IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jay P. White, :

Plaintiff-Appellant, : No. 10AP-294

(C.P.C. No. 09CVH04-5791)

V. :

(REGULAR CALENDAR)

Sears, Roebuck & Company c/o

CT Corporation, Statutory Agent,

:

Defendant-Appellee.

:

DECISION

Rendered on January 20, 2011

Cooper & Elliott, LLC, Rex H. Elliott, Charles H. Cooper, Jr., Bradley A. Strickling, and Adam P. Richards, for appellant.

Seeley, Savidge, Ebert & Gourash Co., LPA, Keith A. Savidge, and Andrew D. Bemer, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Jay P. White, plaintiff-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court granted summary judgment to Sears, Roebuck & Company ("Sears"), defendant-appellee, on appellant's claims for breach of contract and unjust enrichment.

{¶2} Appellant was employed for 17 years by Sears, eventually achieving the position of ASM Operations/Human Resources Manager. On December 31, 2003, Sears terminated appellant's employment "for cause." Sears's basis for the termination was that appellant used a computer to change another employee's time card, effectively removing the obligation to pay overtime to the employee. Sears discovered after appellant's termination that another employee had taken responsibility for changing the employee's time card using appellant's computer password. Sears did not pay appellant any severance compensation, despite appellant's claim that his supervisors had told him for years he would be entitled to two weeks of pay for every year he was employed if he was terminated without cause.

{¶3} Appellant filed an initial action against Sears. One claim was dismissed by the trial court, which this court upheld in *White v. Sears, Roebuck & Co.*, 163 Ohio App.3d 416, 2005-Ohio-5086; some claims were dismissed by the trial court for lack of subject-matter jurisdiction; and the remaining claim was voluntarily dismissed by appellant. However, after Sears refused to pay him any severance compensation, appellant filed the current action against Sears on April 16, 2009, alleging claims of breach of contract and unjust enrichment. On August 5, 2009, Sears filed a motion to dismiss, which the trial court denied September 17, 2009. On January 19, 2010, Sears filed a motion for summary judgment, which the trial court granted via judgment entry March 24, 2010. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The Trial Court erred when it granted summary judgment in favor of defendant Sears, Roebuck & Company ("Sears") on plaintiff Jay P. White's claims of breach of contract and unjust

enrichment by determining that no genuine issue of material fact existed as to whether Mr. White was entitled to severance pay.

- **{¶4**} Appellant argues in his sole assignment of error that the trial court erred when it granted Sears summary judgment. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. Franks v. The Lima News (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. State ex rel. Howard v. Ferreri, 70 Ohio St.3d 587, 589, 1994-Ohio-130. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. Franks. The moving party carries the initial burden of setting forth specific facts that support the motion for summary judgment. Dresher v. Burt, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. If the movant fails to meet this burden, summary judgment is not appropriate. If the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact. ld. at 293.
- {¶5} In the trial court's September 17, 2009 decision, the trial court denied Sears's motion to dismiss and noted:

The Court would like to issue a warning to Plaintiff. It does not like to have its time wasted. In order to prove his claims, Plaintiff must come forward with something substantial to

show the existence of these alleged "unwritten policies." Plaintiff must further show that Defendant endorsed and regularly followed such policies. The Court will not accept Plaintiff's mere assertion that such policies existed. If Plaintiff does not come forward with such evidence, the Court will have no problem sanctioning Plaintiff for filing a frivolous lawsuit. However, for the time being, the Court must deny Defendant's motion.

- {¶6} In its March 10, 2010 decision granting Sears's motion for summary judgment, the trial court found that appellant's claims for breach of contract and unjust enrichment rest upon the determination of whether he is actually entitled to severance pay. The court indicated that the only way appellant is entitled to severance pay is to affirmatively demonstrate: (1) Sears had "unwritten policies" that entitled him to severance pay; (2) these policies were widely known; and (3) Sears regularly followed these widely known policies. The court found that appellant only presented his own assertions that Sears had "unwritten policies" that entitled him to severance pay and provided no outside evidence to show the existence of such policies. The court concluded that appellant's personal statements were not enough to satisfy his burden of proof showing that Sears employed "unwritten policies" as to severance pay.
- questions: (1) Was he terminated without cause? and (2) If he was terminated without cause, was he entitled to severance benefits from Sears? The second question addresses the trial court's basis for summary judgment. Appellant maintains Sears established an unwritten policy entitling him to severance pay when his supervisors made promises to him that he would be entitled to such throughout his employment. In support of this assertion that there existed an unwritten policy, appellant points to the following

evidence: (1) his affidavit averment that he had been told repeatedly by his supervisors that Sears's policy provided him with a severance benefit of two weeks for each year of employment if his termination was without cause; (2) his deposition testimony that, for 17 years, he had observed Sears employees receive severance packages of two weeks of pay for every year of service; (3) his deposition testimony that other individuals had received severance packages constituting two weeks of pay for every year of service; (4) Sears supervisors promised him that his employment included the same severance benefits; and (5) his interrogatory responses that his supervisors at Sears made representations to him regarding the severance policy, which appellant confirmed in his deposition testimony. In granting summary judgment to Sears, the court found that appellant's own statements were not enough to satisfy his burden of proof showing that Sears employed unwritten policies as to severance pay. Thus, the pertinent issue before us is straightforward: Do a non-movant's own statements made in affidavits, depositions, and interrogatory responses, without any further evidentiary support provide sufficient evidence to withstand a summary judgment motion?

{¶8} We find the type of proof submitted and relied upon by appellant in this case does not meet the burden shifting requirements of *Dresher*. As this court has noted:

Generally, a party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party.

Bell v. Beightler, 10th Dist. No. 02AP-569, 2003-Ohio-88, ¶33. Therefore:

[A] non[-]moving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. * * * This rule is based upon judicial economy; [p]ermitting a non[-]moving party to avoid summary judgment by asserting nothing more than "bald contradictions of the evidence offered by the moving party" would necessarily abrogate the utility of the summary judgment exercise. * * * Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early stage of the litigation and unnecessarily dilate the civil process.

Greaney v. Ohio Turnpike Comm., 11th Dist. No. 2005-P-0012, 2005-Ohio-5284, ¶16.

(¶9) Appellant counters that his affidavit did not stand alone. Rather, his affidavit was corroborated by his deposition testimony and interrogatory answers. However, we find that the deposition testimony and the interrogatory answers were equally as selfserving as his affidavit and suffer from the same limitations as the affidavit. It is not only affidavits that fall under the axiom that bald contradictions of the movant's evidence are insufficient to avoid summary judgment. A non-movant's self-serving deposition testimony is also insufficient to demonstrate a material issue of fact. Ervin v. Case Bowen Co., 10th Dist. No. 07AP-322, 2008-Ohio-393, ¶11. See also Isbell v. Johns Manville, Inc., 6th Dist. No. L-06-1240, 2007-Ohio-5355, fn. 2 (non-movant's self-serving deposition testimony, uncorroborated by any other evidence, cannot avail him as against a well-supported summary judgment motion); Augusta v. Lemieux, 11th Dist. No. 2005-A-0034, 2006-Ohio-6696, ¶27 (non-movant's deposition testimony and subsequent affidavit are self-serving and inadequate to meet the reciprocal burden to set forth specific facts showing that there is a genuine issue for trial pursuant to *Dresher*); *Greaney* at ¶17 (non-movant's deposition testimony and subsequent affidavit are self-serving and insufficient to meet reciprocal

burden to set forth specific facts showing that there is a genuine issue for trial pursuant to *Dresher*). Thus, a non-movant's own self-serving assertions, whether made in an affidavit, deposition or interrogatory responses, cannot defeat a well-supported summary judgment when not corroborated by any outside evidence.

{¶10} In the present case, despite the warning issued by the trial court in denying Sears's motion to dismiss, appellant presented only his own unsupported assertions to counter Sears's motion for summary judgment. Buttressing the claims he made in his own affidavit with the same claims from his own deposition and interrogatory responses is insufficient. Appellant had approximately four months from the time of the trial court's denial of Sears's motion to dismiss until Sears filed its motion for summary judgment to conduct discovery or gather other evidence to support his contentions that Sears promised him he would be entitled to severance benefits in accordance with its widely known and regularly followed policy, but he failed to do so. Affidavits or deposition testimony from co-workers, supervisors or managers could have created genuine issues of material fact sufficient to defeat summary judgment.

{¶11} Appellant argues that the reasoning underlying the general principle prohibiting a non-moving party from avoiding summary judgment simply by submitting a self-serving affidavit does not apply here. Appellant asserts that where, as here, the breach of an oral contract is at issue, the concern is that the oral promisor could deny the plaintiff-promisee his day in court merely by submitting his own self-serving affidavit refuting the existence of the oral promise. However, in the present case, Sears has not merely submitted a self-serving affidavit in support of its motion for summary judgment. Rather, Sears relied upon the affidavit of Ken Smith, the former District Manager for the

store at which appellant worked. In the affidavit, Smith averred that, in his 36 years with Sears, he knew of no unwritten policies implemented by Sears that conflicted with the policies outlined in the Sears Human Resource Guide for Managers ("HR Guide"). Sears also submitted the HR Guide to support its motion for summary judgment. The HR Guide indicates that it is company policy to pay service allowance to eligible associates who are terminated due to performance. However, under "Service Allowance," the HR Guide provides that service allowance is not paid in cases of dishonesty or misconduct, or when associates terminate voluntarily or for health reasons. Furthermore, the HR Guide indicates that Sears reserves the right to make the final decision regarding eligibility for service allowance, and it may be withheld whenever the company deems payment to be unwarranted and non-payment is authorized by the person approving the termination. Also, under "Associate Relations," the HR Guide provides that no unit manager or other unit or district executive has the authority to make any agreements with any associates either verbally or in writing that are not in compliance with Sears's human resource or benefit policies. Thus, Smith's affidavit, when coupled with the HR Guide, supported Sears's contention that there was no unwritten policy that guaranteed all employees severance pay when terminated without cause.

{¶12} Appellant also contends that Sears does not dispute his contentions that his supervisors repeatedly represented to him that he would be entitled to severance pay, and Sears only asserts the supervisors did not have the authority to make such representations. However, we fail to find where Sears has conceded this point, and appellant does not direct us to any concession in the record. In its answer to appellant's amended complaint, Sears denied the allegations in paragraph 8 that Sears enforced a

series of unwritten policies related to additional severance amounts paid to employees and denied that Sears advised him that it offered additional severance packages in addition to the severance package stated in the employee handbook to its employees who were terminated for no cause. Sears also denied the allegations in paragraph 24, which alleged several unwritten policies were discussed with appellant during his employment. In addition, in Sears's motion for summary judgment, Sears disputes some of appellant's claims regarding those whom he alleged told him he would be entitled to severance pay if terminated without cause. In its appellate brief, Sears also calls any alleged statements by supervisors that appellant would be entitled to severance pay "unspecified general statements" and "mere assertions" containing "ambiguities" lacking "sufficient articulation of a specific promise." Although we agree that Sears mainly focused its defense on the lack of authority of any managers to make such alleged representations, we fail to find any place in the record where Sears conceded that managers had actually made the representations appellant claims, and Sears made specific denials of any such representations. Lacking any evidence of implied or overt representations by appellant's former supervisors, any claim based upon breach of contract must necessarily fail.

{¶13} With regard to appellant's claim for unjust enrichment, which he pleads alternatively to his breach of contract claim, the elements of an unjust enrichment claim are as follows: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *L* & *H* Leasing Co. v. Dutton (1992), 82 Ohio App.3d 528, 534, citing Hambleton v. R.G. Barry Corp. (1984), 12

Ohio St.3d 179, 183. Given we have found above that there was no unwritten policy widely known and regularly followed by Sears that absolutely entitled appellant to

severance pay, even if his termination was without cause, appellant has failed to

demonstrate any genuine issue of material fact as to Sears's retention of a benefit under

circumstances where it would be unjust to do so without payment. Even assuming Sears

retained some benefit conferred upon it by appellant, there existed no unwritten policy

requiring Sears to pay severance benefits, thereby rendering any failure to do so fair.

Therefore, there is no genuine issue of material fact with regard to appellant's unjust

enrichment claim, and Sears was entitled to summary judgment in this respect, as well.

For all of the above reasons, the trial court properly granted summary judgment to Sears.

Appellant's assignment of error is overruled.

{¶14} Accordingly, appellant's assignment of error is overruled, and the judgment

of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.