

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000889-MR

EAGLE EXECUTIVE EMPLOYMENT,
a division of SWESP INVESTMENT,
INCORPORATED

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 01-CI-00835

DAVID E. ESTES ENGINEERING, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. Eagle Executive Employment ("Eagle Executive") appeals from the entry of summary judgment by the Boone Circuit Court in favor of David E. Estes Engineering, Inc., ("Estes Engineering") in an action for breach of contract. We vacate and remand.

In the summer of 1999, Estes Engineering, a civil engineering firm, contacted Eagle Executive, an executive and professional placement service, in an effort to recruit a land surveyor for the firm. In response to Estes Engineering's request for assistance, Eagle Executive forwarded a copy of

Elwood Boyd's extensive and detailed resume to the firm. Boyd's resume indicated that he was a resident of Pennsylvania and a licensed and qualified professional surveyor ("P.S.").

Before hiring him, Estes Engineering met with Boyd and negotiated the terms of his employment. On October 20, 1999, Boyd was hired by Estes Engineering to perform services as a professionally licensed land surveyor. On the same day, Eagle Executive and Estes Engineering signed a contract (in the form of a letter) formalizing "our agreement with respect to the placement fee for Elwood Boyd, P.S." The parties agreed that Estes Engineering would pay to Eagle Executive the sum of \$11,875.00 in twelve (12) equal monthly installments of \$989.59. The parties also agreed as follows:

[i]f the candidate leaves the employment of Estes Engineering prior to the completion of the twelve month period for any reason, the installments shall be discontinued upon your notice to [Eagle Executive] that Boyd's employment has been terminated.

In August 2000, Estes Engineering inadvertently learned from a client that Boyd was not a registered land surveyor in Pennsylvania and that restraining orders had been issued against him by an Ohio court prohibiting him from surveying in that state without a license. Upon learning that Boyd's surveyor's license had expired, the client refused to allow Boyd or Estes Engineering to continue work on the project. Boyd was given time off in order to clear up the matter.

Although Boyd represented that he was continuing to address the issue, Estes Engineering terminated him. Estes Engineering then demanded that Eagle Executive refund the paid portion of the placement fee that it had paid. Eagle Executive refused, and Estes Engineering filed this action in Boone Circuit Court in July 2001, alleging that Eagle Executive had breached the parties' agreement by supplying an unlicensed candidate for its employment needs.

Following a brief period of discovery, Estes Engineering filed a motion for summary judgment. In its memorandum in support of the motion, Estes Engineering argued that Eagle Executive had so negligently performed its services as an employment agency that it essentially had breached the parties' contract. It argued that even "a cursory background check would have flagged suspicion of Mr. Boyd's qualifications. . . .Defendant failed in its minimum duty as an employment agency, namely, to forward a competent applicant in the land surveying profession." Memorandum at 3.

In its response, Eagle Executive contended that Estes Engineering had never requested that a background check be performed. Moreover, it claimed that its services do not include reference and/or background checks of candidates. Eagle Executive argued that sending Boyd's resume without having first verified his credentials did not amount to a breach of contract.

It contended instead that "the responsibility lies upon the human resources director of the hiring firm to evaluate the candidate once the recruiter has offered him." Memorandum at 2. The circuit court granted the motion and dismissed the action. This appeal followed.

Eagle Executive contends that numerous questions of fact which remained unanswered materially affect the intention and understanding of the parties as to their expectations and responsibilities under the contract. Some of those questions included: (1) whether the employment agency had a duty to conduct a background check of applicants whose names it furnished to clients; (2) if there were a duty to investigate an applicant, how extensively should the agency have researched his professional credentials; (3) what responsibility remained with the human resources director of the hiring company to examine the credentials of an applicant; (4) what were the expectations and understandings of the contracting parties as to the definition of a "qualified candidate" or "applicant"; (5) was Estes Engineering aware that separate fees were assessed for each category of background check conducted (e.g., criminal, professional, educational). This list of material questions of fact, coupled with the fact that discovery had just begun and was far from completion, persuades us that summary judgment was granted prematurely.

The standard for granting summary judgment set forth in Steelvest Inc., v Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 479 (1992), provides that summary judgment is proper only where the movant shows that the adverse party cannot prevail under the circumstances." At first blush, the facts of this case create a strong impression and give rise to an inference that Eagle Executive failed to perform as it had promised in providing a land surveyor to Estes Engineering. That initial impression becomes more blurred and less apparent as the questions of fact are posed. It may be that upon ascertaining the answers and determining the mutual understanding of the parties, the result will be the same. It may be that a different outcome is warranted. We believe that the uncertain flux surrounding these numerous issues of fact makes it impossible for a court to decide this case as a matter of law. Therefore, entry of summary judgment was precluded under the circumstances of this case.

The summary judgment is vacated and this matter is remanded for a trial on the merits of the case.

ALL CONCUR.

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