

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

DIANA BOHART

: NO. 08-01531

:

:

v.

:

: CIVIL ACTION - LAW

ALL EXCAVATING & PAVING and

:

BRYAN DUNLOP

:

**OPINION**

This matter has come before the Court on Defendant’s Motion for Summary Judgment. Defendant argues that Plaintiff’s claim for wrongful termination should be dismissed because Defendant was an at-will employee and that Plaintiff’s claim for conversion of her paycheck should be dismissed. Plaintiff defends that she was a partner in Defendant’s business and was deprived of her job and paycheck.

Summary Judgment may be properly granted “...when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Rauch v. Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). The movant bears the burden of proving that there are no genuine issues of material fact. Id. In determining a motion for summary judgment, the court must examine the record “in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.” Godlewski v. Pars Mfg. Co., 597 A.2d 106, 107 (Pa. Super. 1991). Summary judgment may be properly entered if

the evidentiary record “either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense.” Rauch at 823-24.

Plaintiff asserts that she was an actual partner in All Excavating and Paving. At her Deposition on January 12, 2009, she testified that she was always paid the same rate of \$8 or \$9 an hour. (Deposition Transcript of Ms. Diana Bohart, January 12, 2009, pg. 7, lines 16-25). She testified that there was no written employment contract. (Tr. Pg. 9, lines 5-6). She testified that she did not think she had a written employment agreement. (Tr. Pg. 9, lines 15-19). She testified that she felt like she was his partner; that her and the defendant lived together and decided to do the business together. (Tr. Pg. 10, lines 4-6). Ms. Bohart testified that she was put on payroll in 2003. (Tr. Pg. 14, lines 12-14). She testified that when she and the Defendant were together, he purchases most of the equipment for the business. (Tr. Pg. 15, lines 15-17). She testified that she never had to use any of her own money to pay any equipment loans and that the business paid off the loans that her name was on. (Tr. Pg. 20, lines 7-25; pg. 25, lines 12-20). Ms. Bohart testified that the termination of her employment was related to the termination of her personal relationship to the defendant. (Tr. Pg. 21, lines 17-19). She testified that there was never a written document called partnership agreement. (Tr. Pg. 27, lines 12-16). She testified that, as to her conversion claim, one paycheck defendant wouldn't sign and another week she wasn't even on the payroll. (Tr. Pg. 43, lines 1-7). She testified that her pay and her job were taken from her, and is entitled to wages. (Tr. Pg. 44, lines 2-8). She testified that the business checking account was in defendant's name, that her name was not on the account and when she would sign those checks she would usually sign his name. (Tr. Pg. 51, lines 17-25). Ms. Bohart testified that her and the defendant

never sat down and said that they were going to start the business, who would own what percentage or who had votes at meetings. (Tr. Pg. 62, lines 17-22). The Court finds Plaintiff's testimony to be credible.

In Plaintiff's testimony she alleges that Defendant failed to provide her with a paycheck on at least one occasion. In Plaintiff's Complaint she alleges that she had a constructive possession of her weekly check through Defendant and that Defendant deprived her of possession of her weekly paycheck and employment status. In Defendant's Answer, he asserts that Plaintiff "never had constructive possession of anything" and "never had any possession of employment." There is clearly a dispute as to the number and amount of alleged checks that Plaintiff claims she is owed. Therefore, the Court finds Defendant's Motion for Summary Judgment as to Plaintiff's conversion claim for missing paychecks is hereby DENIED.

The Court also finds that Plaintiff's claim for conversion of employment is essentially a wrongful termination action and therefore will address it as if it were part of Plaintiff's Complaint Count I for Wrongful Termination.

The Court further finds that Plaintiff has failed to create a record that would support a conclusion of a partnership interest in Defendant, All Excavating. As Plaintiff's Complaint and Deposition are insufficient to establish that Plaintiff has any partnership interest in the Defendant, All Excavating, the Court must determine whether Plaintiff was an at-will employee. "As a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship." Luteran v. Loral Fairchild Corp., 688 A.2d 211 (Pa. Super. 1997). "In order to rebut the presumption of at-will employment, a party must establish one of the following: (1) an agreement for a definite duration; (2) an agreement specifying that the employee

will be discharged for just cause only; (3) sufficient additional consideration; or (4) an applicable recognized public policy exception.” Rapafnani v. The Judas Company, 736 A.2d 666 (Pa. Super. 1999). The record does not support a conclusion that any of the four above mentioned conditions exist.

Neither Plaintiff’s deposition testimony nor her Complaint alleges that Plaintiff and Defendant formed an agreement for a definite duration of her employment or for an agreement specifying that she would be discharged for just cause only. Further, Plaintiff does not allege an applicable recognized public policy exception to the at-will employment presumption. Therefore the Court must determine whether sufficient additional consideration was provided by Plaintiff to support a finding of something other than at-will employment. “[A] court will find 'additional consideration' when an employee affords his employer a *substantial benefit* other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform. 'If the circumstances are such that a termination of the relation by one party will result in great hardship or loss to the other, as they must have known it would when they made the contract, this is a factor of great weight in inducing a holding that the parties agreed upon a specific period.’” Id. Citing to 3 A. Corbin, Corbin on Contracts § 684 (1960). (Emphasis Added)

In the case at bar, Plaintiff did confer a benefit to Defendant when she cosigned loans for certain work equipment. At the time of the co-signing Plaintiff and Defendant were, as Plaintiff stated, “partners in life”, shared a residence and maintained an intimate relationship. As the Court stated above, “[A] court will find 'additional consideration' when an employee affords his employer a substantial benefit...” The benefit conferred upon Defendant Dunlop by Plaintiff was not in the

context of an employer-employee relationship but rather in the context of a personal relationship. This is further underscored by the fact that Plaintiff admitted that she did not make any loan payments but rather that business profits paid for them. The Court has already determined that Plaintiff was not entitled to any business profits because she held no partnership interest in the business. Therefore Plaintiff did not suffer any economic hardship or loss in Defendant, All Excavating's repayment of the loans.

The Court finds that Plaintiff has failed to overcome her burden of proving a material issue of fact that would support something other than at-will employment therefore summary judgment is proper.

**ORDER**

AND NOW, this \_\_\_ of March, 2009, it is hereby ordered and directed that Defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part. The motion is GRANTED as to Plaintiff's claim for wrongful termination and is DENIED as to Plaintiff's claim of conversion of paychecks. Count number 1 of Plaintiff's Complaint is DISMISSED.

BY THE COURT,

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Judge Richard A. Gray

cc: William Carlucci, Esq.  
Andrea Pulizzi, Esq.  
Gary Weber, Esq.