[Cite as *Rogers v. Natl. City Corp.*, 2009-Ohio-2708.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91103

TODD ROGERS

PLAINTIFF-APPELLANT

vs.

NATIONAL CITY CORPORATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-630086

BEFORE: Boyle, J., Kilbane, P.J., and Dyke, J.

RELEASED: June 11, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Todd Rogers, appeals from an order granting summary judgment to defendants-appellees, National City Bank Corporation and National City Bank (collectively "National City"), on his claims for breach of contract, promissory estoppel, and unjust enrichment. The crux of his claims is that National City failed to pay him all that he was allegedly entitled under its incentive compensation plan. For the reasons discussed below, we affirm the trial court's decision.

Procedural Facts and History

{¶ 2} In July 2000, Rogers accepted a position with National City as the director of its Loan Trading Department, Loan Syndications Division. As part of his compensation package for the position, National City offered Rogers the opportunity to participate in "a discrete incentive compensation plan for Loan Trading," which was funded with revenue generated from loan trading. Because Loan Trading was a new division and the anticipated revenue was unknown, National City, however, promised Rogers a guaranteed bonus of $200,000 for his first year, to be paid in 2001.

{¶ 3} During Rogers's employment with National City, the pool of eligible participants for the incentive compensation plan increased because the Loan Sales and Trading joined with other sub groups, namely, Syndications, Private

Placements, and Public Debt Equity.

{¶ 4} Rogers continued his employment with National City for five years and resigned in September 2005 after being confronted regarding alleged misconduct in connection with trades.

{¶ 5} Following his resignation, Rogers brought the underlying action, asserting claims for breach of contract, promissory estoppel, and unjust enrichment. In his amended complaint, Rogers claims that National City failed to pay him according to the terms of its offer letter because the bonuses that he received were not "discrete" to his Loan Trading Unit under the Incentive Compensation Plan ("ICP"). He argues that National City enlarged the pool of eligible participants by joining other groups as part of the ICP, thereby reducing his annual payout. As an alternative claim, he also argues that he relied on National City's promise that his compensation under the ICP was based on the revenue of his group and limited to his group members. Finally, Rogers asserts that if his other claims fail, he should recover under the equitable doctrine of unjust enrichment because National City reaped huge profits from his work, it failed to fairly compensate him for this work, and it acted in bad faith by changing the terms of the ICP without communicating them to him.

{¶ 6} National City moved for summary judgment on all these claims, arguing that it complied with the terms of the offer letter and its ICP; that Rogers failed to identify a clear and unambiguous promise that he reasonably and detrimentally

relied on; and that the doctrine of unjust enrichment was inapplicable. The trial court granted National City's motion. From this judgment, Rogers appeals, raising the following assignment of error:

{¶ 7} "The trial court erred in granting defendants' motion for summary judgment because genuine issues of material fact exist concerning the terms of plaintiff's employment contract with defendants, as well as issues of fact concerning plaintiff's other causes of action."

Summary Judgment Standard of Review

{¶ 8} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192.

{¶ 9} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine 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 nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St.3d 190, 191.

{¶ 10} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Breach of Contract Claim

{¶ 11} Rogers argues that the trial court erred in granting summary judgment on his breach of contract claim because ambiguities exist in the contract that should be resolved by a jury. Rogers relies on a July 2000 offer letter issued by National City and signed by both parties prior to Rogers's employment as the governing contract. In the letter, National City promised, among other things, that Rogers would be "eligible to participate in a discrete incentive compensation plan for Loan Trading." The letter described key aspects of the plan and specifically identified that the plan would be funded with 10 percent of loan trading revenue. He argues that any ambiguities as to the meaning of the word "discrete" and National City's interpretation of the incentive compensation plan involve issues of fact that must be resolved by a jury.

{¶ 12} National City counters that Rogers's claim must be examined the context of both the offer letter and the agreements outlining the terms of the ICP for each year that Rogers was employed. The 2001 ICP and subsequent 2002 ICP

expressly contained: (1) a discretion clause, giving National City's Executive Vice President the authority to determine the amount of any award; and (2) an amendment clause, giving National City the ability to amend or terminate the incentive plan at any time. Based on these clauses, National City contends that Rogers's breach of contract claim fails as a matter of law. We agree.

{¶ 13} Generally, a breach of contract claim for underpayment of a bonus or inadequate compensation under an ICP cannot lie when the employer retains discretion to make such an award and even terminate the plan altogether. See, e.g., *Mazzitti v. Garden City Group, Inc.*, 10th Dist. No. 06AP-850, 2007-Ohio-3285, ¶47 (citing numerous cases recognizing the same principle: employer entitled to summary judgment on plaintiff's claim for unpaid bonus when the terms of the bonus incentive plan were discretionary). In some instances, however, courts have recognized that an equitable claim, namely, unjust enrichment, may stand when the discretionary clause renders the agreement illusory or the refusal to award an employee a bonus under the ICP would be inequitable. See *Quesnell v. Bank One Corp.*, 10th Dist. No. 01AP-792, 2002-Ohio-1574; *Kulas v. Bank One Trust Co., N.A.*, 10th Dist. No. 01AP-1290, 2002-Ohio-5002. But even these cases reject an express breach of contract claim. Id.

{¶ 14} Here, although the pool of eligible participants under the ICP increased during the five years that Rogers worked for National City, we find that the ICP expressly granted National City the authority to amend the plan. Moreover, despite

Rogers's attempt to distance himself from the ICP agreements, National City points to Rogers' s deposition testimony, wherein he acknowledged that his breach of contract claim was based in part on the 2001 ICP. The record further reveals that Rogers repeatedly referenced that he was entitled to incentive compensation based on a revenue pool funded in "11% of bank loan trading revenues" – a term spelled out in the 2001 ICP but different than the 2000 offer letter. Indeed, in a letter written by Rogers in January 2004 to Executive Vice President Jim Bell, wherein Rogers inquired as to his 2003 incentive compensation, he specifically referenced that his bonus should be based on a revenue pool of "11%," as expressed in the 2001 ICP.

{¶ 15} But even if we agreed with Rogers that his breach of contract claim was limited to the 2000 offer letter, his claim still fails. To prevail on a claim for breach of contract, the plaintiff has the burden of proving four elements: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage or loss to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. Here, Rogers fails to present any evidence that National City breached the terms of the agreement. To the contrary, the record overwhelmingly demonstrates that National City complied with the terms contained in the letter.

{¶ 16} Notably, National City never promised Rogers a specific bonus payment under the ICP, apart from the $200,000 guaranteed bonus for the first year, which National City paid. Instead, the offer letter stated that Rogers was "[e]ligible to participate in a discrete incentive compensation plan for Loan Trading." The record

reveals that National City included Rogers in the pool of eligible participants and compensated him generously for each year that he was eligible. Indeed, Rogers received the following payments in incentive compensation alone during the years that he was eligible:

·March 2001: $214,393;

·March 2002: $289,500;

·March 2003: $360,000;

·March 2004: $452,250;

·March 2005: $603,000;

·Total payment in incentive compensation: $1,919,143.

{¶ 17} We find the instant case similar to the facts of *Frank v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 02AP-1336, 2003-Ohio-4684, wherein the appellate court affirmed the trial court's grant of summary judgment on the plaintiff's claim for an unpaid bonus under an ICP. Finding no breach of contract, the Tenth District emphasized that the employer was only "obligated to consider appellant for a bonus payment." Id. at ¶14. Because there was no evidence that the employer breached this promise, the court rejected the appellant's claim that the failure to pay under the ICP amounted to a breach. Id. Indeed, mere dissatisfaction with an employer's execution of an ICP does not in of itself support a cognizable claim. Here, the facts are analogous: National City considered Rogers under its ICP and complied with its promise that he was "eligible to participate."

{¶ 18} Thus, based on our review of the record, we find that Rogers's breach of contract claim fails and that no genuine issues of material fact exist to preclude summary judgment.

Promissory Estoppel Claim

{¶ 19} Rogers next argues that the trial court erred in granting summary judgment on his alternative claim of promissory estoppel because genuine issues of material fact exist. We disagree.

{¶ 20} In order to prove a claim of promissory estoppel, Rogers must establish the following elements: (1) a clear and unambiguous promise, (2) reliance on the promise, (3) that the reliance is reasonable and foreseeable, and (4) that he was injured by his reliance. *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, ¶54.

{¶ 21} Rogers argues that National City promised him "compensation consisting of a base salary and an incentive plan discrete to the Loan Trading Unit" but then failed to execute an ICP "discrete" to his unit, thereby diluting his payout. He contends that he detrimentally relied on this promise by staying at National City, instead of pursuing other opportunities. We find his argument unpersuasive.

{¶ 22} Initially, we note that National City never promised Rogers a specific bonus amount. See *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 110-111 (discussion of future benefits or opportunities is insufficiently clear and unambiguous to establish a promissory estoppel claim). Rogers fails to point to a

clear and unambiguous promise that he relied on. National City's broad representation that Rogers was "eligible to participate in a discrete incentive compensation plan for Loan Trading" falls short of a clear and unambiguous promise giving rise to a promissory estoppel claim.

{¶ 23} But even if we agreed that National City's promise of an ICP, "discrete" solely to Rogers's division constituted a clear and unambiguous promise, Rogers still cannot establish reasonable reliance. Rogers acknowledges receiving the 2001 ICP; indeed, he even acknowledges that his breach of contract claim was based in part on the 2001 ICP. As discussed above, the 2001 ICP and 2002 ICP expressly state that National City has discretion to administer and modify the plan. The record also reveals that Rogers signed the employee handbook forms, acknowledging that his employment at National City was at will and that National City reserved the right to modify all its employment policies and practices. Given these disclaimers, we fail to see how Rogers could have reasonably believed that National City was forever precluded from modifying its administration of incentive compensation plans. See *Sexton v. Oak Ridge Treatment Center Acquisition Corp.*, 167 Ohio App.3d 593, 2006-Ohio-3852, ¶14 (employees are bound by terms contained in employee handbooks and policy manuals as conditions of an at-will employment relationship if the employer and employee manifest an intention to be bound by them; continued employment and employee's acknowledgment of policies manifests intent to be bound).

{¶ 24} Finally, Rogers fails to satisfy the last element of a promissory estoppel claim: detrimental reliance. Although Rogers claims that he gave up other opportunities and stayed at National City only because of its promise that he would be compensated under an ICP – "discrete" to his loan trading group – his bare claim is insufficient to establish detrimental reliance. Ohio courts consistently recognize that a plaintiff's "bare assertion that he gave up opportunities for other employment" is insufficient to establish detrimental reliance. See, e.g., *Wing*, supra, at 111; *Eagleye v. TRW, Inc.* (Feb. 17, 1994), 8th Dist. No. 64662; *Hanley v. Riverside Methodist Hospital* (1991), 78 Ohio App.3d 73, 80. Notably, Rogers concedes that he was unemployed at the time that National City hired him and that he never received another job offer while employed there, let alone turn down a job. Further, Rogers was well compensated under National City's ICP, accepting his bonus each year. And Rogers remained at National City even after the eligible pool of participants under his ICP expanded to other departments, thereby negating his own claim.

{¶ 25} Accordingly, we find that the trial court properly granted summary judgment on Rogers's promissory estoppel claim.

Unjust Enrichment Claim

{¶ 26} In his final argument, Rogers contends that the trial court erred in granting summary judgment on his alternative claim of unjust enrichment. He argues that his employment with National City resulted in significant financial gains

for National City and that its retention of such a benefit without payment to him is unjust. We disagree.

{¶ 27} Assuming that the express written contract governing Rogers's claim is deemed illusory, then Rogers may recover under the equitable theory of unjust enrichment if he satisfies the elements. *Quesnell*, supra. To prevail on a claim for unjust enrichment, a plaintiff must establish the following three elements: "(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." *Miller v. Key Bank N.A.*, 8th Dist. No. 86327, 2006-Ohio-1725, ¶43, quoting *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183.

{¶ 28} Here, Rogers fails to satisfy the third element. The record clearly reflects that Rogers was well compensated for his services at National City. Indeed, he received nearly $2,000,000 in incentive compensation. Notably, this case does not involve a situation where an employer refused to compensate an employee under an ICP despite the employee's high performance. Compare *Quesnell*, supra (employer refused to pay any incentive compensation despite employee's performance). Moreover, Rogers's principal complaint is that the wealth was shared among additional people in other departments – not that National City withheld the money for its own benefit. Under the facts of this case, where National City restructured its divisions and merged departments but still handsomely rewarded

Rogers under its ICP, we simply cannot say that National City's failure to pay Rogers more was "unjust."

{¶ 29} Accordingly, we find no genuine issue of material fact as to Rogers's unjust claim and hold that the trial court properly granted summary judgment.

{¶ 30} Rogers's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J.,CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY