IN THE COURT OF APPEALS OF IOWA

No. 0-14 / 89-104

**FRANCIS P. DEVINE,**

Appellant/Cross-Appellee,

vs.

**BERKLEY AND COMPANY, INC.,**

Appellee/Cross-Appellant.

FILED
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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Dickinson County, Charles H. Barlow, Judge.

Plaintiff appeals a district court order granting defendant's motion for summary judgment. Defendant cross-appeals requesting Rule 80 sanctions. **AFFIRMED.**

Donald J. Hemphill of Hemphill Law Office, Spencer, for plaintiff-appellant.

Roger J. Magnuson and Frank J. Magill, Jr., Dorsey & Whitney, Minneapolis, Minnesota; and W. E. Kunze of Kunze Law Office, Arnolds Park; for defendant-appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ. Sackett, J., takes no part.

**SCHLEGEL, J.** 82

Plaintiff appeals a district court order granting defendant's motion for summary judgment. The defendant cross-appeals claiming that Iowa Rule of Civil Procedure 80 sanctions should have been imposed. We affirm the trial court.

Plaintiff Francis P. Devine was employed by defendant Berkley & Co., Inc., as a manager of its Taiwan subsidiary. Devine was orally discharged from his employment on May 23, 1978. He received written notice of his termination on May 31, 1978. In 1979, Berkley and its parent company, Berkley International Company, Ltd., filed a suit against Devine claiming that he had improperly managed the Taiwan subsidiary. Devine filed counterclaims in tort and for breach of his employment contract. In Berkley International Co. v. Devine, 423 N.W.2d 9 (Iowa 1988), the supreme court determined that the claims of both parties were properly dismissed for want of prosecution pursuant to Iowa Rule of Civil Procedure 215.1.

Devine filed the present suit on May 27, 1988, alleging that Berkley breached his employment contract and that the prior suit was an abuse of legal process. Berkley filed a counterclaim for penalties pursuant to Iowa Rule of Civil Procedure 80. Berkley filed a motion for summary judgment. The court granted the motion. The court determined that Devine's contract claim was barred by the

five-year statute of limitations for unwritten contacts in Iowa Code section 614.1(4) and that the abuse of process claim was barred by the two-year limitations period for tort actions in section 614.1(2). The court denied Berkley's counterclaims and its request for sanctions.

Devine appealed. He claims that summary judgment was not proper because there were genuine issues of material fact. Devine believes that the ten-year limitations period of section 614.1(5) should apply because he had a written employment contract. He states that while there was not a specific written employment contract, such a contract may be construed from certain letters and personnel materials. He also asserts that a wrongful termination claim is really a claim for tortious interference with the contract of hire. Devine points out that courts do not favor a defense based on a statute of limitations.

In its cross-appeal, Berkley contends that even if the ten-year statute of limitations in section 614.1(5) applies, Devine's claims should still be barred. It asserts that Devine was terminated on May 23, 1978, and that he did not file the present suit until May 27, 1988, more than ten years later. Berkley also contends that Devine's claims should be barred by the doctrine of laches, pointing to the drawn-out litigation in the previous suit.

Berkley argues that the district court erred in not imposing sanctions against Devine pursuant to Iowa Rule of

Civil Procedure 80. It alleges that Devine knew his claim was barred by the statute of limitations and that he had admitted there was no written employment contract. Berkley feels that Devine is unfairly trying to bring claims that have already been denied by the supreme court.

Questions involving the sufficiency of evidence to withstand a motion for summary judgment or to generate a submissible jury issue in the face of a motion for directed verdict present issues of law. Wolfe v. Graether, 389 N.W.2d 643, 651 (Iowa 1986). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). The burden of showing that there is no genuine issue of material fact is upon the party moving for summary judgment. Matherly v. Hanson, 359 N.W.2d 450, 453 (Iowa 1984). On appeal, we examine the record in the light most favorable to the party opposing the motion to determine if the movant has met his or her burden. Id.

Iowa Code section 614.1(5) provides that an action founded on a written contract must be brought within ten years of the accrual of the cause of action. Section 614.1(4) establishes a five-year limit for unwritten contracts. The district court ruled that the contract was oral and applied the five-year limit. We need not reach this specific question because under either section the limitations period has expired.

The facts are undisputed that this action was commenced on May 27, 1988. The only factual question is when Devine became "on notice" of his alleged breach of contract claim. We hold as a matter of law that such notice occurred more than ten years prior to May 27, 1988.

Devine was fired on May 23, 1978. Devine himself admitted this.

> Q. . . . So you were aware as of May 23rd, 1978, that you were to be terminated from your position as general manager?
>
> A. Yeah, Yes.

In Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 243 (Iowa 1988), the question arose as to when a party was placed on notice regarding a breach of fiduciary duties for statute of limitations purposes. The court applied the discovery rule and held: "the limitations period begins when a claimant has knowledge sufficient to put that person on notice." Our case does not require use of the discovery rule because there was a specific time for the termination which all parties understood. However, the principle remains the same. Devine was clearly placed on notice that his contract with the defendants was breached as of May 23, 1978. In Brown v. Public Employment Relations Bd., 345 N.W.2d 88 (Iowa 1984), the question was whether the time for filing a grievance commenced when a teacher was placed on probation or when she was officially terminated. The court held that the required "change in seniority status"

occurred when she was placed on probation rather than when the termination occurred. The employment contract in Devine's case, whether oral or written, was breached if at all, on May 23, 1978: when he was terminated, signed a letter of resignation, and left the premises never to return.

Devine argues that, even though he was terminated, he was still negotiating the terms and, therefore, his claim did not accrue until those negotiations proved fruitless. This argument is without merit. The alleged breach of contract occurred when the employment was terminated and Devine was aware it was terminated. Possible settlement proceedings cannot extend the statute of limitations. If this were true, a personal injury action would not accrue on the date of the injury (or discovery of the injury), it would only accrue after a failure to settle. This would not serve the purpose of a statute of limitations.

Devine was clearly on notice of any possible breach of contract claim as of May 23, 1978, which is more than ten years prior to his filing the action. There is a tendency to shy away from barring a claim when it appears it may have missed the time limit by only a few days, however, it must be remembered that ten full years preceded this "few days" and any prejudice to the appellant was a result of his own actions. The plaintiff's claim is barred by the statue of limitations in Iowa Code section 614.1, and

though based on a different rationale, the district court's order granting summary judgment is affirmed.

The defendant cross-appealed claiming that rule 80 sanctions should have been imposed. The district court held that sanctions were not warranted in this case. Sanctions are generally granted under Iowa Rule of Civil Procedure 80 if plaintiff's claims are not well grounded in fact or in law, or if interposed for any improper purpose. This claim is not well grounded enough to withstand a motion for summary judgment; however, we cannot say that the trial court abused its discretion in refusing to award sanctions.

**AFFIRMED.**