

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

January 29, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

ROBERT T. WARING,) C/ A NO. 03A01-9610-CV-00344
)
Appellant,) HAMILTON LAW
)
v.) HON. SAMUEL H. PAYNE,
) JUDGE
POLYMER MATERIALS, INC.;)
PRIMEX PLASTICS CORPORATION;)
ICC INDUSTRIES, INC.; JOHN)
J. FARBER; JOHN L. ORAM and)
PAUL J. BERTSCH,) AFFIRMED AND
) REMANDED
Appellees.) AS MODIFIED

TIMOTHY R. SIMONDS and ERIC PAUL EDWARDSON, BAKER, DONELSON,
BEARMAN & CALDWELL, P. C., Chattanooga, for Appellant.

HUGH J. MOORE, JR., DOUGLAS E. PECK, and JOEL A. CONKIN, WTT,
GAITHER & WHITAKER, P. C., Chattanooga, for Appellees.

O P I N I O N

Franks. J.

In this action based on an employment agreement, plaintiff seeks recovery of damages for breach of contract and other theories, because he did not receive any bonuses under terms of the agreement.

The Trial Judge granted summary judgments and dismissed as to all defendants and plaintiff has appealed.

Plaintiff negotiated the sale of all of the stock in Polymer Materials, Inc. (PM), to Primex Plastics Corporation, on February 22, 1991. Plaintiff also negotiated employment and consultancy agreements with PM. These agreements were negotiated simultaneously and in conjunction with Primex's purchase of PM.

Under the terms of the agreements, plaintiff was to remain president of PM for a period of three years, and in addition to his salary he was to receive annual bonuses determined by a formula contained in the agreements. The bonus formula was based on pre-tax, pre-bonus earnings of PM. The crux of plaintiff's argument is that PM breached its obligations under their agreement by preventing plaintiff from operating the company in a reasonable and prudent manner and depriving him of his right to earn bonus compensation?

The agreements provides in pertinent part:

The corporation hereby employs [plaintiff] . . . as president of the corporation. The Employee shall report directly to the President of ICC Industries or other representative designated by the Corporation and will have direct responsibility for the operation of the Corporation, and will perform such other services and duties as may be assigned to him from time to time by the President of ICC Industries or the Board of Directors of the Corporation.

ICC Industries is the parent corporation of Primex. Plaintiff essentially argues that had he been allowed to operate the company without any interference, he would have made profits for PM and thereby would have been entitled to a bonus. The above quoted contractual provision does not give plaintiff total control over the operation of the company. Plaintiff's argument appears to be made in the context of

whether the president could operate the company without any input from its owners. While this is the position he enjoyed before the sale of the stock, the sale separated the lines of authority over the operation of the company and the contract did not restore to plaintiff the control he enjoyed before the sale.

Plaintiff argues that at the direction of PM's new officers and directors he was denied autonomy and control and that such actions were contrary to the representations and assurances made by official of Primex and ICCI prior to the execution of the agreements. At this juncture we should note that the agreements include the following provisions:

No modification, amendment or waiver of any of the provisions of this agreement shall be made effective unless in writing specifically referred to, and signed by both parties.

This agreement supersedes any and all employment agreements or understandings previously entered into between the parties.

. . .

This agreement constitutes the entire agreement of the parties hereto with respect to Employee's employment and his compensation therefor.

Plaintiff's statements in his affidavit fall within the ambit of the parol evidence rule.

The parol evidence rule is a rule of substantive law which, when applicable, defines the limits of the contract. It is not a rule of evidence and it is of itself not a rule of interpretation. (Citations omitted.) *McQuiddy Printing Co. V. Hirsig*, 23 Tenn. App. 434 at 445.

The parol evidence is particularly applicable where the contract contains integration or merger clauses. 29(a)

Am Jur. 2d, Evidence §1095.

However, plaintiff argues the rule is not applicable

here, and alleged the verbal representations about the future operation of the company fraudulently induced him to enter the agreement, and cites *Fowler v. Happy Goodman Family*, 575 S.W2d 496 (Tenn. 1978). The Rule does not apply in cases where the contract was obtained through fraudulent means. See *McMillin v. Great Southern Corporation*, 63 Tenn. App. 732 (1972).

The Trial Judge concluded that the plaintiff neither alleged fraud in accordance with the Rules of Civil Procedure, nor offered material evidence of fraud in response to the motion. Taking into account that the representations made by defendants, as stated by the plaintiff, go to the future successful operation and profitability of PM, we are constrained to affirm the Trial Judge on this issue. It is widely held that fraud cannot be based on erroneous projections and representations as to the future success of a business or corporation. See *Zar v. Omni Industries, Inc.*, 813 F.2d 689 (5th Cir. 1987); *Sharp v. Idaho Investment Corp.*, 504 P.2d 386 (Idaho 1972); *Dorr v. Janssen*, 378 P.2d 999 (Oregon 1963); *Evans v. Gray*, 215 S.2d 40 (Fla. App. 1968). We conclude that the allegations and plaintiff's affidavit do not establish an exception to the application of the parol evidence rule in this case.

Plaintiff also alleged the contract required PM to pay certain premiums of insurance on behalf of plaintiff and that it failed to pay two of these premiums. In response, defendants filed the affidavit of Paul J. Bertsch, who stated that he was president of O'Neil Color & Compound, Inc., (formerly known as PM), and that in April 1995 PM agreed to

pay the insurance premiums described in the complaint. PM had not done so earlier because it had no record of ever having been billed. The record before us further shows that these premiums were tendered to plaintiff's counsel. The record does not indicate that this issue has been resolved. Accordingly, upon remand judgment will be entered in favor of plaintiff for the amount of the premium and interest from the due date to the date of tender.

The record, upon applying the Parol Evidence Rule, does not contain any material evidence that the contract of employment between plaintiff and PM was breached by defendants. Accordingly, we affirm the Trial Judge's granting of summary judgment on this issue as modified.

Plaintiff alleged that the defendants tortiously interfered with and procured PM's breach of the agreements with plaintiff and conspired to deprive plaintiff of his right to receive bonus payments under the agreement. These alleged actions are necessarily predicated upon plaintiff's being able to establish a breach of the agreements. Accordingly, we pretermitt discussion of the remaining issues and affirm the Trial Court's dismissal of this action with costs assessed to the appellant.

Herschel P. Franks, J.

CONCUR:

Houston M Goddard, P. J.

Don T. McMurray, J.