

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PERRY BROWN,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	NO. 05-5096
	:	
PATRICK MURPHY,	:	
KIM MURPHY,	:	
MURPHY JEWELERS of	:	
TILDEN, LLC,	:	
MURPHY JEWELERS of	:	
POTTSVILLE, LLC,	:	
Defendants	:	

MEMORANDUM

STENGEL, J.

February 28, 2006

This case involves the termination of Plaintiff Perry Brown’s employment by the defendants Murphy Jewelers of Tilden, LLC and Murphy Jewelers of Pottsville, LLC (collectively “Murphy Jewelers”). Brown alleges that his termination was in violation of unsigned employment agreements, as well as the common and statutory law of Pennsylvania. Brown filed a seven count complaint alleging: (1) wrongful termination, (2) breach of contract, (3) detrimental reliance and fraud, (4) intentional infliction of emotional distress, (5) negligence, (6) violation of the Pennsylvania Wage Payment and Collection Law: 43 P.S. § 260.1 *et seq.*, and (7) defamation. The defendants filed a motion seeking the dismissal of counts 1, 3, 4, and 5. Federal subject matter jurisdiction for this case is based on diversity, 28 U.S.C. § 1332.

I. BACKGROUND

Brown avers that in the spring of 2004 he was recruited in Arizona by the defendants Patrick and Kim Murphy to work for defendant Murphy Jewelers in the Commonwealth of Pennsylvania. During the recruitment process the parties negotiated adequate compensation, reimbursement of moving expenses, and other benefits commensurate with the position for which Brown was being recruited. The defendants repeatedly made oral and written assurances that Brown was being sought for an employment position of not less than one year, and that all agreed compensation would be honored for the entire year. Although no written contract was fully executed between the parties, an oral agreement for one year of employment was made.

On May 7, 2004, Brown was hired by the defendants as the Executive Vice President of Retail Operations and immediately began working in the Pottsville store. Brown avers that the parties entered into an unsigned employment agreement for the year beginning on May 7, 2004, and that he faithfully, successfully, and satisfactorily performed all duties assigned to him until his untimely termination on October 27, 2004. Brown alleges he was wrongfully terminated without prior notice.

On September 26, 2005, Brown initiated this suit claiming that not only did the defendants wrongfully terminate his employment but they also made defaming remarks about him and caused him severe emotional distress by firing him in front of other employees.

II. STANDARD of REVIEW

When considering a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), the court must accept the complaint's allegations as true and draw all reasonable inferences in plaintiff's favor. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1164-65 (3d Cir. 1987).

Under Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." The rule is designed to screen out cases where "a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the Plaintiff is without right or power to assert and for which no relief could possibly be granted." Port Auth. v. Arcadian Corp., 189 F.3d 305, 311-12 (3d Cir. 1999). Under Rule 12(b)(6), a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The issue, therefore, is not whether the Plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); See also Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000).

III. DISCUSSION

1. Should the Plaintiff's Wrongful Termination Claim be Dismissed?

Absent very limited circumstances, there is no cause of action for wrongful termination of an at-will employee under Pennsylvania law. McLaughlin v.

Gastrointestinal Specialists, Inc., 561 Pa. 307, 313-14 (2000). Brown counters that this case does not necessarily involve an at-will employee as he has pled that a valid, all be it unsigned, employment agreement existed and secured employment from May 7, 2004, through May 7, 2005. Brennan v. National Telephone Directory Corporation, et al., 850 F. Supp. 331, 346 (E.D. Pa. 1994) (citing Schoch v. First Fidelity Bancorporation, 912 F. 2d 654, 659 (3d Cir. 1990) and Rutherford v. Presbyterian University, 417 Pa. Super. 316, 612 A.2d 500, 503 (1992)).

While these well-pled facts may establish a wrongful termination in breach of contract cause of action, they do not support a cause of action based upon the very narrow wrongful termination in violation of public policy exception described in McLaughlin. There are three sources from which the courts will recognize “public policy,” (1) the Pennsylvania Constitution, (2) court decisions, and (3) Pennsylvania statutes. McLaughlin, 561 Pa. at 315-16. Drawing all inferences in his favor, Brown has not pled any facts that his termination was in violation of Pennsylvania public policy.

2. Should the Plaintiff’s Fraud Claim be Dismissed?

Under Pennsylvania law, fraud is shown by clear and convincing evidence of all of the following: (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention that another person will thereby be induced to act, or to refrain from acting, (4) justifiable reliance by the recipient, and (5) damage to the recipient. Permente v. Crown Cork & Seal, Inc., 38 F. Supp. 2d 372, 381-82 (E.D. Pa. 1999), aff’d without op., 210 F. 3d 358

(3d Cir. 2000). “The burden on the plaintiff when pleading fraud is high: the proof must be ‘clear, precise, and convincing.’” Id. (citing Delahanty v. First Penn. Bank, 318 Pa. Super. 90, 464 A.2d 1243, 1252-53 (Pa. Super. 1983)). “The mere non-performance of an agreement is not in itself evidence of fraud.” Permente, 38 F. Supp. 2d at 382. See Mellon Bank v. First Union, 750 F. Supp. 711, 715 (W.D. Pa. 1990) (Pennsylvania courts hold that a broken promise to do something in the future is not fraud so as to permit admission of parol testimony to vary terms of a written agreement); Stout v. Peugeot Motors of Amer., 662 F. Supp. 1016, 1018 (E.D. Pa. 1986) (plaintiff may not necessarily sue in tort for a breach of contract).

In this case, Brown has not pled any facts regarding misrepresentations made either intentionally or recklessly by the defendants. The facts pled by Brown do not support any inference that the defendants hired and helped relocate Brown for any purpose other than to provide him with employment in the Commonwealth of Pennsylvania. Although the employment ultimately failed, no facts have been pled to suggest that the defendants misrepresented their original desire to employ Brown.¹

3. Should the Plaintiff’s Intentional Infliction of Emotional Distress Claim be Dismissed?

The defendants argue that Brown’s Intentional Infliction of Emotional Distress (“IIED”) claim should be dismissed as preempted by the Pennsylvania Workers’

¹Although Brown believes the defendants lured him from Arizona knowing they would not fulfill their part of the employment arrangement, no facts have been pled to support such an inference or belief.

Compensation Act and for failing to rise to the requisite extreme and outrageous standard. Pennsylvania law allows for a very limited exception for a termination-spawned IIED claim apart from the Pennsylvania Workers' Compensation Act. That claim must relate to a third-party's conduct and be directed at the employee for personal reasons. Fugarino v. Univ. Servs., 123 F. Supp. 2d 838, 844 (E.D. Pa. 2000). No facts have been pled that the defendants terminated Brown for any reason other than his job performance.

Although Brown alleges he suffered extreme public humiliation for being fired in front of fellow co-workers, no facts have been pled for the court to draw the inference that he was fired for non-personal reasons.

In the alternative, given the very stringent "extreme and outrageous" standard required for an IIED claim, the conduct complained of by Brown fails to rise to requisite level. See Clark v. Falls, 890 F.2d 611, 623-24 (3d Cir. 1989) (Pennsylvania courts are reluctant to recognize an IIED claim, but have done so where: hospital employees filed falsified reports so that plaintiff was indicted for homicide; defendant sexually harassed employee, followed her at work, forbid her from speaking with others, and withheld necessary information from her; and where the defendant's car hit a child, defendant buried him on the side of the road, and the parents discovered the body months later).

4. Should the Plaintiff's Negligence Claim be Dismissed?

Similar to his IIED claim, the defendants argue that Brown's negligence claim is barred by the exclusivity provision of the Pennsylvania Workers' Compensation Act.

Brown alleges that the defendants owed him a series of duties and that when they breached those duties owed, Brown suffered. Essentially, Brown argues that because of Murphy Jewelers' negligence, Patrick and Kim Murphy were able to personally injure him. This is done to mold the complaint to the narrowly tailored "personal animus exception" to the exclusivity provision of the Pennsylvania Workers' Compensation Act. See Kohler v. McCrory Stores, 532 Pa. 130, 615 A.2d 27, 30-31 (Pa. 1992) (an injury arising in the course of employment, and under the Pennsylvania Workers' Compensation Act "shall not include an injury caused by an act of a third person intended to injure the employe [sic] because of reasons personal to him, and not directed against him as an employe [sic] or because of his employment" (citations omitted)). Brown fails, however, in that the conduct complained of is not personal, but directly arose from his employment.

V. CONCLUSION

The defendants' motion to dismiss is granted. Plaintiff's first, third, fourth, and fifth counts of his complaint are dismissed with prejudice. An appropriate order follows.

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KIM MURPHY,	:	
MURPHY JEWELERS of	:	
TILDEN, LLC,	:	
MURPHY JEWELERS of	:	
POTTSVILLE, LLC,	:	
Defendants	:	

ORDER

AND NOW, this 28th day of February, 2006, upon consideration of the defendants' Motion for Partial Dismissal of the Plaintiff's Complaint (Docket # 8), and the plaintiff's response thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.