Filed 6/14/05 Grundfest v. Cedars Sinai Medical Center CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WARREN GRUNDFEST, Plaintiff and Appellant, v. CEDARS SINAI MEDICAL CENTER, Defendant and Respondent.	B173376 (Los Angeles County Super. Ct. No. BC256036)

APPEAL from a judgment of the Superior Court of Los Angeles County, Haley J. Fromholz, Judge. Reversed and remanded.

Law Offices of Richard A. Love, Richard A. Love and Beth A. Shenfeld for Plaintiff and Appellant.

Hill, Farrer & Burrill, Raymond W. Thomas and Scott L. Gilmore for Defendant and Respondent.

Defendant and respondent Cedars-Sinai Medical Center (Cedars) terminated plaintiff and appellant Warren Grundfest, M.D., medical director of its laser laboratory and holder of an endowed chair, without cause. Grundfest sued Cedars for breach of contract, fraud, breach of fiduciary duty, wrongful termination in violation of public policy, and related causes of action. After Cedars obtained summary judgment in the trial court, Grundfest appeals. He contends there are triable issues of material fact regarding the conflicting terms of his employment with Cedars: at-will employment as medical director in a written agreement versus alleged lifetime appointment as holder of the endowed chair in subsequent oral representations. His breach of contract and fraud actions allegedly arise from these disputed facts. Grundfest further contends wrongful termination in violation of public policy, because he had complained about Cedars's failure to use the charitable trust funds as intended by the donors. Finally, Grundfest claims he occupied a special relationship with the trust and has standing to challenge Cedars's breach of its fiduciary duties. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed. Cedars is a medical center that raises charitable contributions through an endowed chair program. In exchange for a gift of one million dollars or more paid over five years, Cedars names an endowed chair in a specific medical specialty after the donor. Each chair is awarded to a "world class physician" (the holder), generally at the level of full professor, who carries out and oversees the work of the chair. Upon the holder's retirement, another individual of equal quality is selected to hold the chair. The principal from an endowed chair is held in perpetuity, and the investment income is used to fund the activities of the chair.

In 1988, Dorothy and E. Phillip Lyon (the donors) pledged $500,000 to Cedars to establish the Dorothy and E. Phillip Lyon Chair in Laser Research (the Lyon Chair), an endowed chair to develop a research laboratory on laser treatment for a variety of medical conditions. The donors agreed that 80 percent of the donation would be restricted to an

endowment fund for the laboratory, and 20 percent would be applied toward operating expenses. Use of the interest from the invested principal would be determined solely at the discretion of the laboratory director. The donors' pledge card made no mention of any individual. In accepting the gift, Cedars thanked the donors "not only on behalf of the Medical Center but [also] on behalf of those patients who will benefit as a result" of the Lyon Chair.

Grundfest is a licensed physician and surgeon, who held a variety of positions at Cedars from 1982 to 2001. In 1990, Cedars appointed Grundfest the Medical Director of Laser Research and Technology Development.

In 1991, the Lyon Chair was dedicated after the donors increased their pledge to one million dollars. At the same time, in addition to his appointment as Medical Director of Laser Research and Technology Development, Cedars appointed Grundfest the first holder of the Lyon Chair.

On July 1, 1992, Grundfest entered into a written agreement with Cedars confirming his engagement as Medical Director of Laser Research and Technology Development. The one-year agreement set forth that, unless terminated, "it shall be deemed renewed for successive periods of one calendar month each." Either party could terminate the agreement "without cause," it could be "amended at any time by mutual agreement" in "writing," and its terms constituted "the entire understanding between the parties." The agreement further provided that the salary to be paid was the "full and complete compensation for all of the services which you render . . . ." In conformity with that provision, Grundfest received no separate salary as holder of the Lyon Chair. On July 15, 1993, Grundfest and Cedars executed a first amendment extending the agreement for another year to June 30, 1994.

In 1994, Grundfest entered negotiations to move his practice to a laboratory associated with Massachusetts General Hospital. When Grundfest asked about a new contract with Cedars as his agreement was due to expire, its senior vice president allegedly stated: ". . . you don't need a contract, you have an endowed chair, get out of here." During the same period and thereafter, Grundfest was allegedly assured by others

at Cedars, including its president and heads of departments, that he had a lifetime position as holder of the Lyon Chair. Grundfest remained at Cedars. The parties did not enter into any new agreement for Grundfest's employment, nor were there any written amendments to the 1992 agreement.

In 2001, Cedars terminated Grundfest without cause by 90-day written notice. Although the parties discussed continuing financial deficits in the laser laboratory, Grundfest was advised by Cedars that he was terminated without cause under the terms of the written employment agreement. At the same time, Cedars terminated the laser research program, which has not been reinstated. Cedars continues to hold and maintain all income derived from the Lyon Chair in the identified funds, and has paid the deficits in the laser research accounts.

In the course of Grundfest's tenure as holder of the Lyon Chair, additional trust funds were donated to support the work of the laser laboratory, including more than $2 million from the Ziegler family, more than $2 million from the Medallions charitable organization, more than $1.5 million from the Imperial Grand Sweepstakes charitable organization, approximately $500,000 from the Miller endowment, and numerous other small donations. The laser laboratory had in excess of $8 million in state-of-the-art equipment.

Grundfest sued Cedars for breach of contract, fraud, breach of fiduciary duty, age discrimination, wrongful termination in violation of public policy, and breach of royalty agreement and accounting. Cedars moved for summary judgment or, in the alternative, summary adjudication, as to each of the causes of action. The trial court granted Cedars's motion for summary judgment. Grundfest appeals on the breach of contract, fraud, wrongful termination, and breach of fiduciary duty causes of action.

DISCUSSION

A. STANDARD OF REVIEW

The Supreme Court established the standard of review for an order granting summary judgment. "A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855; *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1363-1364.)

B. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT

1. No Triable Issue Exists on the Breach of Contract Cause of Action, Because Termination without Cause was an Express Term of the Integrated Written Agreement

In the absence of a written employment agreement stating otherwise, there is a statutory presumption that employment is at-will. (Lab. Code, § 2922.) "An at-will employment may be ended by either party 'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice." (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 335 (*Guz*) quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 (*Foley*).) The statutory presumption of at-will employment is strong, but it can be overcome by proof that the employer and employee

have impliedly agreed that the employee will be terminated only for good cause. (*Guz, supra,* 24 Cal.4th at p. 336*; Foley*, *supra,* 47 Cal.3d at p. 677.)

It is the employee's burden to prove an agreement not to terminate without good cause, and thus to rebut the statutory presumption of at-will employment. (See *Foley, supra,* at p. 682.) "Generally, courts seek to enforce the actual understanding of the parties to a contract, and in so doing may inquire into the parties' conduct to determine if it demonstrates an implied contract." (*Id*. at p. 677.) "[P]arol evidence is admissible to explain, supplement, or even contradict the terms of an unintegrated agreement . . . ." (*Guz, supra,* 24 Cal.4th at p. 340.)

However, an alleged oral implied contract cannot overcome an at-will provision in an express written agreement, signed by the employee. (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 37-38 (*Starzynski*); see *Guz, supra,* 24 Cal.4th at p. 340, fn. 10.) The express at-will provision controls, because "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results. [Citations.]" (*Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482, disapproved on another point in *Foley, supra,* 47 Cal.3d at pp. 688, 700 & fn. 42; accord, *Starzynski, supra,* at p. 38; *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 630.)

Here, Cedars, as the moving party for summary judgment, showed an element of the breach of contract cause of action cannot be established: Grundfest's employment was terminable "without cause" under the express provision of the integrated written employment agreement.

Shifting the burden to Grundfest to show the existence of a triable issue, Grundfest maintains he was given oral assurance that, as holder of the Lyon Chair, his position would be a "lifetime" appointment. Grundfest provided the following evidence in his declaration: the surgery department chair stated the Lyon Chair would help support the laser laboratory until Grundfest "retired;" the surgery department's head of technological development stated he "had a position for life with that endowed chair;" the cardiology department chairman stated "unless [Grundfest] did something foolish, the chair is [his]"

and "the endowed chair position is for life, until the holder retires." When his contract was about to expire in 1994, Grundfest claims that the senior vice president of academic affairs advised him: ". . . you don't need a contract, you have an endowed chair, get out of here." In his interrogatory responses, Grundfest included the following evidence: the chairman of Cedars's board of directors informed him "you've got the [Lyon] endowed chair, you're going to be here for life;" another board member stated that the Lyon Chair was Grundfest's "forever" and he "will be here for the next 25 years;" and Cedars's president and associate vice president for academic affairs characterized that an endowed chair was a "position for life."

Despite Grundfest's declaration, deposition and interrogatory responses, he made no showing that his employment contract was anything other than a written at-will agreement that could only be amended in writing. He signed that agreement at the time of his appointment as medical director of laser research and technology development, a position he held continuously to the time of his termination. The agreement provided that it was "terminable by either party without cause" and that "either party shall have the right and privilege of canceling and terminating this Agreement without cause upon delivery of three (3) months advance written notice to the other party." Further, the agreement could be "amended at any time by mutual agreement of the parties, provided that before any amendment shall be operative or valid, it shall be reduced to writing and signed by [Grundfest] and by both the Senior Vice President for Academic Affairs and the Associate Vice-President for Academic Affairs." In addition, the agreement specified that its terms constituted "the entire agreement between the parties and supersedes any previous oral or written communications regarding the subject written thereof." Moreover, Grundfest testified that he understood his various roles to comprise one job. The trial court properly relied on this written agreement when it granted summary judgment against Grundfest's claims that his discharge breached an alleged oral employment contract that would have been at variance with the written contract. (See *Starzynski*, *supra*, 88 Cal.App.4th at p. 38.)

Grundfest does not directly dispute Cedars's contention that the written at-will agreement, if applicable, would be fatal to his breach of contract claim. Instead, he argues the written at-will agreement was terminated and became inapplicable under the following circumstances: in 1995 when his reporting responsibilities were moved from the surgery to the cardiology department; in 1996 when his reporting responsibilities as medical director of the laser laboratory were transferred to the surgery department; and in 1999 when he accepted a $116,000 appointment as professor of electrical engineering at UCLA, which resulted in his reduction of work time by 50 percent at Cedars while retaining the same $160,000 base salary.

The uncontradicted evidence shows, however, that Grundfest was continuously employed by Cedars whether he reported to one department or another, and despite taking on the appointment at UCLA. The fact that Grundfest was performing duties that would primarily benefit him did not terminate his employment agreement. He continued to hold the same titles at Cedars, was paid his negotiated salary and bonuses, and earned employment benefits in the relevant period under the at-will employment agreement. Cedars did not waive the requirement of a signed writing that any amendments to the employment agreement be in writing; and Grundfest did not rescind or terminate the agreement. Neither can it be said that there was a modification, rescission or novation of the agreement. (*Marani v. Jackson* (1986) 183 Cal.App.3d 695, 705 [trial court could properly determine that, within the meaning of subdivision (c) of Civil Code section 1698, the written contract expressly precludes oral modification of the written agreement].) We, therefore, conclude that Grundfest failed to carry his burden in showing triable issues concerning a breach of contract.

2. A Triable Issue of Fact Exists for a Portion of the Affected Period on the Fraud Cause of Action

The elements of a cause of action for fraud are (1) the defendant made a false representation as to a material fact; (2) the defendant knew the representation was false at the time it was made; (3) the defendant intended to deceive the plaintiff; (4) the plaintiff

reasonably relied upon the representation; and (5) the plaintiff suffered damages. (*Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 638.)

As the moving party for summary judgment, offering the evidence of the written agreement, Cedars maintains there was no fraud because the at-will provision in the integrated employment agreement precludes justifiable reliance on any alleged oral representations. Cedars argues that the trial court properly ruled those alleged statements violate the parol evidence rule, and are inadmissible to establish a claim of fraud in light of the integrated agreement.

Shifting the burden to Grundfest to show the existence of a triable issue, he offers evidence in his deposition, declaration and answers to interrogatories. Grundfest maintains he was given oral assurances both before and after executing his employment agreement that he held a lifetime appointment until he voluntarily retired as holder of the Lyon Chair.

We find two distinct periods of time in which Cedars made alleged representations to Grundfest that the Lyon Chair was a "lifetime" appointment: (1) from the inception of the Lyon Chair to the execution of the parties' employment agreement in 1992; and (2) after the execution of the agreement.

a. Representations Made Prior To the Written Employment Agreement Are Inadmissible under the Parol Evidence Rule

The parol evidence rule is codified in Civil Code section 1625, and Code of Civil Procedure section 1856. Civil Code section 1625 provides as follows: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Code of Civil Procedure section 1856 provides:
"(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or

supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement."

Integration clauses do not insulate parties from the consequences of making fraudulent representations that are independent of and consistent with the written instrument. (*Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp*. (1995) 32 Cal.App.4th 985, 991-993; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 419.) However, parol evidence cannot be used to prove the fraudulent promises if the alleged promises contradict the terms of the written agreement. "[I]f the false promise relates to the matter covered by the main agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible.' [Citations]." (*Banco de Brasil S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1010.)

As discussed in the previous section, the alleged misrepresentations regarding the term of Grundfest's employment are at variance with the parties' integrated written agreement. Any evidence of the false promise directly violates the parol evidence rule and is inadmissible. (*Banco de Brasil S.A. v. Latian, Inc., supra,* 234 Cal.App.3d 973 at p. 1010.)

b. A Triable Issue Exists Concerning Alleged Representations Made to Plaintiff that No Renewal of Contract was Needed for the Holder of the Endowed Chair

The point of demarcation occurred when Grundfest sought to renew the written employment agreement in 1994, having renewed it previously in 1993. At that meeting, Cedar's Senior Vice President of Academic Affairs advised him: ". . . you don't need a contract, you have an endowed chair, get out of here" and threw him out of his office. At about the same time and thereafter, the surgery department chair allegedly stated the Lyon Chair would help support the laser laboratory until Grundfest "retired;" the surgery department's head of technological development allegedly stated he "had a position for life with that endowed chair;" the cardiology department chairman allegedly told him "unless you did something foolish, the chair is yours" and "the endowed chair position is

for life, until the holder retires." As a result, Grundfest was led to believe the contract terms were not relevant to his continued tenure, and that no formal renewal would be forthcoming.

Prior to the expiration of his contract, Grundfest had been negotiating to move his practice to the Wellman Laboratory at Massachusetts General Hospital, the lead teaching hospital for Harvard University. In reliance on Cedars's representations, Grundfest stayed on at Cedars and developed the work of its laser laboratory, never anticipating that he would be terminated. We cannot say that reliance was unreasonable as a matter of law.

Under these facts, there are triable issues regarding the elements of fraud: (1) whether Cedars made false representations as to the material facts that no contract was necessary for the holder of the endowed chair, a position to be held until the holder's voluntary retirement; (2) whether Cedars knew the representations were false at the time they were made; (3) whether Cedars intended to deceive Grundfest; (4) whether Grundfest reasonably relied upon the representations; and (5) whether Grundfest suffered damages. (*Lazar v. Superior Court supra,* 12 Cal.4th at p. 638.) Accordingly, we find the trial court erred in granting summary judgment on the fraud claim.

3. No Triable Issue Exists on the Claim of Wrongful Termination in Violation of Public Policy, Because No Fundamental Public Policy is Involved

An employer may terminate an at-will contract except for a reason that contravenes fundamental public policy. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252.) Our Supreme Court explains: "We have held that this public policy exception to the at-will employment rule must be based on policies 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . .' [Citation.] This requirement 'grew from our belief that "'public policy' as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch" in order to avoid judicial policymaking.' [Citation.] It also serves the function of ensuring that employers are on notice concerning the public policies they are charged with

violating. 'The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes. . . .' [Citations.] The public policy that is the basis of this exception must furthermore be '"public" in that it "affects society at large" rather than the individual, must have been articulated at the time of discharge, and must be "'fundamental'" and "'substantial.'"' [Citation.]" (*Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104.)

Therefore, to state a claim for termination from employment in violation of public policy, a plaintiff must allege, as to the public policy, a policy which (1) is delineated in a statutory or constitutional provision (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095), (2) involves a matter which affects society at large, rather than the purely personal or proprietary interests of the plaintiff or his or her employer (*id*. at p. 1090), and (3) is fundamental, substantial and well-established at the time of termination. (*Ibid*.)

"'[I]n determining whether discharging an employee for exercising a right violates a fundamental public policy, the focus is not simply on the importance of the right that was exercised. The issue is whether permitting an employer to discharge an employee for exercising that right would undermine a "'clearly mandated public policy'" embodied in the provision from which that right emanates. [Citation.] It must be clear from the provision itself or from some other legislative or regulatory enactment that employers are not free to disregard or limit that right. . . . "[A] constitutional or statutory provision must sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law." [Citation.]' [Citation.]" (*Sinatra v. Chico Unified School Dist.* (2004) 119 Cal.App.4th 701, 706-707.)

"'[T]he term "public policy" is inherently not subject to precise definition. . . .'" (*Gantt v. Sentry Insurance, supra*, 1 Cal.4th at p. 1094.) "'[I]t is generally agreed that . . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, 'lest they mistake their own predilections for public policy . . . .' . . . [C]ourts 'should proceed cautiously' if called upon to declare public policy absent some prior legislative expression on the subject." (*Id*. at p. 1095.) In *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, the court held that the

employee had a fundamental right rooted in public policy to join in a discussion with other employees about whether they were being equitably compensated, because Labor Code section 232 prohibited the discharge of employees for discussing the amount of their wages.

As the moving party for summary judgment, Cedars submitted evidence to show that Grundfest was unable to demonstrate he made any actual protest, report or complaint to Cedars or any governmental agency about any alleged unlawful conduct. Neither did he articulate his termination was causally connected to any statute of public importance.

Shifting the burden to Grundfest, he asserts wrongful termination for having objected to the alleged practice of providing false or misleading information to donors on establishing a perpetual endowment to support his research. Grundfest argues that his termination frustrated the donors' intent to fund an endowed chair with a "lifetime appointment." Such conduct allegedly violated statutes governing charitable trusts. (Corp. Code, § 5142; Bus. & Prof. Code, §§ 17200 and 17510.8; Prob. Code, § 16000.)

However, the statutes cited by Grundfest govern the operations of trusts, not employer-employee relations. Rather than affecting society at large, the fundamental policy he cites involves his own personal and proprietary interest as medical director for laser research and holder of the Lyon Chair in perpetuity. Moreover, the donors' pledge card and their correspondence with Cedars do not support the claim that they intended a "lifetime" appointment for Grundfest under the Lyon Chair. He has, therefore, failed to meet his burden in identifying the element of a fundamental public policy upon which his own claim is based.

4. Plaintiff has No Standing to Claim Breach of Fiduciary Duty, Because He is Neither the Trustee Nor Beneficiary of the Charitable Trust

A cause of action for breach of fiduciary duty must allege the following elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by that breach. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.)

Cedars, as the moving party, produced evidence to show the donation by the Lyons was designated for the benefit of the laser research center, not Grundfest. Pointing

to the pledge card, correspondence, brochure for the Lyon Chair's dedication, and even Grundfest's own transmittal memos, nothing suggests that he was meant to be the beneficiary.

Shifting the burden to Grundfest, he contends Cedars breached its fiduciary duty to him because he had a "special relationship" with the trust as its "designated and intended beneficiary and recipient of the Laser Trust Funds." He argues that because the use of the interest derived from the donation is within the sole discretion of the director of the laboratory, he occupied a special relationship with respect to those assets. Grundfest contends that, as a former recipient of the trust funds and holder of the Lyon Chair, he has a sufficiently unique interest in the charitable trust to have standing to enforce Cedar's fiduciary obligations to maintain a lifetime appointment for the endowed chair's holder.

However, the law is to the contrary. (*Hart v. County of Los Angeles* (1968) 260 Cal.App.2d 512, 516.) With limited exceptions, "a person who has no capacity to take the legal title to property has no capacity to become the beneficiary of a trust of such property, and a person has capacity to continue to be beneficiary of a trust of property only to the extent that he has capacity to hold the legal title to such property." (Rest.2d Trusts 2d, § 117.) Because a charitable trust is established for the benefit of the public or an indefinite group of people, standing to enforce it is generally limited to the Attorney General as the representative of all of the beneficiaries. (*Hardman v. Feinstein* (1987) 195 Cal.App.3d 157, 161-162, and authorities cited therein.) Other persons who have a special and definite interest in a charitable trust (such as a minority trustee) are also authorized to bring an action to enforce the trust or protect its assets; however, a person who has no interest in the trust other than as a member of the public or the group benefited thereby does not. (*Ibid*.)

Here, the donors made a charitable contribution to Cedars, a non-profit institution, to develop a research laboratory for laser treatment for a variety of medical conditions. Cedars accepted the donation on behalf of the medical center and those patients who will

benefit as a result, not on behalf of Grundfest. As an individual, Grundfest is incapable of holding title to the trust fund and has no standing to enforce its provisions.

Accordingly, Grundfest did not carry his burden of showing a triable issue of material fact under the breach of fiduciary duty cause of action.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to enter orders granting summary adjudication of the breach of contract, wrongful termination in violation of public policy, and breach of fiduciary duty causes of action and for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.