STATE OF MICHIGAN

COURT OF APPEALS

RANDALL J. BUIST, Plaintiff-Appellant,	UNPUBLISHED October 12, 2004
v	No. 249808 Kent Circuit Court
VAN HAREN ELECTRIC INC., Defendant-Appellee.	LC No. 02-005309-CK

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In this breach of employment contract action, plaintiff appeals as of right from an order granting defendant's motion for summary disposition. Plaintiff maintains that his written employment contract with defendant was orally modified in May 1998 and that this modification included plaintiff's entitlement to fifty percent of defendant's yearly operating profit. Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because defendant expressly or impliedly ratified an oral agreement made between plaintiff and Brian Van Haren in May 1998. We disagree and affirm the trial court's ruling.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriately granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff and defendant signed an employment contract in 1997, which includes the following:

> Other. This agreement contains our entire agreement and supersedes any prior oral or written understandings and agreements. *We can modify this Agreement only by a writing signed by both you and the President of the Company.* [Emphasis added.]

Although the contract provided that amendments were to be in writing, "it is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses. This is because the parties possess, and never cease to possess, the freedom to contract even after the original contract has been

executed." *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 372; 666 NW2d 251 (2003).

However, while the mere existence of a written modification clause may not be a bar to orally amending the contract, other provisions can. There is Michigan case law upholding provisions in employment contracts that require modifications to be approved and signed by a specific officer or official.[1] *Pepperman v Auto Club of Michigan Ins Group,* 181 Mich App 519, 521-522; 450 NW2d 66 (1989); *Eliel v Sears, Roebuck & Co,* 150 Mich App 137, 140; 387 NW2d 842 (1985). The employers in *Pepperman* and *Eliel* specified who in the company had the *authority* to modify the employment contract, and without approval by this person, modifications made by others were invalid. Similarly, in this case, plaintiff and defendant agreed that any modifications to the employment contract had to be approved/signed by defendant's president. And there is no dispute that defendant's then president, Patrick Van Haren, did not sign any amendment, and no allegation that he knew of the modification and expressly agreed to it.

But plaintiff maintains that defendant is bound to the alleged oral agreement made around Memorial Day 1998 between himself and Brian Van Haren, defendant's then executive vice-president, entitling plaintiff to fifty percent of defendant's yearly profits because defendant expressly ratified the agreement through defendant's March 2000 board minutes. It is true that "'[w]hen an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it.'" *Echelon Homes, LLC v Carter Lumber Co,* 261 Mich App 424, 431; 683 NW2d 171 (2004), quoting *David v Serges,* 373 Mich 442, 443-444; 129 NW2d 882 (1964). In *David, supra* at 444, the Michigan Supreme Court adopted the following definitions from the Restatement Agency, 2d, §§ 82 and 83:

> Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.
>
> Affirmance is either
>
> (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
>
> (b) conduct by him justifiable only if there were such an election.

On March 2, 2000, defendant's board of directors, consisting of plaintiff and Brian Van Haren, ratified the 1998 election of plaintiff as president of defendant and further stated that "[a]ll other actions of the Officers and Directors of the Corporation *in the course of performing their duties* on behalf of the Corporation in 1998 are ratified and approved in all respects" (emphasis added). The specific language of the board minutes to which plaintiff points for support of defendant's express ratification only ratifies those actions of officers and directors

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[1] This principle is not in conflict with that cited in *Quality Products, supra*, because while parties to an employment contract can orally modify the contract notwithstanding a no-oral modification clause, the amendment still needs to be approved by the specific person designated as having this authority.

made during 1998 *in the course of performing their duties*. Because Brian Van Haren was not defendant's president at the time he and plaintiff allegedly made their agreement, the modification of plaintiff's employment contract with defendant was *not* a duty to be performed by Brian Van Haren; therefore, this agreement was not made in the course of performing his duties for defendant and was not ratified by the board of directors in March 2000.

Plaintiff further argues that, even if defendant did not expressly ratify the agreement, it impliedly ratified the agreement by accepting plaintiff's services as president and that, by doing so, defendant accepted all the terms of the agreement including the term entitling plaintiff to fifty percent of the operating profit. We disagree.

Plaintiff mistakenly relies on *Fuchs v Standard Thermometer Co*, 178 Mich 37; 144 NW 484 (1913), to support his contention that because he became president of defendant and accepted the benefits of plaintiff's services, defendant cannot deny the contract's validity. In *Fuchs*, the Supreme Court held that the defendant was estopped from enforcing the plaintiff's oral employment contract because the defendant sent one of its employees to negotiate the contract terms with plaintiff and all of the defendant's officers knew of the plaintiff's subsequent employment. Therefore, the defendant could not claim that the contract was made without its authority. *Id*. at 42. Here, there is no evidence that Patrick Van Haren knew about the terms of the oral agreement or even acknowledged that he was aware of the May 1998 discussions. Ratification of unauthorized act requires knowledge of the material facts by the principal. *Echelon Homes, supra* at 432.

Essentially, plaintiff is arguing that defendant waived its right to have the changed contract terms in writing. In *Quality Products, supra* at 362, the Court considered the requirements for modifying an agreement protected by written modification or anti-waiver clauses. The Court recognized that our freedom to contract allows parties to modify contracts notwithstanding a restrictive clause; however, such modification requires mutual assent to the new or changed contract as well as mutual assent to forgo the restrictive clause in the original contract. *Id.* at 372-373. This requirement of mutual assent "is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id.* at 373. Because Brian Van Haren was not authorized by defendant to alter plaintiff's employment contract, i.e., he was not defendant's president, no such written or oral contract agreeing to waive the original contract's restrictive provision exists *between the parties*.

According to plaintiff's written employment contract, only defendant's president could sign and modify the contract; therefore, any waiver of this provision must have included Patrick Van Haren's assent. "[T]he significance of [the original contract's written modification or anti-waiver] clauses regarding the parties' intent to amend is heightened where a party relies on a course of conduct to establish modification. This is because such restrictive amendment clauses are an *express mutual statement* regarding the parties' expectations regarding amendments." *Id.* at 374 (emphasis in original). But plaintiff presents no evidence to establish that Patrick knew of the May 1998 discussions, made an affirmative representation that the written modification clause was being waived, or that his course of conduct inferred a waiver. Therefore, plaintiff has failed to show either express or implied ratification by defendant of a promise entitling plaintiff to fifty percent of defendant's operating profit.

Plaintiff also argues that Brian Van Haren, while not defendant's president, nevertheless had the authority to bind defendant. Even if we were to assume that Brian had the authority to make changes to plaintiff's employment contract, plaintiff does not provide sufficient evidence to find that a genuine issue of material fact exists as to whether Brian waived the written modification clause. While modifications were made to the employment agreement in July 1998 making plaintiff president, altering his compensation, and granting him certain stock options, each of these actions were either completed in writing or ratified by defendant's board of directors and memorialized in minutes, strongly indicating that the parties did not waive the provision of plaintiff's employment contract that requires that modifications be made in writing. Moreover, the parties course of conduct does not establish waiver. After plaintiff became president, he never took 50% of the operating profits he claims entitlement to and received a bonus equating to approximately 25% of defendant's operating profit in only one of the years he was employed as president. Accordingly, plaintiff has failed to demonstrate a factual dispute as to whether Brian, even if he did have the authority in May 1998 to bind defendant, waived defendant's right to codify all employment contract changes. *Quality Products, supra* at 373.

Plaintiff also argues that defendant was bound by an implied covenant of good faith and fair dealing when determining whether plaintiff and Brian Van Haren would receive a bonus for the 2001 fiscal year. We disagree. Generally, there exists an implied covenant of good faith and fair dealing in all contracts meaning "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc,* 193 Mich App 146, 151-152; 483 NW2d 652 (1992) (Quoted citation omitted). However, Michigan courts have declined to recognize this covenant in the "employment context." *Barber v SMH (US), Inc,* 202 Mich App 366, 372-373; 509 NW2d 791 (1993), citing *Hammond, supra* at 152.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Bill Schuette