

IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

MORRIS ROWE

Plaintiff,

vs.

Case No. 2013 CA 3345

FIRST GREEN BANK, a Florida-chartered
bank and wholly owned subsidiary of FIRST
GREEN BANCORP, INC.,

Defendant.

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CLERK OF CIRCUIT
AND COUNTY COURT
LAKE COUNTY
TALLAHASSEE, FLORIDA

ORDER DISMISSING PLAINTIFF'S COMPLAINT
WITH PREJUDICE

THIS CAUSE came before the Court on June 5, 2014, on Defendant's Motion to Dismiss, and this Court, having heard the argument of counsel, reviewed the Plaintiff's Complaint and Defendant's Motion to Dismiss, and being otherwise duly advised in the premises, finds:

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1. Plaintiff, Morris Rowe ("Plaintiff"), filed a three-count complaint against Defendant First Green Bank (the "Bank").
2. In Count I, Plaintiff alleges that the Bank breached an employment contract with Plaintiff by breaching the "Term Sheet Summary" attached to Plaintiff's Complaint.
3. Plaintiff alleges that the term of the employment contract was to have been five years, and Plaintiff seeks damages for the period of the contract remaining.
4. The "Term Sheet Summary" attached to Plaintiff's Complaint is not signed by any officer of the Bank, or any other alleged agent of the Bank, although the Bank is the party being charged with enforcement of the alleged contract.
5. Under the statute of frauds, "no action shall be brought...upon any agreement that is not to be performed within the space of 1 year from the making thereof...unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized." Fla. Stat. § 725.01 (2013).
6. Plaintiff seeks to enforce a contract that called for performance of certain acts that could not be performed within one year, including, but not limited to, a five-year term of employment and salary raises over a two to three year period. However, the "Term Sheet Summary" was not signed by or on behalf of the Bank, which Plaintiff seeks to hold liable



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for performance. Therefore, the statute of frauds plainly bars enforcement of the contract. *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268, 1271 (Fla. 5th DCA 2009).

7. Additionally, the “Term Sheet Summary” attached to Plaintiff’s Complaint is an “agreement to agree,” and is unenforceable as a matter of law. *ABC Liquors, Inc. v. Centimark Corp.*, 967 So. 2d 1053, 1056 (Fla. 5th DCA 2007).
8. Although Plaintiff’s attached “Term Sheet Summary” includes some proposed terms of Plaintiff’s employment, the “Term Sheet Summary” clearly states that “[Bank] will, within 45 days of undertaking employment, provide [Plaintiff] with a strong management contract...that is mutually satisfactory for a 5 year term.” In addition to leaving the formal language of an employment contract to “mutually agreeable terms,” many of the terms stated in the “Term Sheet Summary” are aspirational, suggestive, and subject to change, such as the language regarding Plaintiff’s formal title, Plaintiff’s proposed compensation schedule, and whether the Bank would be entitled to a non-competition clause.
9. The management contract for Plaintiff’s employment, therefore, was not yet created, as Bank still had to prepare a management contract that would be mutually satisfactory to both Plaintiff and Bank. The “Term Sheet Summary” states that the management contract to be drafted by the Bank would “codif[y] in writing” the “understandings” to the “maximum extent possible as guided by professional advisors.”
10. The creation of a contract requires that there be mutual assent to a certain and definite proposition, and “where essential terms of an agreement remain open, and subject to future negotiation, there can be no enforceable contract.” *ABC Liquors, Inc. v. Centimark Corp.*, 967 So. 2d 1053, 1056 (Fla. 5th DCA 2007); see also *Dows v. Nike, Inc.*, 846 So. 2d 595, 602 (Fla. 4th DCA 2003)(“settlement agreements are not considered final when the record establishes the parties’ intent to take further action prior to the completion of a binding agreement”) and *Spanish Broad. Sys. of Florida, Inc. v. Alfonso*, 689 So. 2d 1092, 1094 (Fla. 3d DCA 1997) (court should have granted directed verdict for defendant on breach of contract when “an essential term of the purported written agreement sought to be enforced (i.e., duration of employment) was missing and indeed subject to further negotiation by the parties”).
11. Therefore, even if enforcement of the “Term Sheet Summary” was not barred by the statute of frauds, the “Term Sheet Summary” would still not constitute an enforceable contract for employment.
12. In Count II, Plaintiff alleges that the Bank, through non-party Kenneth LaRoe, made misrepresentations to Plaintiff to fraudulently induce Plaintiff to become employed at the Bank.
13. Plaintiff’s fraudulent inducement claim is based on the alleged promise of a five-year employment contract, and Plaintiff seeks damages for the period of the contract remaining.

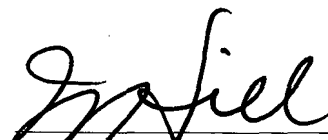
14. The "Term Sheet Summary" attached to Plaintiff's Complaint is not signed by any officer of the Bank, or any other alleged agent of the Bank, although the Bank is the party being charged with enforcement of the alleged contract.
15. When a breach of contract action would be barred by the statute of frauds, a plaintiff cannot simply assert a cause of action for fraud in the inducement to evade "the clear intent of the statutory prohibition" because such a pleading would "effectively repeal the statute." *Puff 'N Stuff of Winter Park, Inc. v. Bell*, 683 So. 2d 1176, 1177 (Fla. 5th DCA 1996).
16. It is the rule of law in Florida that the effect of the statute of frauds cannot be circumvented by a cause of action under fraud. *Canell v. Arcola Hous. Corp.*, 65 So. 2d 849, 851 (Fla. 1953) ("While it is contended by plaintiffs that they are suing for damages for fraud and deceit, such an action under the circumstances of this case is simply an attempt in an indirect manner to obtain damages for breach of the contract. Since the provision in the statute prohibiting any action to be brought on an oral contract within the statute includes actions based indirectly on the contract, an action for damages cannot be maintained on the ground of fraud in refusing to perform the contract, even though the defendant at the time of the making of the oral contract may have had no intention of performing it"); *India Am. Trading, Co., Inc. v. White*, 896 So. 2d 859, 860-61 (Fla. 3d DCA 2005) ("The same infirmity applies to the fraud count as India America cannot circumvent the effects of the statute of frauds by alleging that White fraudulently promised to sell it the real property, thereby fraudulently inducing it into executing an offer to purchase the real property"); *Dewachter v. Scott*, 657 So. 2d 962, 963 (Fla. 4th DCA 1995) ("Even though Dewachter couched her complaint as fraud in the inducement rather than breach of contract, we believe her claim is still barred as it attempts to circumvent the bar to a breach of contract action based on an oral contract terminable at will. Since the parties clearly cannot be restored to the status quo that existed before the alleged contract, as might be sought in an action based on fraud in the inducement, the measure of damages Dewachter sought here would be the same as breach of contract damages").
17. In Count III, Plaintiff alleges that the Bank, through non-party Kenneth LaRoe, made negligent misrepresentations as to the terms of Plaintiff's employment with the Bank.
18. Plaintiff's negligent misrepresentation claim is based on the alleged promise of a five-year employment contract, and Plaintiff seeks damages for the period of the contract remaining.
19. Plaintiff does not attach any document containing the terms of the alleged misrepresentations signed by any officer of the Bank, or any other alleged agent of the Bank, although the Bank is the party being charged with enforcement of the alleged contract.
20. When a breach of contract action would be barred by the statute of frauds, a plaintiff's claim for negligent misrepresentation that "flowed" from the same contract terms was conclusively barred by the statute of frauds. *Conner, I, Inc. v. Walt Disney Co.*, 827 So. 2d 318, 319 (Fla. 5th DCA 2002).

21. In ruling on a motion to dismiss for failure to state a cause of action, the trial court must accept the allegations of the complaint as true and in a light most favorable to the plaintiff. Generally, the statute of frauds is an affirmative defense that cannot be raised in a motion to dismiss unless the complaint affirmatively shows the conclusive applicability of such defense to bar the action. When a complaint facially states that the obligations of the parties were to exist for longer than one year, the complaint is subject to dismissal. *Conner, I, Inc. v. Walt Disney Co.*, 827 So. 2d 318, 319 (Fla. 5th DCA 2002).
22. In Count I, Plaintiff has facially pled a cause of action for breach of an employment contract for a term of five years in which Plaintiff seeks damages for the expected five-year term of employment, but the contract at issue clearly violates the statute of frauds.
23. In Count II, Plaintiff has facially pled a cause of action for fraudulent inducement based upon an employment contract for a term of five years in which Plaintiff seeks damages for the expected five-year term of employment, but the contract at issue clearly violates the statute of frauds.
24. In Count III, Plaintiff has facially pled a cause of action for negligent misrepresentation based upon an employment contract for a term of five years in which Plaintiff seeks damages for the expected five-year term of employment, but the contract at issue clearly violates the statute of frauds.
25. Plaintiff's sole rebuttal to Defendant's Motion to Dismiss on the basis of the statute of frauds is that the statute of frauds is not applicable to Plaintiff's causes of action.
26. It is, therefore,

ORDERED AND ADJUDGED THAT:

27. Defendant's Motion to Dismiss is **GRANTED WITH PREJUDICE**.
28. Plaintiff, Morris Rowe, shall take nothing by this action and the Bank shall go hence without day.
29. This Court reserves jurisdiction to enter any further orders that are proper, including awarding costs to the Bank.

SO ORDERED in Chambers, Lake County, Florida this 27 day of June, 2014.



MARK J. HILL
Circuit Court Judge

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Derek A. Schroth, Esq., Bowen & Schroth, P.A., 600 Jennings Avenue, Eustis, Florida 32726, and to John Finnigan, Esq., Finnigan Law Firm, 1700 Maitland Avenue, Maitland, FL 32751 this _____ day of June, 2014.

Judicial Assistant/Deputy Clerk