership" or a "plan" of the parties' moving forward is not an actual, clear, definite promise.

Mr. Hodge argues in response that his claim of promissory estoppel is not related to at-will employment. Rather, Mr. Hodge bases his claims on promises that in the event of termination, he would be entitled to receive certain benefits. According to Mr. Hodge, those promises were clear and definite.

"The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 83; 854 NW2d 521 (2014) citation omitted.

The doctrine of promissory estoppel is cautiously applied. *Marrero v McDonnell Douglas Capital Corp,* 200 Mich App 438, 505 NW2d 275 (1993). To support a claim of

estoppel, a promise must be definite and clear. *Barber v SMH (US), Inc*, 202 Mich App 366, 376; 509 NW2d 791 (1993). Promissory estoppel will not be enforced when the promise is at variance of a written contract. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999); *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008)(Plaintiff failed to identify any promises made beyond those contained in the policy).

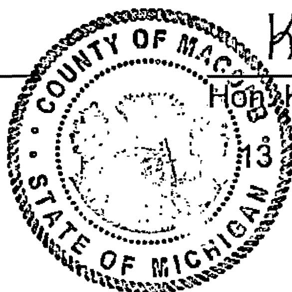
In his Complaint, Mr. Hodge alleges, as an alternative theory, that in the Offer Letter and various emails and communications, DWM made promises to Mr. Hodge regarding severance pay. In addition, Mr. Hodge alleges that DWM promised to pay him upon termination without cause, a severance benefit equal to the dollar value of his fully vested 10% phantom stock interest, to be paid with 10% down and the remaining in equal installment payments over five years, or a lump sum equal to three times Hodge's annual salary, payable immediately, whichever is greater. Complaint ¶ 93-94. Upon review of the Complaint, the Court is satisfied that Mr. Hodge has stated a claim of promissory estoppel. Specifically, ¶94 of Mr. Hodge's Complaint sufficiently alleges a clear and definite statement relating to severance pay. As a result, DWM's motion for summary disposition on Count III is denied.

IV. Conclusion

For the reasons set forth above, DWM's motion is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: OCT 24 2019



Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge