

Casefile method – answer to casefile 1.1



MEMORANDUM 03. 01. 2010 TO: FROM: RE: Daphne Matthews Alex Associate - 4667 Memo Assignment 1: Who Does the Pastry? I. Introduction Collins was hired as Head Chef at the Marrimount Hotel and believed that this job came with the inherent authority to choose his assistant chefs, even though nothing of this was mentioned in the contract for employment. Therefore, when Crest, owner of the Marrimount, attempted to determine Collins's assistants, Collins quit his job and went to work for the Treadwell Center. The contract It may actually be good for Collins to argue that there was no contract between himself and Crest.

First, there was no detailed employment agreement, just a letter signifying the contract terms. The letter referred to itself as a contract lasting for “ five years from the signature thereof. ” However, presumably it was never signed and therefore never consummated. Secondly, Collins could argue that this is an agreement in violation of the statute of frauds, since it requires more than one year to perform and was not signed. Therefore, if Collins argues that he never signed nor agreed to the contract terms, perhaps he can avoid, altogether, the issues of breach of fiduciary duty and the injunction against working for a competitor.

However, it seems evident that both Collins and Crest considered the agreement to be a binding employment contract. This is not merely an oral agreement to be finalized at a later date, as was the case in *Tropicana Hotel Corporation v. Speer*. Collins demonstrated an immediate intent to be bound by the agreement by moving to New York from Atlanta and performing for a year under the contract. Therefore, since it is likely that the court will find a

five-year contract existed and the contract was breached, the question becomes who is liable for the breach?

III. Who breached first? The facts are undisputed that Collins left the kitchen upon the hiring of an unacceptable pastry chef. This would likely constitute a breach of Collins's employment contract absent any other considerations.

However, as the Kansas court states: " A party is not liable for a material failure of performance if it can show that the other party committed a prior material breach of the contract; in such event, the prior breach discharged the first party's own duty to perform. Therefore, if it can be shown that Marmount breached its contract by preventing Collins from choosing his own assistant chefs, Collins can avoid Crest's allegations of breach of fiduciary duty and the injunction against working for a competitor since Crest breached the contract first. II. a. Argument that Crest breached first i. Define " head chef" to determine duties The Supreme Court of Virginia stated in *Neely v. White*, " Before partial failure of performance of one party will excuse the other from performing his contract or give him a right of rescission, the act failed to be performed must go to the root of the contract. Therefore, Collins must show that the overruling of his choice for pastry chef and the hiring of an unacceptable assistant chef constitutes a material breach of contract. The chief dispute is over what duties are included in a position of Head Chef. The written agreement merely states that Collins will " assume the duties of head chef," without stating what those duties are. It might be helpful to point out that the general rule with ambiguities in a contract is that the contract will be construed against the drafter, in this case, Crest.

Additionally, it is helpful that Collins states in his deposition that it is “ industry standard” for a head chef to select his own assistants, much like a basketball coach selects the starting lineup, not the athletic director who hired him. Typically, “ when evidence of custom and usage of the trade is used to interpret a contract and the issue is disputed, summary judgment is inappropriate...” (Nadherny v. Roseland Property Company, Inc.). It is also helpful to our case that Mrs. Stein states in her deposition, “ the head chef runs the dining room. ” While not acknowledging the specific ability to hire, Mrs.

Stein is definitely associating Collins’s role as more managerial than Crest is claiming he had. Further, Collins was able to hire his own dessert chef without interference, creating a presumption that the hiring of his team was within his authority. More logically, this is a big hotel that was seeking Collins out because he was known for preparing gourmet meals for large groups. A Head Chef is more than a cook. They are in charge of the dining room, carefully selecting staff that can help prepare these large meals that would not be possible to create with just one person.

This was a managerial or executive position as much as it was a cooking one. Crest was not just looking for a cook when they hired Collins; they were looking for a Head Chef. By taking away Collins’s ability to hire and fire his “ team” they materially breached the contract to employ Collins as the Head Chef. A court will likely find such an argument persuasive and deem that Crest materially breached the contract first. ii. Reduction in duties or rank is a breach of contract Collins will want to argue that this case is analogous to

Rudman v. Cowles Communications, Inc. , which is controlling authority in New York.

In Rudman, an editor was hired to manage and oversee the publication of his series of books. The employer then began changing Rudman's books without approval and took away his managerial role and oversight. The court found a breach of contract and explained, If an employee...is engaged to fill a particular position, any material change in his duties, or significant reduction in rank, may constitute a breach of his employment agreement. " Here, Crest will argue that the employment agreement was far clearer in Rudman, and the employer agreed upon Rudman's authoritative role, although not expressly in the contract.

Collins will want to rebut this argument by comparing an editor to a chef and looking at industry standards. Just as the court in Rudman stated that Rudman could not " be reduced to being only a productive writer," neither can Collins, the head chef, be reduced to being only another cook. And finally, the court states: " an independent entrepreneur like Rudman would not expect and probably would not accept a subordinate scrivener's role. " If an editor would not accept a subordinate role as a writer, then the court will likely find that an esteemed head chef like Collins would definitely not accept a subordinate role either. iii.

Crest's rebuttal Crest will point to cases like Tropicana Hotel Corporation v. Speer in an attempt to compare Collins to Speer. Crest will argue that there was nothing in the employment agreement that gave Collins the sole right to hire assistant chefs. In Tropicana the court found that Speer was not

constructively discharged and Crest will argue for the same outcome.

Additionally, Crest will argue that this case is more like *Handicapped Children's Education Board of Sheboygan County v. Lukaszewski*. There, a speech therapist claimed health reasons for breaching her contract and leaving one job to take on another position closer to home.

The court held that the danger to Lukaszewski's health was self-induced and that Lukaszewski did not resign for health reasons, but to take a better job.

Crest will compare Collins's actions to Lukaszewski's, claiming there was no breach by Crest, only a breach by Collins in walking out and taking a better position where he would have managerial authority over his assistant chefs.

iv. Likely outcome It is likely that the court will find that Crest breached the employment contract with Collins by hiring an unapproved member to his team of chefs, effectively converting Collins from a top-tier chef into just another cook in the kitchen.

If however, the court determines that Crest did not breach the contract, then Crest will push forward with their claim for breach of contract and breach of fiduciary duty of loyalty. b. Argument that Collins breached first i. Breach by quitting before 5-year contract terminated Crest's first argument will be that Collins breached his contract when he quit coming into work after the Hipic chef was hired. Nothing in the contract stated that Collins's duties included the sole ability to hire chefs, but not coming into work is most definitely a violation of the "duties of head chef" that he did possess.

Thus, if Collins can't show that Crest breached the contract first by hiring the chef without his approval, he is in trouble. ii. Breach of fiduciary duty of

loyalty In Collins's deposition, he states that he was in discussions with the Treadwell center, but not until after Crest's hired an assistant chef and breached the contract. Thus, if Collins cannot show that Crest breached the contract first, he is also going to have to defend a claim for breach of fiduciary duty. Crest claims that Collins convinced the Casketmaker's Convention to leave the Marrimount and relocate to the Treadwell Center.

If they can prove this, they will have a claim for breach of fiduciary duty of loyalty. In *Orkin Exterminating Co. v. Rathje*, the court stated, "[A]n executive employee is barred from actively competing with his employer during the tenure of his employment, even in the absence of an express covenant so providing." iii. Collins's Rebuttal In response to Crest's claim that Collins breached the contract by quitting, Collins should point to *Tropicana*. The argument is that by breaching its contractual duty to Collins, Crest constructively discharged Collins.

Unlike *Tropicana*, in which the plaintiff failed to show constructive termination, here there is a contract that was agreed upon. Additionally, Collins is dealing with more than just trusted subordinates. Rather, Collins requires a team of chefs to prepare meals for these large groups, and it is industry standard for a head chef to control his assistant chefs. Additionally, Collins should argue lack of causation in responding to the breach of fiduciary duty claim. In *Orkin*, the plaintiffs could not show that defendant's actions caused damage to the corporation.

Similarly, Collins did no damage to the Marrimount because there were no statements made in competition with Marrimount. The only proof is Collins's

deposition, which states that he informed his old friend at a school reunion that he was leaving the Marrimount. There is no proof of a secret business arrangement with Treadwell and no proof that Collins desired to convince the Casketmakers Convention to relocate to the Treadwell. If Collins can show that business just followed his decision to leave, then there will not be a claim for a breach of fiduciary duty of loyalty. v. Likely outcome If the court finds that Crest did not breach the employment contract, then it will obviously find that Collins did breach by leaving the Marrimount. However, I believe it is unlikely that the court would find a breach of fiduciary duty of loyalty. There is simply too little evidence to survive a motion for summary judgment. While it is likely that the Casketmakers Convention changed venues to obtain Collins as the chef, it does not follow that Collins breached any fiduciary relationship. Remedies available to the parties a.

Salary Collins would like to recover withheld salary that he earned from working in the kitchen prior to his termination. If Collins can show that he did not breach the contract or breach a fiduciary duty of loyalty, then he will obviously have no problems recovering his salary. Even if the court finds there was a breach of contract, Collins will still likely recover his salary, as the court in *Prete v. Madison* states, " It does not follow from the fact that a breach is material that the breacher can recover nothing for his performance.

In an appropriate case, the courts have allowed a party who did not substantially perform to recover in restitution. " If, however, the court finds there was a breach of the fiduciary duty of loyalty, then Crest has a good argument to withhold earnings. In *Orkin* the court stated that one remedy for

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breach of this kind is “ forfeiture of compensation by the employee during the period of breach of fiduciary duty. ” Collins could still argue that he should get his salary from the period of time that he worked and was not yet in breach of his fiduciary duty. . Bonuses Whether or not Collins may recover his bonuses will be determined depending on if the court finds that Collins had a contractual entitlement to the percentage or a mere expectation. Crest will argue under Nadherny that Collins is not entitled to any bonuses after he left the kitchen, and possibly attempt to withhold bonuses from the time when he was working in the kitchen as well. It is my opinion that Collins would be better off not fighting for the bonuses after he left.

Like many contracts, there was nothing clear in the language that dealt with a failed relationship and pursuing this claim could distract the court from focusing on salary and bonuses for time worked. Plus, it makes our client seem like he is fighting to be made whole, not just get something for nothing. IV. c. Restitution for increased salary Crest will argue under Lukaszewski that Collins will owe them the difference in salary that they will be forced to pay in order to procure a head chef to replace Collins.

The court stated, “ Thus damages for breach of an employment contract include the cost of obtaining other services equivalent to that promised but not performed, plus any foreseeable consequential damages. ” In Lukaszewski the pay rates for teachers were set, and the school hired someone with more experience and the court still didn’t give the teacher any room to avoid paying for the increased expenses the school was faced with. It is likely that if the court finds that Collins breached his duty, he will be

responsible for these damages. Collins can, however, argue that he does not owe as much as 25%.

Collins's salary was to be increased 12% each year. Thus, the additional 12% is money that the Marrimount was going to pay their head chef anyway and cannot be considered damages attributable to the breach. Additionally, Collins can argue that Crest cannot just go hire the most expensive chef and expect to recover the entire difference from Collins (Lukaszewski).

Injunction or declaratory judgment The best way to get the declaratory judgment that Collins seeks is to get the court to rule in his favor that Crest breached the contract.

If Crest breached the contract, then it cannot enjoin Collins from taking the job with Treadwell. In the unlikely event that the court does not find in favor of Collins, he still has options. Collins can point to the contract and show that there is nothing in there concerning any sort of provision not to compete.

Therefore, Crest has no right to enjoin Collins from working where he chooses.

V. Conclusion In conclusion, it seems likely that the court will find in favor of Collins on his breach of contract claim. Crest breached the contract by preventing Collins from hiring his own assistant chefs.

Regardless of this, however, the court will likely find that Collins is owed salary for his time worked. There is no evidence sufficient to support a claim for breach of fiduciary duty and one cannot withhold salary from someone for a mere breach of contract. The issue of bonuses could go either way, but the argument is not that strong for either party. And finally, regardless of who breached the employment contract, it is likely that Collins will have not

have trouble accepting the position of head chef at Treadwell, since there was no covenant to not compete.