STATE OF SOUTH CAROLINA COUNTY OF HORRY Coleen R. Kennedy, Plaintiff, v. South Carolina Technical College System & Horry-Georgetown Technical College, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT CASE NO.: 2018-CP-26-1696

ORDER

THIS MATTER came before the Court on Defendants Horry Georgetown Technical College's ("HGTC") and the South Carolina Technical College System's ("SCTCS") (collectively, "Defendants") Motion for Summary Judgment (the "Motion") filed on February 25, 2019. The Motion requested the Court dismiss the Complaint filed by Plaintiff, Colleen Kennedy ("Kennedy"). Kennedy's Complaint alleges a single cause of action for breach of contract.[1] The Motion was heard on July 24, 2019. Present on behalf of Kennedy was Aaron Wallace, Esq. Present on behalf of Defendants was Emmanuel Ferguson, Esq. Based on the pleadings, discovery, legal memoranda, undisputed facts, record before the Court and arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

This is a breach of an employment contract case and the relevant, material facts are not in dispute. HGTC previously employed Kennedy as a nursing instructor from 2007 until December 31, 2016. Kennedy was working for HGTC pursuant to the provisions of S.C. Code Ann. § 9-1-

[1] Kennedy voluntarily dismissed her cause of action for breach of contract with fraudulent intent.

2210, the Teacher and Employee Retention Incentive Program ("TERI").[2] Under TERI, state employees participating in the South Carolina Retirement System (the "Retirement System") were allowed to "retire" for purposes of participating in the Retirement System but continue their employment with a participating employer for a period not to exceed five years.[3] The day before the fifth annual anniversary of Kennedy's participation in the TERI program was December 31, 2016.

Nearly one year prior, on January 5, 2016, Kennedy sent an email to Tara Lahnen ("Lahnen"), the Assistant Director of Human Resources at HGTC. In her email, Kennedy informed Lahnen of Kennedy's desire to continue her employment beyond the expiration of her participation in the TERI program. The same day, Lahnen responded to Kennedy's email with HGTC's re-employment procedure under TERI:

> **RE-EMPLOYMENT**
>
> **The System Office/College [HGTC] is not required to re-hire an employee whose TERI program period has ended.** A previous TERI program participant maybe hired into any type of position (FTE position, Temporary Grant, Time-Limited, or Temporary), and shall be eligible for benefits as they relate to that position. Any decisions to rehire a previous TERI program participant should be made in a non-discriminatory manner. (emphasis in original.)

Thereafter, on January 18, 2016, Kennedy sent a letter to H. Neyle Wilson ("President Wilson"), the President of HGTC. In her letter, Kennedy again expressed her desire to "return full time in January 2017," beyond her participation in the TERI program in December 2016. Subsequently, on January 20, 2016, Wilson sent a letter to Kennedy informing her that her participation in the TERI program will end on December 31, 2016. In particular, Wilson wrote the

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[2] TERI was repealed July 1, 2018.

[3] Section 9-1-2210(H), now repealed, stated, "[a] program participant shall terminate employment no later than the day before the fifth annual anniversary of the date the member commenced participation in the program."

following: "[a]t the end of your TERI, if you are interested in continuing your employment, you may apply for the positions that we have available."

The Assistant Vice President for Academic Affairs for Nursing and Associated Healthcare Science, Dr. Christy Bailey ("Dr. Bailey") also received Kennedy's January 18, 2016, letter. On January 20, 2016, Dr. Bailey emailed Kennedy and informed her of HGTC's process related to employees leaving the TERI program. Dr. Bailey's email to Kennedy, states, in part:

> "[o]nce your TERI is complete the College [HGTC] is required to advertise the position. I have already been sent a reminder to complete the vacancy for this coming fall so that it may be advertised. All employees that TERI and then desire to continue in a full-time employment position must apply to the position"

On August 25, 2016, Kennedy acknowledged receipt of an August 22, 2016, letter[4] from Dr. Marilyn Fore ("Dr. Fore"), Senior Vice President for HGTC, regarding Kennedy's work as a faculty member. Dr. Fore's letter informed Kennedy she, and all other unclassified faculty members would receive a 3.25% increase in their salaries effective August 22, 2016. Dr. Fore's letter identifies Kennedy's salary for the 2016-2017 school year and states:

> "[a]s a faculty member you are an employee of the State of South Carolina and the terms and conditions of this letter as set forth in applicable laws, rules and regulations of the Budget and control board, statewide policies and procedures of the State Board for Technical and Comprehensive Education and the policies and procedures of the College."

Consistent with TERI and HGTC policies, Kennedy's employment with HGTC ended effective December 31, 2016, by way of her resignation/retirement under TERI. Specifically, Kennedy signed a "Termination Checklist" on October 25, 2016. The "Termination Checklist" identifies Kennedy's retirement date as December 31, 2016, and the phrases "Retirement TERI

[4] Hereafter, "the August 22, 2016, Letter."

end" and "TERI ending" are written on the checklist. During her deposition, Kennedy testified she read the "Termination Checklist" and the form was filled out when she signed it.

Also consistent with TERI, the policies of State Board for Technical and Comprehensive Education, and the policies of HGTC, Kennedy applied for and competed with other applicants for the advertised position as a nursing instructor with HGTC. However, HGTC did not select Kennedy for the then open position. Kennedy did not apply for any other open positions and her employment with HGTC ended December 31, 2016.

Kennedy asserts Dr. Fore's August 22, 2016, Letter constituted an employment contract between she and HGTC.[5] Kennedy asserts that despite the statutory mandates of TERI and requirements of HGTC policies, Dr. Fore's August 22, 2016, Letter to Kennedy contractually bound HGTC to continue her employment beyond 2016 and into the 2017 academic year, including the 2017 summer term.

LEGAL STANDARD

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* In determining whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Telephone and Telegraph, Inc.*, 306 S.C. 101, 410 S.E.2d 537 (1989).

[5] The August 22, 2016, Letter is the only communication Kennedy alleges constitutes a contract.

However, "'[w]ith respect to an issue on which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is absence of evidence to support the non-moving party's case.'" *Id.* at 115, 410 S.E.2d at 544 (quoting *Celotex Corporation v. Catrett*, 477 U.S. 317, 325 (1986)). In that case, the "moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" *Id.* (quoting *Celotex* at 323) (emphasis in original)). "'Once the moving party has carried its initial burden, the opposing party must . . . 'do more than simply show that there is some metaphysical doubt as to the material facts,'" and "'must come forward with 'specific facts showing there is a genuine issue for trial.'" *Id.* (quoting *Matshusita Electrical Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

CONCLUSIONS OF LAW

For the purposes of the Motion only, Defendants did not contest Kennedy's assertion the August 22, 2016, Letter was a contract.[6] Rather, Defendants contend even if the August 22, 2016, Letter was a contract for employment, there is no fact Kennedy can present to a jury of a breach. Further, Defendants contend the laws of the State of South Carolina, including TERI, and HGTC's policies barred Kennedy's continued employment as a matter of law without making the nursing instructor position available for other applicants. Defendants argue there is no evidence Kennedy was promised employment with HGTC after she resigned on December 31, 2016. Finally, allowing Kennedy to amend the Complaint to add a claim for promissory estoppel would be futile and prejudicial. The Court agrees.

[6] Nonetheless, the August 22, 2016, Letter informed Kennedy she, like every other qualifying HGTC employee, will receive a 3.25% pay increase. As the issue was not raised by Defendants, this Court makes no finding as to whether the August 22, 2016, Letter is a contract.

A. DEFENDANTS DID NOT BREACH AN EMPLOYMENT CONTRACT WITH KENNEDY

1. The August 22, 2016, Letter is Subject to the Laws of the State of South Carolina.

Even assuming the August 22, 2016, Letter was a contract, it was subject to the laws of the State of South Carolina. The mandates of the TERI statute were part of the August 22, 2016, Letter to Kennedy both as a matter of law and by express reference to "applicable laws."[7] Further, the State Board for Technical and Comprehensive Education policies and the policies of HGTC were also part of the August 22, 2016, Letter to Kennedy by express reference to "the policies and procedures" of HGTC and the State Board for Technical and Comprehensive Education. Additionally, the "applicable laws, rules and regulations" of the State Budget and Control Board are expressly referenced and part of Dr. Fore's August 22, 2016, Letter. Dr. Fore's letter is unambiguous in respect to its inclusion of State Board for Technical and Comprehensive Education and HGTC polices, as well as the inclusion of the laws, rules and regulations of the State Budget and Control Board.

All these laws, rules, regulations and policies referenced by Dr. Fore are part of the August 22, 2016, Letter and, therefore, included and incorporated into Kennedy's alleged employment contract. Additionally, as a matter of law and express reference, TERI is unambiguously part of the August 22, 2016, Letter. Notably, TERI required, as a matter of statutory law, Kennedy resign her employment "no later than the day before the fifth annual anniversary of the date the member commenced participation in the program." S.C. Code Ann. § 9-1-2210(H). As to Kennedy, TERI

[7] *See Inabinet v. Royal Exchange Assur. of London,* 165 S.C. 33, 36, 162 S.E. 599, 600 (1992) ("Every contract entered into in this State embodies in its terms all applicable laws of the State just as completely as if the contract expressly so stipulated.").

required she resign her employment with HGTC no later than December 31, 2016. Defendants, in accepting Kennedy's resignation, complied with TERI and, consequently, complied with Dr. Fore's August 22, 2016, Letter to Kennedy (i.e. the alleged contract).[8]

2. There is No Evidence Defendants' Actions Breached Any Agreement Kennedy Had with Defendants.

Defendants' actions with respect to Kennedy's resignation effective December 31, 2016, and the decision to choose another applicant to fill the open position created by Kennedy's resignation, complied with TERI, the State Board for Technical and Comprehensive Education policies and HGTC policies. There is no evidence to show Defendants breached an agreement to employ Kennedy. In fact, the evidence in the record, including Kennedy's own deposition testimony, shows Kennedy resigned from her employment with HGTC on December 31, 2016. Consequently, Defendants' were required to advertise the nursing instructor position and their decision to select another applicant did not breach any employment contract with Kennedy.

Although Kennedy testified she *intended* to continue her employment with HGTC into 2017, there is no evidence Defendants *offered*[9] Kennedy employment after her resignation on December 31, 2016. Defendants allowed Kennedy to apply and compete for available positions including the nursing instructor position.[10] Consequently, Defendants complied with the August 22, 2016, Letter, including its stated incorporation of "applicable laws" and the "policies and procedures" of the State Board for Technical and Comprehensive Education and HGTC.

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[8] There is no evidence Defendants terminated Kennedy's employment. To the contrary, the only evidence in the record shows Kennedy resigned her employment by way of her "retirement" under the TERI program on December 31, 2016.

[9] Further, there is no evidence Defendants *promised* Kennedy employment with HGTC as it relates to a promissory estoppel claim.

[10] Kennedy testified she did not apply for any other positions with HGTC or the South Carolina Technical College System.

3. There is No Evidence Kennedy Was Promised Employment After Her December 31, 2016, Resignation.

Even if the August 22, 2016, Letter was a contract, there is no evidence Kennedy was promised employment subsequent to her December 31, 2016, resignation. Kennedy testified she received and understood the January 5, 2016, email from the Assistant Director of Human Resources when Kennedy was provided HGTC's TERI procedure which states, "**[t]he System Office/College [HGTC] is not required to re-hire an employee whose TERI program period has ended.**" (emphasis in original.) Further, during her deposition, Kennedy testified she understood she would need to apply for employment with HGTC after she completed the TERI program.

Kennedy also testified she received the January 20, 2016, email from Dr. Bailey informing Kennedy her position would be advertised prior to her December 31, 2016, resignation and filled after she completed the TERI program on December 31, 2016. Moreover, Kennedy testified she received the January 20, 2016, Letter from President Wilson informing her she would need to apply for "the positions that we have available" after her December 31, 2016, resignation. Finally, Kennedy testified no one promised her she would be selected for the nursing instructor position she applied for in September 2016.[11]

Therefore, even if the August 22, 2016, Letter was an employment contract, there is no evidence HGTC breached its agreement with Kennedy. Kennedy was required to resign her employment with HGTC by statute. The August 22, 2016, Letter clearly states the provisions of Kennedy's employment are subject to "the terms and conditions of [the August 22, 2016, Letter]

[11] Kennedy clearly understood the hiring process described in her correspondence with Defendants because Kennedy testified she applied for the nursing instructor position around September 2016 and interviewed for the position around October 2016.

as set forth in applicable laws, rules and regulations of the Budget and control board, statewide policies and procedures of the State Board for Technical and Comprehensive Education and the policies and procedures of the College [HGTC]." Further, HGTC was required to post the nursing instructor position and consider other applicants for the position. Finally, there is no evidence HGTC promised Kennedy a position after her December 31, 2016, resignation. These facts, viewed in a light most favorable to Kennedy, do not create a triable issue of fact to establish a cause of action for breach of contract.[12]

B. MOTION TO AMEND

1. Kennedy's Motion to Amend is Futile.

"Although promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations." *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct.App.2013). "Specifically, the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped." *Id.* "To this end, **and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous** with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition [act] by the promisor." *Id.* at 469-70, 742 S.E.2d at 11. (emphasis added.) "Thus, promissory estoppel has broad applicability to prevent injustice, but where a promise is unclear or the alleged harms are unconnected to the inconsistent disposition [inconsistent act], the doctrine does not risk imposing its own inequity against the party sought to be estopped." *Id.*

[12] The Court's grant of summary judgment also supports the denial of Kennedy's Motion to Amend her Complaint to add a cause of action for promissory estoppel.

"The elements of promissory estoppel are (1) a promise unambiguous in its terms is present; (2) the party to whom the promise is made reasonably relies on it; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to who the promise is made must sustain injury in reliance on the promise." 7 *S.C. Jur. Estoppel and Waiver* § 14.1, *citing Woods v. State*, 314 S.C. 501, 431 S.E.2d 260 (Ct.App.1993). *See also Bishop v. City of Columbia*, 401 S.C. 661, 664, 738 S.E.2d 255, 261 (Ct.App.2013) (listing elements necessary to prove promissory estoppel); *Richardson* at 379, 769 S.E.2d 237, 241 (2015) (listing elements necessary to prove promissory estoppel).

Here, the Court finds there is no evidence HGTC made an unambiguous promise to "re-hire" Kennedy subsequent to her December 31, 2016, retirement. Further, even if Defendants made an unambiguous promise to Kennedy, there is no evidence Kennedy relied on the alleged promise or Defendants failed to deliver on the promise.[13] Stated differently, and in light of a potential claim for promissory estoppel, it would be futile to allow Kennedy to amend her Complaint to add a claim for promissory estoppel when the Court has found there is no evidence of a broken or unfulfilled promise. Kennedy, in her Memorandum in Opposition to Defendants' Motion for Summary Judgment, makes a two-sentence argument in support of her motion to amend:

> "As is indicated in the Section 1 deposition excerpts, it is clear that Ms. Kennedy relied upon the Promissory averments of the Defendants with respect to its ***contractual*** guarantees to Plaintiff. To the extent that the Defendants are attempting to avoid Plaintiff's contract claims, it is apparent that the evidence in this case supports an additional claim of Promissory Estoppel based upon Defendants' own documented ***contract*** provided to Plaintiff." (emphasis added.)

[13] For purposes of their Summary Judgment Motion, Defendants do not contest the existence of a contract. Therefore, even if there was evidence Kennedy relied on a promise she would be employed beyond 2016, there is no evidence the promise was broken because Kennedy resigned her position under TERI.

Here, Kennedy relies on the August 22, 2016, Letter as the basis of her promissory estoppel claim. Kennedy provides no evidence beyond the August 22, 2016, Letter to support her claim Defendants should be required to employ Kennedy beyond her December 31, 2016, retirement.

As discussed above, Kennedy acknowledged she was informed by at least *three* people- the President of HGTC, the Assistant Vice President for Academic Affairs at HGTC, *and* the Assistant Director of Human Resources at HGTC- that Kennedy would have to apply for and compete with other applicants for any available positions after her participation in the TERI program ended. Further, Kennedy testified no one at HGTC promised her she would be selected for the nursing position she applied for in September 2016. There is no evidence HGTC made an unambiguous promise Kennedy would be hired for a position at HGTC after she retired from her employment with HGTC on December 31, 2016, and no evidence relied on any promise.[14]

This Court finds no evidence to create a triable issue of fact to establish a cause of for promissory estoppel. Therefore, allowing Kennedy to amend her Complaint to add a cause of action for promissory estoppel would futile. *See McCarthy v. Cliffs Communities, LLC*, No. 2015-UP-436, 2015 WL 4945392, at *1 (S.C. Ct. App. Aug. 19, 2015) (citing *Jennings v. Jennings,* 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct.App.2010) *rev'd on other grounds,* 401 S.C. 1, 736 S.E.2d 242 (2012)) ("Although leave to amend should generally be 'freely given,' this court has held that it may be denied where the proposed amendment would be futile.").

2. Kennedy's Motion to Amend is Not Timely.

Kennedy filed her Summons and Complaint alleging a cause of action for breach of contract and breach of contract with fraudulent intent on March 15, 2018. Defendants filed a

[14] There is no evidence Kennedy rejected an offer of employment, providing the same or better compensation and benefits, elsewhere in reliance of her belief the August 22, 2016, Letter was a promise HGTC would employ her for the 2017 school year.

Motion to Dismiss on April 20, 2018, seeking to dismiss the claim for breach of contract with fraudulent intent. On May 21, 2018, Defendants filed their Memorandum in Support of Plaintiff's Motion to Dismiss. Thereafter, on May 31, 2019, the Court dismissed Kennedy's claim for breach of contract with fraudulent intent.[15]

On June 12, 2018, Defendants filed their Answer. On February 21, 2019, Defendants took Kennedy's deposition.[16] Subsequently, on February 25, 2019, Defendants filed their Motion for Summary Judgment. On May 6, 2019, Defendants filed their Memorandum in Support of Summary Judgement. On May 9, 2019, Kennedy filed her *first* Memorandum in Opposition to Defendants' Motion for Summary Judgment. Kennedy's first memorandum did not seek to amend her Complaint.

Subsequently, on June 25, 2019, the Parties were notified the hearing on Defendants' Motion for Summary Judgment was set for July 24, 2019.[17] Thereafter, on June 21, 2016, Kennedy summitted a second Memorandum in Opposition to Defendant's Motion for Summary Judgement, this time adding a request to amend under Rule 15, SCRCP. In short, Kennedy raised her motion to amend more than ***fifteen months*** after she filed her Complaint. Further, Kennedy's motion to amend was first raised the Friday before the scheduled hearing on Defendant's Motion for Summary Judgment.

Kennedy presented no significant factual developments that warranted the untimely amendment. Further, even if the amendment was granted, Defendants would still be entitled to summary judgment on the promissory estoppel claim. *See, Health Promotion Specialists, LLC v.*

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[15] Kennedy agreed to voluntarily dismiss this claim.
[16] No other depositions were taken in this case.
[17] The hearing on Defendants' Motion of Summary Judgment was moved from June 24, 2018, to July 24, 2019, due to a potential conflict involving the judge initially assigned to hear the Motion.

S .C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (finding the circuit court properly denied party's motion to add a cause of action to its complaint because amendment did not occur after a seven year delay and the undertaking of extensive discovery, particularly when there were no significant factual developments that warranted the untimely amendment); *Collins Entm't, Inc. v. White,* 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct.App.2005) ("[t]he prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it").

3. Allowing Kennedy to Amend Would be Prejudicial to Defendants.

Kennedy's seeks to add an additional claim for promissory estoppel. Such an amendment at this stage would be prejudicial to Defendants. *See, Ball v. Canadian Am. Exp. Co .,* 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct.App.1994) ("Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action."); *Johnson v.. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir.1986) (finding prejudice can result when a proposed amendment is offered shortly before or during trial and raises a new legal theory that would require gathering and analysis of facts not already considered by opposition).

"A contract and promissory estoppel are two separate and distinct legal theories. They 'are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other.'" *Satcher v. Satcher,* 351 S.C. 477, 484, 570 S.E.2d 535, 538 (Ct.App.2002) (quoting *Duke Power Co. v. S.C. Pub. Serv. Comm'n,* 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985). "Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor

from making an inconsistent disposition of the property [or inconsistent act]." *Id.* at 484, 570 S.E.2d at 538-39.

Here, Defendants did not have the opportunity to gather evidence to defend a claim for promissory estoppel. Specifically, Defendants had no opportunity to engage in discovery related to reliance damages, if any, Kennedy may claim. Further, Kennedy did not present the Court with any evidence of reliance damages. Therefore, Kennedy's Motion to Amend is Denied.

CONCLUSION

For the reasons discussed, Defendants' Motion for Summary Judgment is GRANTED and Plaintiff's Motion to Amend is DENIED.

AND IT IS SO ORDERED!

Benjamin H. Culbertson
Circuit Court Judge

August 5, 2019