

2014 WL 5391057 (D.C.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of the District of Columbia,
Civil Division.

German BERNAL, Plaintiff,

v.

IGLESIA EVANGELICA APOSTOLES Y PROFETAS EF 2:20, Defendant.

No. 2012 CA 006324 B.
February 12, 2014.

**Memorandum of Points and Authorities in Support of Plaintiff's Reply
to Defendant's Opposition to Plaintiff's Motion for Summary Judgment**

[John F. Pressley, Jr.](#), #379716, 7600 Georgia Avenue, N.W., Suite 412, Washington, D.C. 20012, (202) 723-8800, for plaintiff.

Judge [Rankin](#).

Calendar 7

Preliminary Statement

This is a case arising out of a dispute between two factions of Iglesia Evangelica Apostoles Y Profetas Ef 2:20 (the church), a conservative evangelical church. Prior to the dispute, the plaintiff, German Bernal, had served as pastor of the church since its inception over thirty (30) years ago in El Salvador. Since immigrating to the United States in 1983 he continued to serve as pastor of the church until retiring in 2005.

Pursuant to the plaintiff's retirement the Governing Board and Deacons of the church entered into an agreement with the plaintiff to provide payment of a pension to him pursuant to which he would begin receiving payments upon his retirement and continue to be involved with the church. Mr. Bernal retired in December of 2005 and starting receiving his pension in January of 2006 in compliance with the agreement.

In the fall of 2007 a dispute arose whereby the church was divided and litigation ensued. The primary case was resolved in favor of the church faction of which the plaintiff was not a part. Upon subsequently taking control of the church in July of 2012 and out of what appeared to be pure vindictiveness, the faction took it upon themselves to callously terminate Mr. Bernal's pension, notwithstanding the terms of the agreement which precluded such action.

Mr. Bernal is an **elderly** gentleman who depended on his pension. He had no reason to expect the cutoff of his livelihood. As a result of the cutoff of his pension, he is dependent upon his son, Gember Bernal for housing and **financial** support. Pursuant to the instant lawsuit, Mr. Bernal seeks reinstatement of his pension which is rightfully owed to him.

ARGUMENT

I. DEFENDANT'S FACTUAL CONTENTIONS DO NOT COMPLY WITH RULE 56(E) AND SHOULD NOT BE CONSIDERED

1. Besides being scurrilous and irrelevant, the actual allegations made by the defendant should not be considered by the court as they do not in the slightest way comply with the applicable Superior Court Rules of Civil Procedure related to opposition to a motion for summary judgment.
2. The defendant, for instance, does not provide a proper affidavit. The procedures relating to an affidavit in an opposition to a motion for summary judgment are spelled out in Sup.Ct.Civ. R. 56(e) which provides in pertinent part as follows

Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (emphasis added)

It is clear that defendant has consciously failed to comply with Rule 56(e). Defendant does not provide an affidavit, but instead attached a blank signature page to the end of defendant's opposition. As a result, one does not know to which statements the signer of the document is attesting to. Nor is it clear as to exactly which factual allegations, if any, are "made on personal knowledge" as required by Rule 56(e). This cannot be the basis for a legal defense. As a result, pursuant to Rule 56(e), "summary judgment, if appropriate, [should] ... be entered against the adverse party."

3. As indicated, supra, defendant's statement of facts are scurrilous and designed to vilify as opposed to being legally relevant or admissible. It is the type of response made when there are not sufficient legal arguments to present. None of the allegations present a valid defense to the issue at hand, whether or not defendant breached the contract to provide a pension to the plaintiff.

II. DEFENDANT FAILS TO PROVIDE A STATEMENT OF MATERIAL FACTS IN DISPUTE

4. In addition to defendant's failure to comply with Sup.Ct.Civ. R. 56(e), defendant has failed to comply with Sup.Ct.Civ. R. 12-I(k) which provides in pertinent part that

Motions for Summary Judgment. In addition to the points and authorities required by subparagraph (e) of this Rule, there shall be served and filed with each motion for summary judgment pursuant to Rule 56 a statement of the material facts numbered by paragraphs as to which the moving party contends there is no genuine issue. Each material fact shall be stated in a separate numbered paragraph. Any party opposing such a motion may, within 10 days after service of the motion upon the party, serve and file a concise statement of genuine issues setting forth all material facts numbered by paragraphs as far as possible to correspond to the paragraphs of the movant's statement of facts claimed not to be in issue as to which it is contended there exists a genuine issue necessary to be litigated. The opponent's statement of disputed material facts shall be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement of facts claimed not to be in issue. In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

Rule 12-I(k) clearly provides an opportunity (and obligation) for a party opposing a motion for summary judgment to present to the court a statement of material facts that the party believes to be in issue. Defendant has failed to provide such a document. As a result, pursuant to the Rule, "the Court may assume that the facts as claimed by the moving party are admitted ..." Id.

III. DEFENDANT'S OPPOSITION CONSISTS PRIMARILY OF CONCLUSORY ALLEGATIONS

5. Defendant's opposition consists primarily of conclusory allegations:

- a. Plaintiff provided no consideration
- b. Plaintiff's promise is not sufficient consideration
- c. Plaintiff had a duty to serve as Pastor under his existing agreement with the Church¹
- d. The payment was to be issued to plaintiff regardless of whether he worked another day or minute for the Church
- e. Plaintiff breached his fiduciary duty
- f. Plaintiff awarded himself this lifetime pension
- g. Plaintiff transacted a deal that was unfair

A. Conclusory Allegations are not Sufficient

6. When a trial court considers a motion for summary judgment, it must view all evidence and inferences from that evidence in the light most favorable to the non-moving party. Nevertheless, once the moving party has carried its initial burden, “[t]he opposition [to summary judgment] must consist of more than conclusory allegations, and be supported by affidavits or other competent evidence tending to prove disputed material issues of fact.” *Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 892 (D.C.2008). The party opposing the motion for summary judgment must offer “competent evidence admissible at trial showing that there is a genuine issue as to a material fact.” *Sanchez v. Magafan*, 892 A.2d 1130, 1132 (D.C.2006) (quoting *Hill v. White*, 589 A.2d 918, 921 (D.C.1991) (citations and internal quotation marks omitted)). Accord, *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C.1979) (“Summary judgment should be granted to the movant unless the opposing party offers competent evidence admissible at trial showing that there is a genuine issue as to a material fact.”).

IV. DEFENDANT HAS NOT PRESENTED ANY CREDIBLE. LEGAL DEFENSES

7. Defendant has not presented any credible or legal defenses to plaintiff's claims of Promissory Estoppel and Breach of Contract.

A. Defendant Presents no Defense to Plaintiff's Promissory Estoppel Claim

8. It is clear from defendant's peremptory discussion of promissory estoppel that it does not understand the concept or it has absolutely no defense to the claim. Defendant states that “[i]n promissory estoppel or quasi-contract, the unjust enrichment of one party creates a duty on the other party.” [Opposition, p. 9]. With all due respect, what does that mean? It appears that defendant is equating promissory estoppel with quasi-contracts. They are not the same. This case does not involve a quasi-contract claim. It has nothing to do with an unjust enrichment claim. Plaintiff has never made such a claim.

B. The Alleged Breach of Fiduciary Duty is not a Defense to Promissory Estoppel or Breach of Contract

9. To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C.2009).

10. Liability on theory of promissory estoppel requires evidence of a promise; promise must reasonably induce reliance upon it, and promise must be relied upon to detriment of promisee. *Simard v. Resolution Trust Corp.*, 639 A.2d 540, 552 (D.C.1994) (citations omitted).

11. Assuming, arguendo, that plaintiff breached a fiduciary duty², defendant fails to establish how that is a defense to either breach of contract or promissory estoppel. It is not. Defendant does not provide a single case that supports any such preposterous notion. As a result, defendant has failed to even present actual, valid defenses to plaintiff's claims. As a result, summary judgment should be granted.

C. Defendant's Argument that the Board did not have the Authority to Establish a Pension is without Credibility or Merit

12. Defendant's argument with respect to the Board supposedly not having authority to establish a pension is also strikingly without merit. To support this argument defendant recites two provisions from the church By-Laws. The first provision states that the Board will "be responsible for and care for the assets of the Church ..." Well, so what. How does such a general and innocuous provision prevent a Board from establishing a pension. If that were the case, there would be no pensions allowed in the country (a clearly absurd result). The second provision relied upon by defendant provides that the "Church will not seek **financial** gain; however, any year-end surpluses will be invested in new assets or in improving existing assets..." Again, so what. How does this prohibit the church from establishing a pension. A surplus would be anything that exists after payment of legitimate bills, expenses and contractual obligations. Defendant's arguments just do not make sense³.

CONCLUSIONS

What the defendant has attempted to do in its opposition to plaintiff's Motion for Summary Judgment is smear the plaintiff. What it has not done is comply with the Rules. Defendant has failed to provide a single affidavit. Defendant has failed to prepare and provide a Statement of Material Facts in Dispute. More substantively, defendant has not presented any credible or legal defenses to promissory estoppel or breach of contract. As a result, summary judgment should be granted with respect to these claims.

Respectfully submitted,

/s/ John F. Pressley, Jr.

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Footnotes

1 Defendant presents no information or evidence on the alleged "existing agreement".

2 This allegation is part of a continual and irrelevant effort on the part of defendant to portray the plaintiff in an unfair and negative light.

3 In the vernacular, it literally appears that the defendant is throwing something against the wall to see if anything sticks.

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