

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

CONCORD DISTRICT COURT  
CIVIL ACTION 0647 CV 0529

DOUGLAS LUCCIANO,  
Plaintiff

vs.

TD BANKNORTH INSURANCE AGENCY, INC.,  
Defendant.

**MEMORANDUM AND DECISION ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT**

Statement of Facts

Defendant has moved for summary judgment on all three counts of the Complaint and plaintiff has cross-moved for summary judgment on count III. Neither alleges that there are any material facts, as ordinarily understood, in dispute. The following, apparently undisputed, factual discussion is taken from the evidentiary materials in the parties' filings.

Douglas Lucciano ("Lucciano" or "plaintiff") began work at the Catalano insurance agency in Methuen in 1997. TDBanknorth ("TD" or "defendant"), through a corporate predecessor, acquired Catalano in 1998. In December of 1998, Lucciano and Catalano signed a "Memorandum of Understanding" which stated, at 1, that:

"The Company agrees to employ Employee as an employee at will and to pay Employee such compensation as may be mutually agreed to from time to time."

Lucciano understood that that provision meant that he could be fired at any time and that the employer did not need a reason to fire him. Lucciano Dep. at 101.

In August, 2003, Lucciano notified Banknorth that he intended to resign. In response Banknorth offered him a new position. Banknorth agreed that Lucciano's "salary will be



had been earned and were due before the termination. This final point involves Lucciano's sale of a new insurance policy to a customer on March 15, 2005, which was not invoiced or paid until April 11, 2005, more than two weeks after his termination. If a commission were due on that policy, it would amount to \$2,152.

### Analysis

The primary legal issue presented by TD Banknorth's summary judgment motion seems straightforward. Was Lucciano an at-will employee at all times or did the first EPIC, which he signed on January 20, but was effective from January 1, 2004, create a one year contract? TD Banknorth argues first that that issue is moot. It argues that any rights under the first EPIC were replaced by the second EPIC, which was effective as of March 1, 2004, which it honored for over a year until his termination. Lucciano notes however that the second EPIC is largely identical to the first, except for the approximately 25% reduction in salary. Thus, he argues he received no consideration for entering into the second EPIC, making it invalid as an amendment or novation of the first EPIC. But this argument must fail since, even under Lucciano's reading of the EPICs, EPIC I would have expired on December 31, 2004 and, by entering into EPIC II, Lucciano received a "guarantee" of employment for an additional two months, through February 28, 2005, which would constitute legal "consideration."

Thus, if TD Banknorth correctly reads the EPIC, Lucciano was always an at-will employee and it paid him what he was due under each contract as it was in effect. On the other hand, if Lucciano's reading is correct, EPIC I was terminated by the parties as of March 1, 2004, and TD Banknorth fulfilled fully its obligations under EPIC II. Under neither reading did TD Banknorth breach any contract with Lucciano.

I need not rest my conclusion on this rather narrow point however. If it were necessary to reach the point, I would conclude, as a matter of law, that TD Banknorth's reading of EPIC I

is correct, that is, that Lucciano was at all times an at-will employee and so TD Banknorth was free to require him to enter into a new contract as a condition of remaining employed.

I base this conclusion of law on these undisputed facts. First, Lucciano conceded in his deposition that the 1998 Memorandum of Agreement between him and TD Banknorth's predecessor provided that he was an employee at will, that provision meant he could be fired at any time and that it was never changed. Second, EPIC I was intended to confirm the understanding that had been reached earlier in August when Lucciano threatened to resign and was induced to stay by being given "producer" status and the right to receive commissions, but otherwise would receive a salary "guaranteed at what it is now." Third, the course of the parties' dealings after EPIC I suggests it was not intended nor understood to create a guarantee of a full year's employment at a fixed rate. If it had been so understood, it seems unlikely that Lucciano would have meekly accepted a 25% pay cut after less than two months. Fourth, the EPIC documents do not "look" like one year contracts. There is no fixed expiration date, there is no provision for termination prior to expiration of the year (not even for cause), there is no definite end date and there is no provision for automatic or other renewal or extension. Finally, after March 1, 2005, when EPIC II (if it were a one year contract) would have expired, the parties did not enter into any new contract, which suggests an understanding that the EPIC contract continued in force on an at-will basis.

Furthermore, it deserves note that nowhere in the papers before the Court does Lucciano repudiate his deposition testimony about his original at-will status. He alleges only that a TD Banknorth employee promised "to guarantee my salary for one year" to keep him from resigning. He does not allege that anyone at defendant affirmatively promised him the security of a one-year contract or any other form of security. He relies solely on the EPIC language quoted above, language which certainly is not conclusive on this point since, as Judge, now

Justice, Botsford has noted, a salary guarantee is not necessarily inconsistent with at-will status. See Davis v. Jenny Craig, Inc. Nos. 95-4704E, 1998 WL 1181152, at \*9 (Mass. Super Ct. Nov. 30, 1998)(Botsford, J.).

Lucciano also raises an argument of “economic duress.” He contends that he was compelled by necessity to acquiesce to TD Banknorth’s proposal that he accept a 25 % salary reduction and sign EPIC II. This defense, he contends, is applicable regardless of whether he had an annual contract or was an at-will employee. Assuming EPIC I did create a one year contract, “economic duress” invalidated his free consent to EPIC II and so that cannot serve as a novation, entitling him to the benefits of EPIC I for the full year ending December 31, 2004 (or perhaps until his termination on March 25). Even if EPIC was an at-will contract, it certainly guaranteed a certain level of salary and, if EPIC II was involuntary, he should have received that salary, not the lesser EPIC II level, until his termination.

Though creative, this argument requires little discussion. I have found that EPIC I did not change Lucciano’s at-will status. As an at-will employee, Lucciano could have been fired at any time; as his deposition testimony shows he understood. Since he could have been fired, requiring him to accept a lower rate of pay in return for continued employment was not “economic duress,” it was simple and lawful hardball. On the other hand, even if EPIC I did create a contract for a one-year period, Lucciano has not shown that TD Banknorth used duress to compel him to accept EPIC II, with its longer duration. As noted earlier, he had received an offer from another institution in 2003 at a comparable salary which he had used to leverage TD Banknorth into making him a producer. To make out an economic duress claim, Lucciano must show specific facts demonstrating he was a victim of a wrongful act which deprived him of his unfettered will. See International Underwater Contractors v. N. E. Tel. & Tel., 8 Mass. App. Ct. 40, 42 (1979). As Judge McLeod-Mancuso noted in Barton v. Brassring, Inc., C.A. No. 044188,

2006 WL 3492161, \* 4-5 (Mass. Super. Ct. 2006), a claim of duress is normally defeated by the availability of a reasonable alternative such as a civil suit and duress cannot be inferred simply from the inevitable emotional and financial stress associated with the loss of a job. Lucciano has not shown why he could not have initiated this action in 2004, particularly since the record demonstrates that he has pursued remedies before the Massachusetts Attorney General and the MCAD nor has he alleged any extraordinary personal “facts” which support a claim of duress.

Since Lucciano has not shown show any breach of contract by TD Banknorth, judgment should be entered against him on Count I. Since his Wage Act claim is dependent on the alleged unpaid wages, summary judgment should also be entered against him on count II.

The final issue involves the unpaid commissions on the insurance policy sold in early 2005, which was neither invoiced nor paid for until after his termination. TD Banknorth claims that it was entitled to withhold commissions on that sale based on the “clear language” of its Commission Lines Compensation Policies and Procedures Plan (the “plan”). In paragraphs 15 and 30 of the Complaint Lucciano referenced that plan, thus implicitly conceding it applied to him. The plan provides that commissions will not be paid for new business unless it “is invoiced or paid on or before the producer’s termination date” language Lucciano himself references in paragraph 30 of the Complaint.

Lucciano seeks to avoid the clear import of that language in two ways. First, he argues, despite referencing the plan in his complaint, that it does not apply to him since it apparently was drafted by Morse, Payson & Noyes Insurance, one of the several companies that owned the agency where he had worked since 1997, and not by TD Banknorth. But it is not necessary to untangle the somewhat unclear ownership structures Lucciano worked under during his time at “TD Banknorth.” In his deposition he concedes he may have worked directly for MPN at one time; more importantly it seems undisputed that the plan is the only written document that

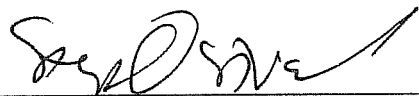
provided how commissions for “special lines” were to be paid and nowhere does specifically Lucciano deny that the plan did apply to him. His point that both EPIC I and II provided for a different rate of commission than that set forth in the plan does not necessarily mean the other provisions of the plan ceased to apply to him, particularly since plaintiff specifically contended that under EPIC I he was given a salary higher than other producers to induce him to stay at the company and there is no reason to doubt that that “special deal” could have extended to a higher rate of commission. Indeed the plan must apply to Lucciano since without it there would be absolutely no basis for calculating what commissions and on what terms, he should be compensated and his claim for commissions would have to be rejected as speculative.

Finally, Lucciano seeks to avoid the impact of the plan by claiming it is an “illegal document contrary to public law which must be considered to be void.” Opp. To Motion for Sum. Judg. at 16. To reach this result, Lucciano relies on Fortune v. National Cash Register, 373 Mass. 96 (1977). Fortune recognizes an employer cannot terminate an employee in bad faith to avoid paying commissions that are “on the brink.” But, as noted above, Lucciano concedes he was not fired to prevent his receipt of the relatively small amount of commissions that he would have been entitled to if he had remained employed for another few weeks. There is nothing before the court to suggest “bad faith” here. Lucciano offers no basis nor authority for his argument that a facially sensible provision that a company need not pay commissions to persons if they are no longer employed when the sales price is actually received is illegal as a matter of law. Since there is no prospect that Lucciano can prevail on his claim for unpaid commissions, summary judgment should therefor be entered in TD Banknorth’s favor on count III.

Conclusion

For the reasons stated above, I find, based on the undisputed material in the record, that TD Banknorth has not breached any contractual obligations it had to Lucciano, nor is it in violation of its duties under the wage act, nor does it owe him any unpaid commissions. Accordingly, pursuant to Mass. R. Civ. P. 56, summary judgment shall be entered in favor of the defendant dismissing the complaint.

By the Court,



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Stephen Ostrach

DATED: October 1, 2007.