

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002645-MR

CITY OF OWENSBORO, KENTUCKY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 99-CI-00829

LARRY SABO

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: The City of Owensboro, Kentucky (hereinafter "the City") has appealed from the trial judgment and from the order denying its motion for a Judgment Notwithstanding the Verdict (hereinafter "JNOV") entered by the Daviess Circuit Court. Following a jury trial, former City employee Larry Sabo was awarded a judgment of \$129,160 in damages for the City's breach of the implied duty of good faith and fair dealing in

¹ Senior Judge Joseph R. Huddleston, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

relation to a May 11, 1998, written agreement (hereinafter "the Agreement") extending his probationary period. Having determined that the City owed Sabo a duty of good faith and fair dealing pursuant to the Agreement, we affirm.

Because the issue on appeal concerns an issue of law, which we review *de novo*, we shall only briefly set forth the salient facts. On February 1, 1997, Sabo was appointed by the City's Board of Commissioners to the classified civil service position of Director of Finance and Administration on a twelve-month probationary basis pursuant to KRS 90.350. Office relationship problems arose during Sabo's probationary period, leading the Board of Commissioners to vote at the April 22, 1998, Board meeting to extend his probationary period for six months, through October 6, 1998. The minutes of the meeting read, in part, as follows:

Sabo's attorney, Ralph Wible, talked about a complaint filed by Alma Randolph, the City's Human Resources/Community Relations Specialist, dealing with issues of conflict between Randolph, Sabo, and Bill Dixon, Executive Director of the Owensboro Human Relations Commission. Wible said according to a mediator's report, the relationship problems were hostile but that they could be resolved.

Mayor Waymond Morris pointed out that there has been threat of litigation; that the Commission has discussed the matter twice in closed session; and that the practice of the Commission has been not to discuss personnel matters publicly.

After further comments, Wible said Sabo would be agreeable to an extension of his probationary period "so that you may evaluate for yourself his employment, whether he is a competent finance manager, whether he can do a good job, whether he can work well with other people, and whether he is a loyal employee of the City of Owensboro."

On May 11, 1998, City Manager Ronald L. Payne and Sabo entered into the following Agreement:

THIS AGREEMENT made and entered into this the 11th day of May, 1998, by and between THE CITY OF OWENSBORO, KENTUCKY, a municipal corporation of the Second Class, 101 East Fourth Street, P. O. Box 10003, Owensboro, Kentucky 42302-9003, and LAWRENCE D. SABO, 4248 Wood Trace, Owensboro, Kentucky 42303.

RECITALS

WHEREAS, pursuant to KRS 90.350 and Section 201 of the City of Owensboro Personnel Policy Manual, Lawrence D. Sabo (hereafter "Sabo") was appointed by the Board of Commissioners to the classified civil service position of "Director of Finance and Administration" on a probationary full-time basis, on February 1, 1997; and

WHEREAS, at a specially called meeting on Wednesday, April 22, 1998, the Board of Commissioners (hereafter "City"), by a majority vote, agreed to grant Sabo's request for continuation of his probationary full-time employment through October 7, 1998, to permit further evaluation of Sabo's performance; and

WHEREAS, the City hereby agrees to the continuation of Sabo's probationary full-

time employment status on the terms and conditional set forth hereinbelow;

NOW, THEREFORE, in consideration of the recitals set forth hereinabove, and for other good and valuable consideration, the receipt of which is acknowledged herein, the parties mutually covenant and agree as follows:

1. Sabo agrees that he is a probationary employee and that his probationary appointment shall continue from February 1, 1997, for a maximum period of time ending October 7, 1998.

2. Sabo agrees that he has no greater rights during the continuation of his probationary period than he had at the time of his initial probationary appointment as Director of Finance and Administration.

3. Sabo agrees to waive any and all legal rights, if any he may have, to challenge in any way the right of the City to extend his probationary period appointment for a maximum period of time ending October 7, 1998.

4. Sabo covenants and acknowledges that he has read and understands all of the provisions in this Agreement, has retained and been advised by legal counsel of his choice with regard to applicable law and his rights and obligations hereunder, and voluntarily, knowingly, and intelligently agrees to execute same without any duress or coercion to do so.

IN TESTIMONY WHEREOF, the parties have affixed their signatures to this Agreement on this the day and date first hereinabove written.

In order to evaluate Sabo's performance, Payne distributed a leadership assessment survey to several City employees. It is

Sabo's contention that these surveys and later resurveys were not conducted in good faith by Payne, as he focused for the most part on negative responses and on responses from individuals who did not report directly to Sabo.

At the regularly scheduled September 15, 1998, Board meeting, the Board of Commissioners again considered Sabo's regular civil service appointment. Payne recommended to the Board that Sabo's performance should not be deemed satisfactory based upon his evaluation, and that he should be released from his probationary employment. At a special session on September 17, 1998, the Board accepted Payne's recommendation, and released Sabo from his position by a 4 to 1 vote.

On October 20, 1998, Sabo filed a complaint in Daviess Circuit Court against the City and the members of the Board of Commissioners (hereinafter "Sabo I"),² alleging that he was wrongfully terminated and asserting that by operation of law, his probationary period ended in February 1997 after twelve months and at that time he became a fully vested, permanent, full-time civil service employee. He argued that his rights were violated when he was terminated without notice or the opportunity for a due process hearing pursuant to KRS 90.360. On motion for summary judgment, the circuit court ruled that Sabo remained a probationary, at-will employee at the time of

² Case No. 98-CI-01230.

his termination because the Board had to deem him satisfactory pursuant to KRS 90.350(9) before he could achieve regular civil service status. A three-judge panel of this Court affirmed this ruling in an unpublished opinion rendered August 25, 2000.³

Sabo filed the action presently before this Court on July 13, 1999, alleging claims of defamation, tortious interference with a business relationship, and civil conspiracy. As defendants, he named the City, Payne, employee Alma Randolph,⁴ and James Anthony Fulkerson, the City's former deputy finance director and current Director of Finance and Administration. Early in the lawsuit, the circuit court dismissed Sabo's complaint, concluding that the defendants were protected by either an absolute or a qualified privilege. Another three-judge panel of this Court reversed that ruling, and remanded the case for further proceedings, holding that Sabo's complaint sufficiently stated a viable cause of action.⁵ After that opinion became final, Sabo filed a third Amended Complaint alleging a claim against the City and Payne for breach of an implied duty of good faith and fair dealing in relation to the May 11, 1998, Agreement. Sabo claimed that the City and Payne

³ Appeal No. 1999-CA-000727-MR.

⁴ Sabo voluntarily dismissed his claims against Randolph during the course of the litigation.

⁵ Appeal No. 2000-CA-000021-MR.

fraudulently entered into the Agreement without any intention of honoring their obligation.

Following extensive discovery, the defendants filed a motion for summary judgment on all claims. Regarding the breach of the implied covenant, they argued that the doctrine of *res judicata* applied to block Sabo's claim as he impermissibly split his cause of action, asserting that he should have raised his claim in Sabo I. Furthermore, the defendants argued that the implied duty of good faith and fair dealing does not flow to probationary or at-will employees. The circuit court summarily denied that motion as well as a subsequent one, and the matter proceeded to a jury trial on August 9, 2004. At the directed verdict stages, the City argued that Sabo was not owed a duty of good faith and fair dealing because he was an employee at-will. However, Sabo countered with the argument that consideration flowed between the two parties to the Agreement because at the time they entered into it, his at-will status was an open question and he gave up that claim for the right to be evaluated. Furthermore, he asserted that good faith was implied in the Agreement, and it was up to the jury to determine whether the City acted accordingly. The circuit court, in deciding what it termed a legal question, determined that the Agreement was a contract, and that while it did not set out all of the burdens, expectations, and ramifications, it was a sufficient document to

find legally enforceable terms, subject to review and interpretation by the court, and carried with it the contractual requirement of good faith. During the discussion of the jury instructions, the City also argued that there was no evidence presented to the jury that the Commissioners ever ratified the Agreement.

The jury found for the defendants on all of Sabo's claims, except for its finding that the City had breached its implied duty of good faith and fair dealing. Interrogatory No. 11 provided as follows:

You are instructed that there is an implied covenant of good faith and fair dealing in every contract. Each party to a contract is bound to act in good faith and without willful misconduct or gross negligence in his or her performance or enforcement of the contract. The exercise of "good faith" excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.

You will find for Plaintiff Sabo if you determine from the evidence that:

(1) Plaintiff Sabo entered a contract with Defendant City of Owensboro;

(2) the City of Owensboro failed to exercise good faith in the performance or enforcement of the contract; and

(3) Plaintiff Sabo suffered damages as a result.

Otherwise you will find for the City of Owensboro.

The jury then awarded Sabo \$113,000 in lost wages, nothing in lost retirement benefits, \$2,160 in expenses reasonably incurred in seeking new employment, and \$14,000 for the loss on the sale of his residence. The circuit court entered its final Order and Judgment memorializing the jury's verdict on September 16, 2004.

The City then filed a motion for a JNOV, arguing that the instruction on the implied duty of good faith was improper as the Agreement was not a contract and because Sabo was not entitled to a duty of good faith and fair dealing as he was an at-will employee. The circuit court denied the motion in an order entered November 15, 2004:

The jury has rendered a verdict finding the defendant City of Owensboro liable for damages in the amount of \$129,160.00 to Larry Sabo (Sabo) for breach of the implied warranty of good faith and fair dealing in connection with a written agreement executed on May 11, 1998. The agreement purported to extend Sabo's probationary employment with the City of Owensboro for a period of six months for the purpose of evaluation and attempted to settle certain legal differences between the parties. The City of Owensboro has filed a motion for a judgment notwithstanding the verdict arguing that since Sabo was an at-will employee he cannot maintain a claim for breach of an implied warranty of good faith and fair dealing.

It was not disputed at trial and the jury was instructed that at all times previous to his termination of employment

Sabo was an at-will employee dischargeable by the City of Owensboro for any reason or no reason at all. This finding is *res judicata* in other litigation between the parties that arose prior to the filing of this action.

The Court ruled prior to trial that the written agreement entered into by Sabo and the City of Owensboro on May 11, 1998 was a legally binding contract for consideration.^[6] The contract incorporated and memorialized the decision of the City Commission made at its meeting on April 28, 1998 to extend Sabo's probationary employment. The agreement was negotiated, prepared and reviewed by legal counsel for the parties. Both Sabo and the City of Owensboro, by and through the City Manager Ron Payne, signed the document. Both the City of Owensboro and Sabo received rights and benefits under the contract.

The basic purpose of the law of contract is to establish legally enforceable expectations of performance by the contracting parties. The right to petition for legal redress assures the integrity of the agreement. In this case the contract expressed the intentions of the parties that Sabo would continue employment in an at-will status for an additional six-month period for the purpose of further evaluation of his job performance. The agreement provided that Sabo would give up any claim that he had become a merit employee due to the delayed action on the part of the City Commission on permanent status with civil service protection. At the time the written contract was executed this was an important legal question that was resolved by the parties' expressed conditions and stipulations in the contract.

⁶ The record reflects that the circuit court ruled during the directed verdict stage at trial, rather than prior to trial, that the agreement was a contract.

The Court finds as a matter of law and equity that the written contract entered into between Sabo and the City of Owensboro on May 11, 1998 distinguishes the facts of this case from other at-will employment cases that do not recognize a duty of good faith and fair dealing on the part of the employer. Under the unique sequence of events in this case by entering into the written contract with Sabo the City of Owensboro was required to act in good faith in evaluating Sabo over the extended six-month period of time. It was not required to grant him permanent merit status or even evaluate him in a business-like manner. The City of Owensboro would have been privileged in a claim of negligence in its evaluation. The Court finds however that under these circumstances the City of Owensboro was not privileged to act dishonestly, violate good faith or generally accepted standards for fair dealing in contract. The Court finds that the claim of the City of Owensboro that Sabo's at-will status precludes the jury finding that it violated the implied warranty of good faith and fair dealing is subject to the doctrine of equitable estoppel. Sabo had the right under the contract to be treated honestly. The jury found that City of Owensboro employees engaged in a conspiracy to deprive Sabo of his employment. The jury also found that the City of Owensboro acting through its officials breached the implied duty of good faith and fair dealing in contracting with Sabo and awarded him damages. The Court finds that the jury could reasonably believe that the action by the City Manager in presenting only negative evaluations to the City Commission was in furtherance of a conspiracy among certain city employees to rid themselves of Sabo in favor of the local candidate for the job. The Court finds that the evidence presented at trial supported the verdict of the jury.

The City of Owensboro also argues that Sabo failed to prove the loss on the sale of his home. Sabo testified that he sold his home for the price he paid for it but was damaged by the amount of the real estate commission incident to the sale. There was no evidence at trial that the commission was unreasonable. The Court finds the evidence sufficient on this point.

IT IS THEREFORE ORDERED AND ADJUDGED that the motion for judgment n.o.v. is denied.

This appeal followed.⁷

On appeal, the City continues to argue that the circuit court erred when it instructed the jury that it could find a breach of an implied duty of good faith and fair dealing by the City, when it failed to determine that Sabo's claim was barred by the doctrine of *res judicata*, and because no employment contract existed between Sabo and the City. On the other hand, Sabo argues that the circuit court did not commit any error.

We shall address first the City's argument that Sabo I should have a *res judicata* affect in the present case and that Sabo should not be permitted to split his cause of action, in reliance upon Yeoman v. Commonwealth.⁸ We disagree with this argument. In Sabo I, Sabo raised a wrongful discharge claim, naming the City and the members of the Board of Commissioners.

⁷ Sabo's cross-appeal (case No. 2005-CA-000072-MR) was dismissed on April 25, 2005, as untimely filed.

⁸ 983 S.W.2d 459 (Ky. 1998).

In the present case, he sued the City and several City employees and raised several claims not related to his eventual discharge, but were based on other torts and breach of contract.

Therefore, we cannot hold that Sabo's current case should be barred by the doctrine of claim preclusion.

Next, we shall address the City's argument that no contract of employment existed between it and Sabo. Relying upon Gambrel v. United Mine Workers of America,⁹ the City posits that Sabo had to establish that there was an obligation on his part to render service for a fixed amount of time and a reciprocal obligation of the City to retain his employment in order to sustain his claim for breach of an employment contract. Because the Agreement at issue in this case did not contain those specific temporal terms, the City asserts, it could not be an employment contract. Alternatively, the City argued that even if the Agreement were considered to be an employment contract, the City, through its Board of Commissioners, never authorized such an action. On the other hand, Sabo argues that the Agreement constituted a contract and that his status as an at-will employee did not negate the City's obligation to fairly evaluate him according to that Agreement.

While we agree with the City that an employment contract did not exist, we nevertheless conclude that the

⁹ 249 S.W.2d 158 (Ky. 1952).

Agreement entered into by the parties constituted a contract. Black's Law Dictionary defines a contract as "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."¹⁰ Consideration is defined as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act. • Consideration, or a substitute such as promissory estoppel, is necessary for an agreement to be enforceable."¹¹ In Conseco Finance Servicing Corp. v. Wilder,¹² this Court held, "A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms."

In the present case, it is clear to this Court that the May 11, 1998, Agreement constituted an enforceable contract between Sabo and the City. The Agreement contains the necessary recitals of consideration to create an enforceable contract in that the City was required to act (to permit further evaluation of his performance) and Sabo was required to forbear from challenging the City's right to extend his probationary period

¹⁰ Black's Law Dictionary 341 (8th ed. 2004).

¹¹ Id. at 324.

¹² 47 S.W.3d 335, 341 (Ky.App. 2001)(citing Cline v. Allis-Chalmers Corporation, 690 S.W.2d 764 (Ky.App. 1985)).

and to agree that he had no greater rights during the continuation of his probationary period. Furthermore, while we recognize that a city is required to ratify or authorize a contract through its Board of Commissioners,¹³ in this case the minutes of the Board of Commissioners' meeting and the Agreement itself both indicate that the Board authorized the contract.

Finally, we shall address whether the City owed an implied duty of good faith and fair dealing to Sabo, despite his position as a probationary, at-will employee. The City argues that the trial court erred as a matter of law in instructing the jury that it could find a breach of this implied duty because there is no cause of action for this breach available for probationary, at-will employees. In support of this argument, the City cites to several state and federal cases examining Kentucky law, which hold that an at-will employee cannot establish a claim for a breach of an implied duty of good faith and fair dealing.¹⁴ On the other hand, Sabo argues that the implied covenant attaches to the May 11, 1998, Agreement, even though he remained an at-will employee, as every contract includes an implied duty of good faith and fair dealing, citing

¹³ Lewis v. Board of Education of Johnson County, 348 S.W.2d 921 (Ky. 1961).

¹⁴ Wymer v. JH Properties, 50 S.W.3d 195 (Ky. 2001); Wyant v. SCM Corporation, 692 S.W.2d 814 (Ky.App. 1985); McCart v. Brown-Foreman Corporation, 713 F.Supp 981 (W.D.Ky. 1998).

Ranier v. Mount Sterling National Bank.¹⁵ This implied duty obligated the City to fairly evaluate him according to the terms of the Agreement. Because of this separate Agreement, he argues that the case law cited by the City is not applicable to him.

We agree with Sabo that the cases cited and relied upon by the City are inapplicable in the present case. While it is true that the employees in those cases and Sabo were all at-will employees, the Agreement Sabo entered into with the City brought him out of that category, albeit limited to his claim that the City be required to fairly evaluate him. It is, however, well settled in this Commonwealth that, "[w]ithin every contract, there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out."¹⁶ In the May 11, 1998, Agreement, Sabo agreed that his probationary status was to continue for up to another six months and gave up his right to challenge the City's right to extend this period. In return, the City was to permit further evaluation of his job performance. The Agreement contained an inherent promise by the City to perform these evaluations in good faith. The record contains sufficient evidence to support the jury's finding that

¹⁵ 812 S.W.2d 154 (Ky. 1991).

¹⁶ Farmers Bank and Trust Company of Georgetown, Kentucky v. Willmott Hardwoods, Inc., 171 S.W.3d 4, 11 (Ky. 2005). See also 17A Am.Jur.2d Contracts § 336.

the City breached its duty to perform those evaluations fairly and in good faith. Finally, we note that Sabo is not contesting his actual discharge in this case; rather, he is asserting that the City breached its implied duty as a party to the Agreement by not allowing him to be evaluated in good faith. The trial court did not commit any error in denying the City's motion for a JNOV.

For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert T. Watson
Chris J. Gadansky
Louisville, KY

Patrick D. Pace
Owensboro, KY

ORAL ARGUMENT FOR APPELLANT:

Patrick D. Pace

BRIEF FOR APPELLEE:

Dennis D. Murrell
Amy E. Shoemaker
Louisville, KY

ORAL ARGUMENT FOR APPELLEE:

Dennis D. Murrell