[Cite as *Steele v. Mara Ents., Inc.*, 2009-Ohio-5716.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dennis S. Steele,	:	
Plaintiff-Appellant,	:	
		No. 09AP-102
v.	:	(C.P.C. No. 06CVH-06-7810)
Mara Enterprises, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 29, 2009

Law Offices of Russell A. Kelm, Russell A. Kelm and *Cynthia L. Dawson,* for appellant.

Schottenstein, Zox & Dunn Co., L.P.A., John P. Gilligan, James E. Davidson and *Steven D. Forry,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Dennis S. Steele, appeals from a judgment of the Franklin County Court of Common Pleas granting the "Motion for Partial Summary Judgment" of defendant-appellee, Mara Enterprises, Inc., and denying plaintiff's "Motion to Compel Discovery." Because (1) the trial court properly granted defendant's motion for

summary judgment on the promissory estoppel claim, (2) the trial court properly granted defendant's motion for summary judgment on the wrongful termination claim, and (3) the trial court did not abuse its discretion in denying plaintiff's motion to compel discovery, we affirm.

I. Procedural History

{¶2} Defendant Mara Enterprises, Inc. ("Mara") is a closely held Ohio corporation founded by Charlie Hill and involved primarily with real estate property management. Plaintiff Dennis S. Steele is a shareholder and former president of Mara. Plaintiff first worked for Mara for a short time in 1972 when Charlie Hill hired him to perform janitorial and maintenance duties at one of Mara's properties. Ten years later, plaintiff returned to Mara as a general manager. Within a year of his rehire, plaintiff became vice president of Mara.

{¶3} After Charlie Hill's death in 1991, the majority of Mara stock passed to his widow, LaVerne A. Hill, who eventually transferred ownership of her shares to the LaVerne A. Hill Trust, making the trust Mara's majority shareholder. Laverne Hill is also on Mara's board of directors. Plaintiff remained with Mara after Charlie Hill's death and maintained a close relationship with Laverne Hill.

{¶4} Sometime after 1991, though plaintiff cannot recall the exact date or year, plaintiff began to converse with Laverne Hill regarding his future with the company. In those conversations, which occurred between 1991 and 2005, Laverne Hill told plaintiff in some fashion that "as long as she was alive, I had my job with the company." (Depo. at 65, 68, 78-79, 190-91, 195.) Plaintiff continued to work for Mara, eventually becoming

president and a member of the board of directors. In 2004, and again in 2005, Mara's board of directors permitted plaintiff to purchase one share of Mara stock for $100.

{¶5} At a meeting of Mara shareholders on September 6, 2005, a resolution passed to replace all members of the board of directors, including plaintiff. At that same meeting, the new board of directors voted to terminate plaintiff's employment with Mara. As a result, plaintiff filed a complaint against Mara on June 15, 2006 in the Franklin County Court of Common Pleas alleging claims for promissory estoppel, wrongful termination, and past-due director's fees. Mara answered, asserting counterclaims for conversion, breach of fiduciary duty, and unjust enrichment. After Mara voluntarily dismissed its counterclaims, Mara moved on May 22, 2007 for partial summary judgment on plaintiff's promissory estoppel and wrongful termination claims.

{¶6} Plaintiff filed a memorandum opposing Mara's summary judgment motion and attached an affidavit in which plaintiff stated, for the first time, that he turned down two other offers of employment while he worked for Mara. Plaintiff also filed a motion to compel discovery on June 6, 2007, one day after the discovery cutoff date.

{¶7} On September 5, 2008, the trial court rendered a decision granting Mara's motion for summary judgment on plaintiff's promissory estoppel and wrongful termination claims. The court concluded plaintiff's promissory estoppel claim failed because plaintiff did not present evidence that Mara clearly and unambiguously promised continued employment to him. In addressing the reliance element of plaintiff's promissory estoppel claim, the court acknowledged plaintiff's affidavit averring he relied on Laverne Hill's "promises" by turning down two offers of employment while he was in Mara's employ. The trial court, however, found the affidavit contradicted plaintiff's deposition testimony and

thus was insufficient to create a genuine issue of material fact regarding the requisite reliance element. Concluding plaintiff's employee at will status permitted Mara to terminate plaintiff's employment despite his shareholder status, the court concluded summary judgment was appropriate on plaintiff's wrongful termination claim. Having determined the promissory estoppel and wrongful discharge claims, the trial court on December 5, 2008 denied plaintiff's motion to compel discovery. The trial court journalized its decision for Mara on January 16, 2009, and plaintiff then dismissed his claim for unpaid director fees.

II. Assignments of Error

{¶8} Plaintiff appeals, assigning three errors:

> I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON [PLAINTIFF'S] CLAIM OF PROMISSORY ESTOPPEL.
>
> II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON [PLAINTIFF'S] CLAIM OF WRONGFUL TERMINATION.
>
> III. THE TRIAL COURT ERRED IN FAILING TO COMPEL DISCOVERY.

III. First Assignment of Error – Promissory Estoppel Claim

{¶9} Plaintiff's first assignment of error asserts the trial court erred in granting Mara's motion for summary judgment on plaintiff's promissory estoppel claim.

{¶10} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving

party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶11} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party cannot discharge its initial burden simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must point to specific evidence of the type listed in Civ.R. 56(C) to affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Id. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. Id. Once the moving party discharges its initial burden, however, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. Id.

{¶12} In Ohio, the default rule governing employment relationships is employment at-will. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, ¶5, citing *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103. Thus, "unless otherwise agreed, either party to an oral employment at-will employment agreement may terminate the employment at any time." *Callander v. Callander*, 10th Dist. No. 07AP-746, 2008-Ohio-

2305, ¶21 (internal quotation marks omitted), quoting *Daup v. Tower Cellular, Inc.* (2000), 136 Ohio App.3d 555, 560.

{¶13} Promissory estoppel is both a quasi-contractual concept and, when applicable, an exception to the general rule of employment-at-will. *Mers* at 104-05. Under this equitable doctrine, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *McCroskey v. State* (1983), 8 Ohio St.3d 29, 30, quoting Restatement of the Law, Contracts 2d (1973), Section 90; *Talley v. Teamsters Loc. No. 377* (1976), 48 Ohio St.2d 142, 146. In order to prevail on a promissory estoppel claim, a plaintiff must demonstrate: (1) the existence of a clear and unambiguous promise (2) upon which one would reasonably and foreseeably rely, and (3) plaintiff actually relied on the promise (4) to plaintiff's detriment. See *Interstate Gas Supply, Inc. v. Calex Corp.*, 10th Dist. No. 04AP-980, 2006-Ohio-638, ¶105, citing *Marusa v. Brunswick*, 8th Dist. No. 04CA0038-M, 2005-Ohio-1135, ¶39, appeal not allowed, 106 Ohio St.3d 1486, 2005-Ohio-3978. Plaintiff contends genuine issues of material fact as to the existence of a clear, unambiguous promise of employment, as well as plaintiff's detrimental reliance on that alleged promise, preclude summary judgment for Mara.

{¶14} Plaintiff initially must demonstrate a genuine issue of material fact regarding the requisite clear and unambiguous promise. According to Ohio law, the promise at a minimum not only must be sufficiently clear and unambiguous, but also must promise "continued employment for a specific period." *Daup* at 563, citing *Corradi v. Soclof* (May 25, 1995), 8th Dist. No. 67586; *Interstate Gas Suppy* at ¶105; see also *Hoyt v.*

Nationwide Mut. Ins. Co., 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶45 (stating "a promise of continued employment must be for a specific term in order to establish a prima facie claim of promissory estoppel"). Here, plaintiff claims Laverne Hill told him on numerous occasions he would have a job with Mara for as long as she was alive. Plaintiff's evidence does not suggest she at any time discussed plaintiff's future with the company in number of years, but instead always tied her statements to her lifespan. Such statements are insufficient to meet the promise element of a promissory estoppel claim.

{¶15} In *Callander*, this court addressed similar facts and determined repeated, "routine" statements that an employer would transfer his ownership interest to an employee at "either [the owner's] time to retire or his untimely demise" were not sufficient to establish a claim for promissory estoppel because there was "nothing clear or unambiguous about the alleged promises made." *Callander* at ¶17, 34. Death, although inevitable, is unpredictable. A future event that, by its very nature, could occur in ten minutes or ten years is too indefinite to constitute a "specific term" for purposes of promissory estoppel. Such statements are, at best, discussions of "possible future career developments and opportunities." Id. at ¶25; see also *Daup* at 563, citing *Scanlon v. Tremco, Inc.* (Dec. 3, 1998), 8th Dist. No. 73808 (noting "vague, indefinite promises of future employment" or "mere representations of future conduct without more specificity * * * do not form a valid basis for the application of the doctrine of promissory estoppel").

{¶16} Similarly, here, Laverne Hill's statements were tied to her own death and, as a result, suffered the same deficiency as those "promises" made in *Callander*: they fail to unambiguously promise continued employment for a specific period of time. Indeed, the statements lacked specificity in other aspects. The statements never included a

discussion of job title, job responsibilities, compensation, or contingencies in the event the business closed or Laverne Hill decided to part with her ownership interest before her death. The complete lack of details suggests Laverne Hill's statements were anything but clear and unambiguous promises of continued employment. See, e.g., *Pfleger v. BP America, Inc.* (June 27, 1996), 8th Dist. No. 68874 (noting that to maintain an action based upon promissory estoppel, an employee must demonstrate the alleged promise contained enough information to meet "the criteria of a formal contract").

{¶17} Even if we could construe Laverne Hill's statements to be an unambiguous promise of employment for a specified period, we question her ability to bind Mara to such a promise. Despite being the majority shareholder of Mara, she was not an officer of the corporation. She never made her statements in a business setting or in the presence of Mara's board of directors, the alleged promise was never discussed at a Mara board meeting, and Mara never adopted Laverne Hill's statements. Indeed, Mara's employee handbook, which plaintiff in part authored and implemented, not only stated that all employees are at-will but required that any employment agreement purporting to change the at-will status must be in writing and bear the signature of a Mara officer.

{¶18} Despite those factors, plaintiff never requested that Laverne Hill put her statements in writing; nor did he ever ask the board of directors to confirm her statements. Even when Mara terminated plaintiff's employment at the September 6, 2005 meeting, plaintiff did not mention her statements. Mara, not Laverne Hill, is the defendant in this case and this record presents no basis to construe her statements as Mara's official position.

{¶19} The trial court thus properly concluded that, even construing the evidence and all reasonable inferences drawn from it in favor of plaintiff, reasonable minds only could conclude that Mara made no actual promise of future employment. The absence of a clear, unambiguous promise is itself fatal to plaintiff's promissory estoppel claim. See, e.g., *Dailey v. Craigmyle & Son Farms, L.L.C.,* 177 Ohio App.3d 439, 447, 2008-Ohio-4034 (stating the court need not consider the additional elements necessary for promissory estoppel when proponent fails to meet the initial burden of establishing the existence of a promise). We thus need not address whether plaintiff established a genuine issue of material fact as to the element of detrimental reliance. Since plaintiff is unable to create a genuine issue of material fact concerning the first of the requisite elements of a promissory estoppel claim, he has not discharged his burden under Civ.R. 56. Plaintiff's first assignment of error is overruled.

IV. Second Assignment of Error – Wrongful Termination Claim

{¶20} Plaintiff's second assignment of error contends the trial court erred in granting summary judgment on plaintiff's claim of wrongful termination. Although the at-will nature of Ohio's employment law gives employers the right to discharge employees for any reason or no reason at all, a public policy-based exception to the employment at-will doctrine arises "when an employee is discharged or disciplined for a reason which is prohibited by statute." *Greeley v. Miami Valley Maint. Contrs., Inc.* (1990), 49 Ohio St.3d 228, paragraph one of the syllabus; *Painter v. Graley* (1994), 70 Oho St.3d 377, paragraphs two and three of the syllabus. Public policy exceptions to the employment at-will doctrine are not limited to statutory provisions but are ascertainable from any number of other sources. *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 150, 1997-Ohio-219.

{¶21} Ohio recognizes as public policy a heightened fiduciary duty between majority and minority shareholders when the plaintiff was a shareholder, director, and employee of a closely held corporation. *Morrison v. Gugle* (2001), 142 Ohio App.3d 244, 254-55, citing *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 108. Plaintiff accurately points out that "[a] majority shareholder has a fiduciary duty not to misuse his power by promoting personal interests at the expense of corporate interests." *United States v. Byrum* (1972), 408 U.S. 125, 137, 92 S.Ct. 2382, 2391. "Majority or controlling shareholders breach such a fiduciary duty to minority shareholders when control of a close corporation is utilized to prevent the minority from having an equal opportunity in the corporation." *Crosby* at 109. Absent a legitimate business purpose, such a breach is actionable. *Morrison* at 225.

{¶22} Plaintiff here was a shareholder, director, and employee of defendant, a closely held corporation. As such, plaintiff argues Mara owed him a heightened fiduciary duty. Though plaintiff correctly phrases the scope of this heightened fiduciary duty, his argument is flawed. The majority shareholder of Mara Enterprises is the LaVerne A. Hill Trust, yet the only named defendant to this lawsuit is Mara. The majority shareholder, not the corporation, bears the fiduciary obligations. See *Cecil v. Orthopedic Multispecialty Network, Inc.*, 5th Dist. No. 2006 CA 00067, 2006-Ohio-4454, ¶57 (noting failure to name the majority shareholder as a defendant was fatal to breach of fiduciary duty claim against the closely held corporation because, as a matter of law, "[i]t is the majority shareholders [of such a corporation] that owe a duty to appellant [a minority shareholder]").

{¶23} Plaintiff, however, argues that *Gigax v. Repka* (1992), 83 Ohio App.3d 615, allows him to pursue his wrongful termination claim against the corporation. In *Gigax*, the

plaintiff was a minority shareholder and the defendants were majority shareholders; the corporation itself was not a party. Id. *Gigax* thus "did not hold that the closely held corporation owed the minority shareholder a fiduciary duty." *First Health Network v. Shuman* (Aug. 28, 1996), 9th Dist. No. 17662. Plaintiff's reliance on *Gigax* is misplaced, as that case did not create a claim against a corporation under the circumstances present here.

{¶24} Plaintiff nonetheless contends the circumstances here are unique. He asserts that, not only is he a minority shareholder in a closely held corporation, but the trustee of the Hill Trust, as a majority shareholder, exercised such control over the company as to render the company and the majority shareholder one and the same. In such instances, plaintiff asserts, the corporation is a proper defendant to a claim of wrongful termination. Plaintiff cites *Estate of Schroer v. Stamco Supply, Inc.* (1984), 19 Ohio App.3d 34, 40, to support his argument.

{¶25} In *Schroer*, the plaintiff, a minority shareholder, sued a closely held corporation because the controlling shareholder group failed to cause the corporation to repurchase the minority shareholders' shares on the same terms and conditions offered to the controlling shareholder group. Id. *Schroer*, however, does not advance plaintiff's argument. Because the corporation in *Schroer* was the repurchasing entity, it was a necessary and proper party to the action. Id. Here, plaintiff does not claim Mara was required to repurchase plaintiff's shares. In fact, plaintiff still owns his two shares of Mara stock, and no one at the company has ever demanded, or even suggested, plaintiff must sell his shares to the corporation.

{¶26} In the final analysis, plaintiff does not have cause of action, on these facts, for wrongful termination based on breach of fiduciary duty against a closely held corporation. Having failed to establish that Mara is a proper defendant, no genuine issue of material fact remains regarding plaintiff's wrongful termination claim. The trial court properly granted Mara's motion for summary judgment on plaintiff's wrongful termination claim. Plaintiff's second assignment of error is overruled.

V. Third Assignment of Error – Motion to Compel Discovery

{¶27} In the final assignment of error, plaintiff maintains the trial court erred in denying his motion to compel discovery. Plaintiff alleges Mara used abusive discovery tactics, withholding documents and information and preventing plaintiff from timely receiving information he should have had the opportunity to address in his brief opposing Mara's summary judgment motion.

{¶28} We review the trial court's resolution of discovery matters under an abuse-of-discretion standard. *State ex rel. Keller v. Columbus* (2005), 164 Ohio App.3d 648, 660, citing *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469 (noting that, absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues). An abuse of discretion implies an "unreasonable, arbitrary, or unconscionable" decision. *Walter v. ADT Security Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324, ¶39, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶29} Here, the trial court did not abuse its discretion in denying plaintiff's motion to compel discovery. Although plaintiff alleges Mara's "abusive" discovery tactics prevented him from obtaining information he should have had the opportunity to address

in his response to Mara's summary judgment motion, plaintiff never filed a Civ.R. 56(F) motion seeking additional time to conduct the discovery he states he needed to respond to the summary judgment motion.

{¶30} Civ.R. 56(F) provides that "[s]hould it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated" in an affidavit "present * * * facts essential to justify the party's opposition, the court" either "may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just." When a nonmoving party to a summary judgment motion needs additional time to respond, he or she may seek a continuance to obtain additional discovery. *Benjamin v. Deffet Rentals, Inc.* (1981), 66 Ohio St.2d 86, 92. If, however, a party fails to avail itself of the provision of Civ.R. 56(F), summary judgment appropriately is granted to the moving party. Id. Plaintiff never invoked the procedures in Civ.R. 56(F). Instead, after fully responding to Mara's motion for summary judgment, plaintiff asserted that Mara's noncompliance with discovery requests hampered plaintiff's ability to respond.

{¶31} Plaintiff suggests a Civ.R. 56(F) motion was unnecessary. He notes such a motion may not always be required if the party seeking additional discovery effectively communicates to the court, by some other means, that substantial discovery has not yet occurred. See, e.g., *Tucker v. Webb Corp.* (1983), 4 Ohio St.3d 121, 122-23 (holding that where defendant instituted summary judgment proceedings prior to any substantial discovery in the case, and plaintiff informed the court in his memorandum opposing summary judgment that no substantial discovery had been conducted, summary judgment was inappropriate even though plaintiff did not avail himself of Civ.R. 56(F)).

{¶32} Two factors render plaintiff's argument unpersuasive. Here, unlike *Tucker*, substantial discovery occurred before plaintiff filed his motion to compel discovery. The record indicates Mara responded to plaintiff's first discovery requests on September 15, 2006, offering answers to interrogatories, documents, and some objections. Plaintiff waited until April 12, 2007, nearly seven months later, to inform Mara of perceived deficiencies in its discovery response. On April 25, 2007, Mara responded with supplemental answers, reiterated certain objections, and asked for clarification on certain requests, and on May 21, 2007 it served plaintiff with a second set of documents in response to plaintiff's second request for production.

{¶33} Moreover, not until June 6, 2007 did plaintiff file his motion to compel discovery, informing the trial court for the first time of what plaintiff believed to be Mara's insufficient cooperation in discovery. The extended discovery cutoff date, however, was June 5, 2007, making plaintiff's motion to compel untimely. Plaintiff's failure to earlier pursue the court's assistance renders *Tucker* inapplicable. See *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶42 (finding appellant's reliance on *Tucker* misplaced when appellant had already been given sufficient time for discovery and appellant was not diligent in following up on those discovery requests he had already made). See also *Fifth Third Bank v. Davis* (Jan. 31, 1985), 1st Dist. No. C-840348 (holding trial court did not abuse its discretion in denying plaintiff's motion to compel answers to interrogatories where defendant had answered the propounded interrogatories to the best of its ability, or in denying plaintiff's motion to extend the discovery cutoff date when plaintiff filed its motion after the cutoff date).

{¶34} Because plaintiff had the opportunity to conduct substantial discovery, did not avail himself to the procedures of Civ.R. 56(F), and filed his motion to compel after the discovery cutoff date, the trial court did not abuse its discretion in denying plaintiff's motion to compel discovery. Plaintiff's third assignment of error is overruled.

{¶35} Having overruled plaintiff's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

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