

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: SC04-2236

FOURTH DCA CASE NO: 4D02-5111

J.R.D. MANAGEMENT CORP., a New York corporation,
and
ROBERT R. WEINER,

Petitioners,

vs.

HEATHER DULIN,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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JURISDICTIONAL ISSUES PRESENTED

- I. THE FOURTH DISTRICT'S OPINION AFFIRMING A CLAIM BY AN EMPLOYEE AT WILL FOR BREACH OF A SEVERANCE AGREEMENT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT

- II. THE FOURTH DISTRICT'S OPINION PERMITTING AN EMPLOYEE AT WILL TO BRING AN ACTION FOR FRAUD IN THE INDUCEMENT AGAINST A PERSON WHO IS NOT PARTY TO THE CONTRACT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

STATEMENT OF THE CASE AND FACTS

The Respondent adopts the Statement of the Case and Facts presented by Petitioner except as stated herein. The Respondent brought a two count action for Breach of Contract against J.R.D. Management and an action for Fraud in the Inducement against J.R.D. Management and Robert Wiener. The trial court dismissed the Fraud in the Inducement as to J.R.D. due to the existence of a contract. The trial court did not dismiss Dulin's claim for Fraud in the Inducement against Wiener as he was not a party to the contract.

Paragraph 10 of the Employment Agreement provided that the Petitioner, J.D.R. Management, was obligated to pay Dulin \$15,000.00 as severance compensation in the event her employment was terminated for any reason other than good cause within the first twelve months of her employment.

At the trial of this matter, Respondent presented testimony that after having entered into a contract which was later ratified by J.R.D., the Respondent was terminated without good cause. J.R.D. attempted to produce evidence that the termination was for good cause, but the jury at the end of the trial determined that Dulin was terminated without good cause and held in her favor.

At the trial of this matter, Dulin presented testimony that Robert Wiener and others at J.R.D. Management referred to Wiener as Chairman of the Board and that he and he alone negotiated her employment contract. Robert Wiener was not a

party to the contract. Dulin also presented testimony that Weiner was not Chairman of the Board of J.R.D. Management and in fact, had no official title with the company. Weiner had several years previously, divested himself all controlling interest in J.R.D. Management. Testimony was presented that General Electric Credit, the lender for the project from which this litigation arises, specifically required that Weiner have no involvement in J.R.D. or the Management of the Project. The jury received evidence that Weiner's promises to Dulin exceeded those similarly situated employees within J.R.D. and her car allowance was greater than J.R.D.'s president. Testimony regarding additional misrepresentations made by Weiner with regard to his authority to enter into a contract, his service as a liaison with Dulin, and his failure to disclose the true feelings and/or intentions of J.R.D. with regard to Dulin also were presented to the jury.

The jury found Dulin was fired without cause within the first year of her employment. The jury found that Robert Weiner, individually, was guilty of Fraud in the Inducement.

SUMMARY OF THE ARGUMENT

The Fourth District Opinion does not conflict with any opinion of this Court as Dulin brought an action for breach of the severance portion of her contract, a provision which provided a specific term of time and a specific remedy.

The Opinion of the Fourth District Court of Appeal does not conflict with any opinion of this Court with regard to an Fraud in the Inducement Action being brought against a third party who induces another to enter into a contract.

ARGUMENT

Pursuant to Fla.R.App.P., 9.120, this Court's jurisdiction is discretionary and may among other grounds be invoked for decisions of a District Court of Appeal which expressly or directly conflicts with another provision of the District Court of Appeal or the Supreme Court on the same question of law. Here, the Petitioner has not met the burden established by the Fla.R.App.P. to invoke the discretionary jurisdiction of this Court.

I. THE FOURTH DISTRICT'S OPINION AFFIRMING A CLAIM BY AN EMPLOYEE AT WILL FOR BREACH OF A SEVERANCE AGREEMENT IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT

It is true that this Court has consistently held that an terminated employee who is deemed to be an employee "at will" does not have an action for breach of employment contract when the employee seeks wages or future benefits. *DeMarco v. Publix Super Mkts., Inc.*, 384 So.2d 1253 (Fla. 1980) and *Smith v. Piezo Tech. &*

Prof'l Adm'rs, 427 So.2d 182 (Fla. 1983). Petitioner's argument that the Fourth District Court of Appeal's Opinion conflicts with this Court's Opinions in *DeMarco* and *Smith* is inapposite. In those cases, the terminated "at will" employee sought future wages or benefits. In those cases, there was no definitive term of time upon which to base a claim for future wages. Further, it is acknowledged that the mere mention of a rate of compensation based upon a term of time, i.e. \$40,000.00 a year, does not establish a term of time for the purposes of an action for future wages.

Knudsen v. Green 116 Fla. 47, 156 So. 240 (1934) was a action by an employee "at will" brought against his employer under a contract that provided a specific amount of compensation per month without a definite term of time. The Court held that the measure of damages is the "worth of the bargain, not loss of advantages from previous employment." *Knudsen*, supports the Respondent's position as the Respondent had specifically bargained for severance compensation in a specific amount which was governed by a specific term of time. In *Knudsen*, the Court ultimately approved damages which were the measure of the "worth of the bargain." The Opinion of the Fourth District Court of Appeal is not contrary or in conflict with this Opinion; rather, it is in concert with *Knudsen*.

In *Savannah, F.&W. R. Co. v. Willett*, 43 Fla. 331, 31 So. 246 (1901), the plaintiff brought an action for breach of and "at will" employment contract and

sought damages for the period of time which he was out of work. The plaintiff had been employed by the railway as a conductor, but there was no stipulation as to the length of time for the employment. The Court held that the plaintiff did not have a cause of action for breach of contract. Again, it is noted that in the case at bar, the Respondent's award was not based upon lost future wages but rather the Petitioner's breach of the term of the contract with regard to the severance agreement. As admitted below, the Respondent acknowledges that if this was solely a claim for loss of future income based upon the stated income and for a hypothetical period of time, then the claim would be barred.

Here, Dulin's initial complaint sought severance damages, a claim that was never abandoned and a claim which was based upon a specific severance provision within the contract. The severance provision in question states:

“10: Severance If I am terminated for any reason other than good cause at anytime during the first 12 months, I will be given a severance payment of \$15,000.00.”

Here, at trial and before the Fourth District Court of Appeals, Petitioner mistakenly argued that Dulin first brought her claim for severance at trial. The Opinion below provides a clear finding that severance compensation was part of the Plaintiff's initial prayer for damages and that claim was not abandoned. In paragraph 8 of the complaint, Dulin alleged that the agreement provided for

severance payments if she was terminated for any cause other than good cause within the first year, in paragraph 17 Dulin alleged that she was terminated without cause and no valid reason was given for her termination and in the prayer for relief for Count I, Dulin demanded severance compensation per the agreement. Counsel for Dulin further clarified the nature of the claim when in a hearing on a Motion to Dismiss, counsel argued that the claim was to enforce the contract for severance benefits. Lastly, the Pretrial Stipulation clearly indicated in paragraph 3(f) that the issue of severance pay was before the Court.

Here, the Petitioner argues that simply because the contract lacked a term of time for the duration of the employment, the Plaintiff's claim should be barred. The Plaintiff's claim and award below was based upon a specific provision which provided for a definitive amount of compensation if the Plaintiff was terminated for any reason other than cause within a specific time period.

The Respondent's contract with J.R.D. is consistent with other "at will" contracts commonly used in the business community. When an employer seeks to hire an applicant in an "at will" setting, the applicant is able to protect themselves from an unwarranted termination by negotiating a severance compensation provision. These severance provisions are common and simply allow the parties to determine their respective risks and benefits in the event of a termination for convenience or without good cause. The decision of the Fourth District Court of

Appeal was proper and more importantly is not a conflict with any Opinion of this court.

I. THE FOURTH DISTRICT'S OPINION PERMITTING AN EMPLOYEE AT WILL TO BRING AN ACTION AGAINST A PERSON WHO IS NOT PARTY TO ANY CONTRACT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The Fourth District Court of Appeal's Opinion does not conflict with any opinion of this Court with regard to the ability of an at will employee to bring an action for Fraudulent Inducement against a person or entity that was not a party to the employment agreement.

The Petitioner argues that the Respondent used the Fraud in Inducement claim to circumvent the "at will" doctrine that would prevent a Fraud in the Inducement claim from being brought against **the employer**. Here, the Fraud in the Inducement claim was brought against an individual, Weiner, a person who was not a party to the contract, a person who made several misrepresentations regarding his authority, the terms and conditions of Dulin's employment and the person who induced her into employment with a third party at her peril.

To adopt the Petitioner's argument would mean that a terminated employee could not bring an action against third parties who had engaged in independent torts, and fraudulent behavior independent of the contract's breach simply because a contract existed with another entity. Here, the Respondent brought an action for

Fraud in the Inducement against the individual party who made false misrepresentations upon which she relied to her detriment, that party is a stranger to the contract and cannot even be considered a third party beneficiary of the contract.

CONCLUSION

The Fourth District Opinion does not conflict with any opinion of this Court as Dulin brought an action for breach of the severance portion of her contract, a provision which provided a specific term of time and a specific remedy.

The Opinion of the Fourth District Court of Appeal does not conflict with any opinion of this Court with regard to an Fraud in the Inducement Action being brought against a third party who induces another to enter into a contract.

The Petition has not established that the Opinion of the Fourth District Court is at conflict and the Petition to invoke this Court's discretionary jurisdiction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert D. Soloff, P.A., 888 Southeast Third Avenue, Suite 400, Fort Lauderdale, FL 33316 this _____ day of December, 2004.

MICHAEL J. KENNEDY

CERTIFICATE OF FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

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