SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2389-10T4

ANDREW JAMES MANNING,

Plaintiff-Appellant,

v.

LITHIUM TECHNOLOGY
CORPORATION and AMIR ELBAZ,

Defendants-Respondents.

Submitted November 1, 2011 - Decided December 16, 2011

Before Judges Simonelli and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3200-08.

The Law Firm of William Koy, LLP, attorneys for appellant (William F. Koy and William J. Koy, on the briefs).

Levy, Ehrlich & Petriello, attorneys for respondents (Jeffrey W. Plaza, on the brief).

PER CURIAM

In this matter, plaintiff Andrew James Manning claims that defendant Lithium Technology Corporation (LTC) breached his employment contract and the implied covenant of good faith and fair dealing, and was unjustly enriched by its failure to comply with the contract's termination without cause provision. Plaintiff also claims that LTC and defendant Amir Elbaz (Elbaz) made negligent misrepresentations about the contract, and Elbaz tortiously interfered with plaintiff's economic gain. Plaintiff appeals from the December 1, 2010 Law Division order, which granted summary judgment to defendants, and dismissed this matter with prejudice. We affirm.

The following facts are derived from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In November 1994, plaintiff began working as the Director of Process Development for Hope Technologies, a company that later became LTC. In 2002, he signed a three-year employment contract with LTC, commencing January 1, 2002 and terminating December 31, 2004, for the positions of Executive Vice-President, Chief Operating Officer (COO) and Chief Technical Officer (CTO) (the 2002 contract). The 2002 contract did not contain a "signing bonus" provision or a provision regarding termination without cause; it only contained provisions for plaintiff's termination "for cause" and if he became totally disabled or died.

LTC's Board of Directors (Board) had to approve all employment contracts. After the contracts were approved and signed, LTC placed the original contract in its files and the employee received a copy. Plaintiff received a copy of the 2002 contract.

Plaintiff claims that he signed a new three-year employment contract in 2003 that superseded the 2002 contract, and received a copy; however, he did not produce the original or a signed or unsigned copy of the new contract. LTC claims that the 2002 contract was never renewed or extended, and there was no other contract with plaintiff in its files.

During December 2004 or January 2005, plaintiff and Franz Kruger, LTC's then Chief Executive Officer (CEO), discussed a possible increase in plaintiff's annual salary. Plaintiff claims that in January 2005, Harry van Andel (van Andel), the Board's chairman, approached him about changes to LTC's management structure, and proposed a new employment contract appointing plaintiff as President and COO; however, they never discussed specific terms, such as compensation or duration.

Plaintiff discussed his proposed new contract with William Hackett (Hackett), who would be joining LTC as Chief Financial Officer (CFO). Hackett told plaintiff that LTC was preparing a contract for Hackett, and "that there would be a similar contract drawn up" for plaintiff. Although Hackett was aware that LTC was negotiating a contract with plaintiff, he was not involved in the negotiations or in drafting a contract, and he never saw a draft.

In March 2005, LTC's attorney sent plaintiff a draft of a three-year contract that was apparently meant for Hackett because it contained a $50,000 signing bonus provision, as Hackett was joining LTC, and gave "full authority and responsibility" for LTC's financial affairs, which were responsibilities of the CFO, not the COO. The draft contract provided for a $275,000 annual salary, bonuses, and stock options, and also contained the following termination without cause provision:

> 3.3 Without Cause. The Company may terminate the Executive's employment for any reason at any time. In such event the following provisions shall govern:
>
> i) if the Company does not desire to have the Executive continue working for the Company, Executive's employment shall terminate immediately and the Company shall pay to Executive (net of applicable deductions and withholdings) an amount equal to twelve (12) months salary and a *pro rata* bonus based on the prior year's bonus paid to Executive. In addition, the Company shall provide and pay for health benefits for Executive and his dependents for a period of twelve months following termination. The salary and bonus payments shall be paid one half within (30) days after the termination date, and one half

> within seven (7) months after the termination date.
>
> ii) if the Company desires that the Executive continue working for the Company (a) the Company shall provide to Executive twelve (12) months notice of termination and the Executive agrees to continue working for the Company during that twelve month period (the "Transition Period"); (b) provided the Executive continues to provide services to the Company, the Company shall continue to pay to Executive his salary during the Transition Period; (c) provided the Executive continues to provide services for the entire Transition Period, the Company shall pay to Executive within thirty (30) days after the termination date one lump sum payment consisting of six months' salary, a bonus in an amount equal to last year's bonus paid to Executive, and health benefits for Executive and his family for a period of six months following termination.
>
> If the Company terminates Executive's employment without cause, the Stock Options shall be treated in accordance with the terms of the applicable stock incentive plan and stock option agreement pursuant to which such options were granted, except that all then exercisable options and all then unexercisable options shall immediately become exercisable on the date of termination, and all of the same shall remain exercisable in accordance with the terms of the applicable plan and agreement.

In May 2005, plaintiff met with van Andel, Hackett, Ralf Tolksdorf, LTC's then CFO, and Klaus Brandt (Brandt), the managing director of GAIA Akkumulatorenwerke GmbH, a European company that had merged with LTC. Following a group discussion of general business matters, van Andel met with each man privately to review their respective contracts. The others were not privy to the discussions at the private meetings, and the parties never discussed their respective contracts with each other.

Plaintiff claims that the contract he and van Andel reviewed during their private meeting was identical to the draft contract that LTC's attorney had sent him in March 2005, except it omitted a bonus provision. Plaintiff also claims that after he expressed his dissatisfaction with this omission, van Andel hand-wrote a bonus provision into the contract, the two men then signed it and shook hands, and van Andel said he would send plaintiff a copy. Plaintiff never received a copy and claims that he would "periodically remind" van Andel of this. Plaintiff admits that he never asked anyone else at LTC for a copy. There was no original contract, or a signed or unsigned copy in LTC's files, and there is no evidence that plaintiff received a bonus pursuant to this contract.

Plaintiff claims that the Board voted on and approved his and Hackett's contracts at a Board meeting on June 15, 2005. However, the minutes of that meeting reflect that the Board had postponed decisions on the contracts "until the Compensation Committee of the Board could review [them] and make a recommendation to the [Board]."

The Board met again on June 17, 2005. David Cade (Cade), a member of the Compensation Committee, was at both meetings. His notes of the June 17 meeting reflect that the Board had only agreed to a $275,000 annual salary for plaintiff, retroactive to January 1, 2005, to appoint plaintiff as President and COO as soon as Kruger resigned, and to have van Andel meet with plaintiff to finalize plaintiff's contract. Plaintiff and van Andel never met and there were no further contract negotiations.

On June 20, 2005, the Board passed a resolution approving Hackett's and Brandt's contracts.[1] The Board did not pass any resolution approving a contract with plaintiff. It did, however, pass a resolution approving plaintiff's appointment as President and COO, effective June 20, 2005, at an annual salary of $275,000, retroactive to January 1, 2005.

In October 2006, Elbaz was appointed as LTC's Executive Vice-President and CFO. He soon developed a close working relationship and friendship with van Andel and Brandt. Although Elbaz believed that he had a "healthy" professional relationship

---

[1] The resolution approved a "three year employment agreement" with Hackett, effective June 20, 2005, which contained provisions for a $275,000 annual salary, a signing bonus of $50,000, and an annual discretionary bonus of up to 25% of Hackett's salary with a minimum of $34,375 for 2005. It also approved Brandt's position as GAIA's managing director "pursuant to an agreement which provides for an annual salary of €170,000 from April 1, 2005 through December 31, 2007."

with plaintiff, Hackett said that "it was not a collegial relationship, what you expect to find amongst executives of a corporation."

In February 2007, Brandt advised plaintiff that he, Elbaz, and van Andel had decided that plaintiff should step down as President and COO, but plaintiff could remain employed as CTO. Van Andel died shortly thereafter in March 2007. After his death, Brandt and Elbaz presented LTC's new organizational chart, which listed Brandt as CEO, Elbaz as CFO, and plaintiff as CTO with no one reporting to him. In a June 13, 2007 email to Elbaz, Brandt, and others, plaintiff stated that his removal as President and COO effectively terminated his contract under the termination without cause provision.

On September 28, 2007, the Board passed a resolution approving plaintiff's removal as President and COO; however, plaintiff continued to work at the same salary, and he assisted LTC's new COO, Ken Rudisuela, in his transition into the company. In an October 18, 2007 letter, LTC's attorney notified plaintiff that LTC would continue paying his current salary and health benefits through June 20, 2008, when his employment would cease.

Plaintiff then wrote to the Board that "[a]s there is no agreement between LTC and myself, this is not, nor should it be construed as a letter of resignation. It is simply a notice that I feel that my responsibilities of assisting in the transition have been met and I will cease assisting the company effective May [15, 2008]." LTC paid plaintiff until May 15, 2008. He subsequently began employment with a competitor of LTC.

On July 9, 2009, plaintiff filed a complaint, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment claims against LTC; negligent misrepresentation claims against LTC and Elbaz; and a tortious interference with economic gain claim against Elbaz. He alleged that he had a three-year contract as of May 2005, and was entitled to his salary, bonuses, health benefits, and stock options pursuant to the termination without cause provision.

LTC and Elbaz filed a motion for summary judgment. In an oral decision granting the motion, Judge Dumont dismissed the breach of contract and breach of the implied covenant of good faith and fair dealing claims. He found there was no contract other than a contract to appoint plaintiff as President and COO with a $275,000 annual salary, which LTC did not breach.

The judge also dismissed the negligent misrepresentation claim against LTC, finding that "[e]ven giving plaintiff all favorable inferences, the only representation he could have reasonably relied upon was that he was entitled to receive an annual salary of $275,000 for a period of three years commencing January 1, 2005, which is exactly what he received." The judge also found that the tort of negligent misrepresentation did not apply in this contract case because defendants did not owe an independent duty to plaintiff imposed by law.

The judge dismissed the tortious interference claim against Elbaz, finding that Elbaz was acting within the scope of his employment with respect to plaintiff, and there was no evidence that Elbaz's conduct was causally related to the Board's decision to remove plaintiff as President and COO. The judge dismissed the unjust enrichment claim against LTC, finding that plaintiff received his full salary and benefits until the day his employment ceased, and he was not entitled to anything more. This appeal followed.

On appeal, plaintiff primarily contends that there is a question of fact as to whether a contract existed between the parties that included the termination without cause provision. He argues that he presented evidence of an offer and acceptance, consideration, and certainty, or evidence of a binding contract, sufficient to withstand summary judgment on his breach of contract and breach of the implied covenant of good faith and fair dealing claims. We disagree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Coyne v. New Jersey Dep't of Transp., 182 N.J. 481, 491 (2005); Twp. of Cinnaminson v. Bertino, 405 N.J. Super. 521, 531 (App. Div.), certif. denied, 199 N.J. 516 (2009). Thus, we consider, as the trial judge did, "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

"A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). "If the parties agree on essential terms and further manifest an intention to be bound by those terms, they have created an enforceable contract." Graziano v. Grant, 326 N.J. Super. 328, 339-40 (App. Div. 1999). Thus, "there must be an unqualified acceptance of the offer in order for there to be a contract." Id. at 340. Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable. Heim v. Shore, 56 N.J. Super. 62, 72-73 (App. Div. 1959). "Parties are not bound by what they think, but rather by what they say." Ibid. "In the absence of a contract, there is no implied covenant of good faith and fair dealing." Nolan v. Control Data Corp., 243 N.J. Super. 420, 429 (App. Div. 1990).

Viewing the facts in a light most favorable to plaintiff, we are satisfied that Judge Dumont properly dismissed the breach of contract and breach of the implied covenant of good faith and fair dealing claims. No reasonable juror could conclude that the parties had a binding contract that included the termination without cause provision. There is no dispute that the Board had to approve an employment contract. Thus, even if plaintiff and van Andel had agreed to a contract in May 2005 that contained a termination without cause provision, LTC never agreed to it because the Board never voted on or passed a resolution approving it. Because there was no contract containing a termination without cause provision, there was no implied covenant of good faith and fair dealing. Ibid.

Further, it is clear from the Board's June 20, 2005 resolution that the parties only had a binding contract as to plaintiff's position and salary. LTC appointed plaintiff to the position of President and COO and paid him his full salary and benefits until the day he left the company. Thus, LTC did not breach the contract.

We are also satisfied that Judge Dumont properly dismissed plaintiff's negligent misrepresentation claim against LTC and Elbaz. Negligent misrepresentation is a tort. "Under New Jersey law, a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2002). Neither LTC nor Elbaz owed plaintiff an "independent duty." The contract defined the full scope of the duty owed to plaintiff. See ibid. In addition, plaintiff cannot establish that Elbaz made any misrepresentation about the alleged May 2005 contract because Elbaz joined LTC after the contract discussion had occurred.

Judge Dumont also properly dismissed plaintiff's tortious interference claim against Elbaz. A plaintiff may only assert a tortious interference claim against "defendants who are not parties to the relationship." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 752 (1989). "[I]f an employee or agent is acting on behalf of his or her employer or principal, then no action for tortious interference will lie." DiMaria Constr., Inc. v. Interarch, 351 N.J. Super. 558, 568 (App. Div. 2001), aff'd, 172 N.J. 182 (2002). Even assuming that Elbaz was responsible for plaintiff's removal as President and COO, there is no evidence that Elbaz acted outside the scope of his employment with LTC in connection with that removal.

Finally, we are satisfied that Judge Dumont properly dismissed plaintiff's unjust enrichment claim. Plaintiff cannot establish that LTC received any benefit from him "and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION