

STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

KEN ROSS, COMMISSIONER OF THE OFFICER
OF FINANCIAL AND INSURANCE
REGULATION

Petitioner,

OPINION AND ORDER

v

10-397-CR

AMERICAN COMMUNITY MUTUAL
INSURANCE COMPANY,

Respondent.

FILED
CLERK OF THE COURT
INGHAM COUNTY, MICHIGAN

2012 AUG 24 P 2:04

FILED

At a session of said Court
held in the city of Mason, County of Ingham,
this 24th Day of August 2012.
PRESENT: HON. WILLIAM E. COLLETTE

This matter comes before this Court pursuant to the claims of Michael E. Tobin, Ellen M. Downey, Francis P. Dempsey, Michael A McCollom, Beth L. McCrohan, and Leslie J. Gola against American Community Mutual Insurance Company. The Court, being fully advised in the premises, makes the following determinations.

FACTS

Michael E. Tobin, Ellen M. Downey, Francis P. Dempsey, Michael A McCollom, Beth L. McCrohan, and Leslie J. Gola (hereinafter "Plaintiffs") each had an employment contract¹ (hereinafter "pre-rehabilitation contract") with American Community Mutual Insurance Company (hereinafter "American"), which stated that upon a change in control and discharge without cause the employee would be entitled to severance benefits pursuant to the contract. On April 8, 2010, American consented to a stipulated order by

¹ The Plaintiffs' contracts are dated between September 27, 2004, and May 29, 2009.

this Court placing American into rehabilitation under Ken Ross, Commissioner of the Officer of Financial and Insurance Regulation, as the Rehabilitator. Pursuant to this order, all litigation against American was stayed and all employment contracts of American's officers, managers, and employees were terminated "[s]ubject to any contractual rights and applicable law." American's officers, managers, and employees remained employed as at-will employees until notified otherwise by the Rehabilitator. On April 16, 2010, Michael Tobin was discharged by the Rehabilitator without cause. On August 17, 2010, Ellen Downey was permanently laid-off. The remaining four Plaintiffs voluntarily resigned between December 2010 and August 2011.

On January 18, January 25, and January 26, 2012, four of the six Plaintiffs submitted claims to the Deputy Rehabilitator seeking payment of the severance benefits under their respective pre-rehabilitation contracts. On February 7, 2012, the Rehabilitator and Deputy Rehabilitator responded to the four Plaintiffs' claims, denying the claims pursuant to MCL 500.8137(4). On February 17, 2012, Plaintiff McCrohan also submitted a claim against American and objected to the Rehabilitator's denial of the other Plaintiffs' claims. Thereafter on April 10, 2012, all six Plaintiffs filed a petition with this Court to lift the stay of litigation against American in order to allow their claims to go forward. This Court granted the petition on April 11, 2012, and entered a stipulated order on May 8, 2012, deeming the claims filed, allowing the Surplus Noteholders to participate in the action, and establishing a briefing schedule.

DISCUSSION

Plaintiffs allege that they are entitled to severance benefits pursuant to their pre-rehabilitation contracts because their benefits are for "services rendered" prior to

American entering rehabilitation by agreeing to continue employment with American even though American was in financial distress and that a change in control occurred when American entered rehabilitation. Plaintiffs also argue in the alternative that they are entitled to their severance benefits under the pre-rehabilitation contract under the doctrine of promissory estoppel as Plaintiffs reasonably relied on American's promise of providing severance benefits to their detriment. Plaintiffs also argue that this Court's April 8, 2010 order terminating all contracts of officers, managers, and employees did so "[s]ubject to any contractual rights and applicable law,"² thereby allowing their claims under the terminated contracts. The Court disagrees. For the following reasons, this Court finds that the Plaintiffs are not entitled to their pre-rehabilitation contract severance benefits.

A

According to MCL 500.8137(4): "[c]laims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to the issuance of an order of rehabilitation or liquidation under section 8113 or 8118." In determining the meaning of a statute, the Court's obligation "is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v. Ameritech Services, Inc.*, 466 Mich 304, 312 (2002). In determining the statute's meaning, the Court "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.*

The pertinent part of MCL 500.8137(4) states that payment is limited to "services

² Stipulated Order Placing American Community Mutual Insurance Company Into Rehabilitation, Approving Appointment and Compensation of Special Deputy Rehabilitators, and Providing Injunctive Relief at 5, ¶8.

rendered prior to the issuance of an order of rehabilitation.” Plaintiffs argue that they satisfy this language because they remained employed with American while it was under financial distress, rendering services requested under the pre-rehabilitation contract. However, Plaintiffs’ right to their severance benefits does not vest until a change in control occurs. Thus, under Plaintiffs’ argument, MCL 500.8137(4) would protect Plaintiffs’ severance benefits under the pre-rehabilitation contract for services rendered before the rehabilitation order that vested after the issuance of the order of rehabilitation and after the Rehabilitator had taken over responsibility of American. The Court does not agree with this interpretation.

The language of MCL 500.8137(4) permits a “limited” avenue for payment to directors, principal officers, or persons performing similar functions under employment contracts. This limited avenue requires two elements to be met in order to be eligible: 1) that the payment is for “services rendered,” and 2) that the services rendered were “prior to the issuance of an order of rehabilitation.” The legislature clearly required payment to directors, principal officers, or other persons performing similar functions to be limited in scope. The legislature effectuated this limitation by requiring that a plaintiff have “rendered” or completed the service that he or she is seeking compensation for prior to the issuance of the order of rehabilitation.

Here, even assuming that Plaintiffs were rendering services as required by MCL 500.8137(4), Plaintiffs had not yet rendered the service required to entitle them to compensation pursuant to their pre-rehabilitation contract severance benefits as a change of control had yet to occur “prior to the issuance of an order of rehabilitation.” Even if the order of rehabilitation placing the Rehabilitator in charge of American is deemed a

change in control as Plaintiffs argue, Plaintiffs did not completely render the service required to receive their pre-rehabilitation contract benefits prior to the rehabilitation order. Instead, the service required under the pre-rehabilitation contract for severance benefits would require service to be performed at least up to the issuance of an order of rehabilitation, where Plaintiffs argue a change of control occurred. Plaintiffs even refer to the severance benefits as “Change in Control benefits.”³ This requirement does not fit within the express limitation for payment of services rendered under MCL 500.8137(4), where the legislature specifically limited the payment for services “rendered prior to the issuance of an order of rehabilitation.” Allowing Plaintiffs to recover contractual severance benefits based on service completed on or after the issuance of the rehabilitation order would be contrary to the legislature’s intent and would unduly expand the allowable payments to directors, principal officers, or other persons performing similar duties under employment contracts.

Similarly, Plaintiffs’ argument that the termination of their pre-rehabilitation contracts were subject to any contractual rights and applicable law, thereby allowing them to claim severance benefits under their contracts fails as MCL 500.8137(4) clearly bars payment of these benefits. Plaintiffs’ had yet to perform service sufficient to vest their rights to the pre-rehabilitation contract severance benefits, thereby barring payment of the severance benefits under MCL 500.8137(4).

B

A claim for promissory estoppel requires a promise by the promisor, the promisor to reasonably expect to induce action or forbearance by the promisee, the promisee is

³ Brief in Support of Former Officers’ Claims for Severance And/Or Other Benefits Pursuant to the Terms of Their Executive Employment Agreements at 5.

reasonably induced to perform such action or forbearance, and injustice can only be avoided by enforcement of the promise. *Ypsilanti Twp. V. General Motors Corp.*, 201 Mich App 128, 133-34. Promissory estoppel requires an actual, clear, and definite promise. *Id.* at 134. Reliance is reasonable only if it is induced by an actual promise. *Id.*

Here, American did not make a clear and definite promise that it would pay severance benefits pursuant to the pre-rehabilitation contract in the event of rehabilitation or that these benefits would be paid contrary to Michigan law. Plaintiffs did not reasonably rely on American's promise that they would receive severance benefits in the event of a change in control due rehabilitation where MCL 500.8137(4) limits payment of claims to services rendered prior to the issuance of an order of rehabilitation. Plaintiffs also did not reasonably rely in staying in American's employment through the issuance of the rehabilitation order as this Court's April 8, 2010 order specifically states:

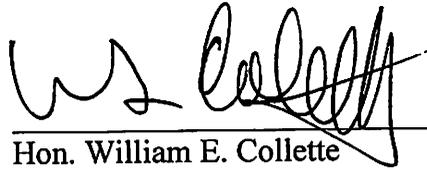
This provision requiring payment of pre-Rehabilitation employee wages does not apply to, and the Rehabilitator shall not pay, any severance or other non-wage payments otherwise due to an American Community officer, manager, or employee upon the termination of his or her employment contract entered into prior to the date of this Order.⁴

Furthermore, allowing a claim for promissory estoppel based on a terminated employment contract at the issuance of the order of rehabilitation would allow individuals to circumvent MCL 500.8137(4) and nullify the express limitation intended by the legislature. Therefore, Plaintiffs have not asserted an actionable promissory estoppel claim.

THEREFORE IT IS ORDERED that Plaintiffs' claims against American Community are **DENIED** under MCL 500.8137(4).

⁴ Stipulated Order Placing American Community Mutual Insurance Company Into Rehabilitation, Approving Appointment and Compensation of Special Deputy Rehabilitators, and Providing Injunctive Relief at 7, ¶14.

IT IS FURTHER ORDERED that the Rehabilitator's denial of Plaintiffs' claims is **AFFIRMED.**



Hon. William E. Collette
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, on August 24, 2012.



Jeffrey Hoard
Law Clerk