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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BROOK DORE, Plaintiff and Appellant, v. ARNOLD WORLDWIDE, INC., et al., Defendants and Respondents.	B162235 (Los Angeles County Super. Ct. No. BC260637)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed in part; reversed in part with directions.

Magana, Cathcart & McCarthy, Clay Robbins III and Marc Carlson for Plaintiff and Appellant.

Bergman & Dacey, Gregory M. Bergman and Beth D. Corriea for Defendants and Respondents.

Plaintiff Brook Dore alleges defendants made false representations of long term employment to induce him to leave his secure position with an advertising agency in Denver and accept a managerial position with defendants in Los Angeles. Twenty-eight months later defendants fired Dore without giving any reason. Dore then brought this action for breach of contract, fraud, negligent misrepresentation and intentional infliction of emotional distress. The trial court granted defendants' motion for summary judgment as to all causes of action finding Dore could not establish an express or implied-in-fact agreement to terminate his employment only for good cause. Dore filed a timely appeal from the judgment.

We affirm the judgment as to defendant Arnold Worldwide Partners because the undisputed evidence shows it cannot be held liable for any wrongdoing by its co-defendant Arnold Worldwide, Inc. and Dore was not entitled to a continuance to engage in discovery on this issue. We reverse the judgment as to Arnold Worldwide, Inc. because we find triable issues of fact exist as to Dore's causes of action for breach of contract, fraud and intentional infliction of emotional distress.

FACTS AND PROCEEDINGS BELOW

In 1999 Dore worked in Denver Colorado as a regional account director with a nationwide advertising agency. He had been employed with the agency for the past five years specializing in automobile accounts. Early in 1999 Dore began contemplating a move to California. His current employer agreed to attempt to find him a position in its Los Angeles office. Meanwhile Dore entered into negotiations with two other agencies in Southern California. While these negotiations progressed, Dore learned about the availability of the management supervisor position in the Los Angeles office of Arnold Communications (Arnold).[1]

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[1] Arnold Communications subsequently changed its name to Arnold Worldwide, Inc.

Dore interviewed for the position with several of Arnold's officers and employees. These officers and employees had been with Arnold from five to twenty-five years. In the interviews Dore was told Arnold had landed a new automobile account in its Los Angeles office and needed someone with his background and experience to handle the account on a "long-term" basis. Among other things, Arnold officials told Dore if hired he would "play a critical role in growing the agency," Arnold was looking for "a long-term fix, not a Band Aid," and Arnold employees were treated as "family." Dore also learned the fate of the last two persons to hold the management supervisor position in the Los Angeles office: one was fired for "financial indiscretions" the other was terminated because his work did not satisfy a major client.

Arnold offered Dore the management supervisor position by telephone in early April 1999. Dore orally accepted the offer and subsequently signed the bottom of a letter from Arnold signifying his acceptance of "the terms of this offer." Dore acknowledges the letter did not specifically guarantee him a particular period of employment and did not specifically state he could only be terminated for good cause. Nevertheless, Dore testified that based on his conversations with Arnold officials he believed "as long as I did a good job and that my position continued to exist, I would continue to be employed by [Arnold]."

Arnold terminated Dore in August 2001 without stating any reason.

Dore filed this suit against Arnold and another company, Arnold Worldwide Partners, a few months later. His complaint alleges breach of contract, fraud, negligent misrepresentation and intentional infliction of emotional distress. Both defendants answered and moved for summary judgment. The trial court granted the motions and subsequently entered judgment for the defendants. Arnold filed a timely appeal.

DISCUSSION

I. A TRIABLE ISSUE OF FACT EXISTS AS TO WHETHER DORE'S EMPLOYMENT COULD ONLY BE TERMINATED FOR GOOD CAUSE.

Arnold contends it is entitled to summary judgment on Dore's breach of contract cause of action because Dore cannot establish an express or implied-in-fact agreement his employment could only be terminated for good cause. Arnold principally relies on the terms of its written employment offer which Dore accepted. This offer and Dore's acceptance, Arnold argues, constituted an integrated contract containing an express provision Dore's employment was "at will." The parol evidence rule, therefore, prohibits Dore from introducing any evidence contradicting the "at will" clause. Arnold further argues Dore's evidence of an implied-in-fact agreement not to terminate his employment without good cause is not admissible because Dore testified at his deposition Arnold breached an express "good cause" agreement. Finally, Arnold maintains even if Dore's evidence is admissible it is not sufficient to raise a triable issue of fact about the existence of an implied "good cause" agreement.

For the reasons explained more fully below we reject Arnold's arguments and conclude a triable issue of fact exists as to whether Dore's employment could only be terminated for good cause. Whether or not the parties intended the contract term relating to the duration of Dore's employment to be their complete and final agreement on the subject of termination, extrinsic evidence is admissible to show the parties understood Dore could only be terminated for good cause. If the contract was not integrated as to the subject of termination, evidence would be admissible to show a supplementary agreement requiring good cause for termination. If the contract was integrated as to the subject of termination, evidence would still be admissible to show the parties meant the termination clause to include a good cause requirement. The argument Dore's deposition testimony bars introduction of his evidence of an implied-in-fact agreement on termination is totally lacking in merit. Finally, we conclude Dore has presented sufficient evidence to raise a

triable issue of fact as to whether his employment agreement with Arnold required good cause for termination.

A. The Parol Evidence Rule Does Not Bar Evidence Dore's Employment Could Only Be Terminated For Cause.

Arnold maintains its employment contract with Dore was contained in a written offer and acceptance which the parties intended to be the complete and exclusive expression of their agreement. Under the parol evidence rule such a fully integrated written contract cannot be contradicted or supplemented by prior or contemporaneous oral agreements.[2] Thus, Arnold reasons, evidence is not admissible to show the contract required good cause for termination when no such provision was included by the parties in their written agreement.

Arnold's senior vice president sent Dore a letter "confirm[ing] our offer to join us as Management Supervisor in our Los Angeles office." The letter stated in relevant part:

"The terms of this offer are as follows: . . . You will have a 90-day assessment with your supervisor at which time you will receive initial performance feedback. . . . After your assessment is complete, you and your supervisor will have the opportunity to discuss consideration for being named an officer of Arnold Communications. [¶] Brook, please know that as with all of our company employees, your employment with Arnold Communications, Inc. is at will. This simply means that Arnold Communications has the right to terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications at any time."

The letter concluded by asking Dore to "please sign this letter signifying your acceptance of these employment terms and return this to me at your earliest convenience." Dore signed and returned the letter.

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[2] Code of Civil Procedure section 1856, subdivision (a); *Cerritos Valley Bank v. Stirling* (2000) 81 Cal.App.4th 1108, 1115-1116.

Arnold maintains the letter and Dore's acknowledgement created a fully integrated contract expressly providing Dore's employment was "at will." This being the case, the parol evidence rule prohibits Dore from introducing evidence of a prior or contemporaneous oral agreement which contradicts, explains or supplements the terms of the contract.[3]

We disagree with Arnold's analysis of the contract. Although the term "at will" when used in an employment contract normally conveys an intent employment "may be ended by either party 'at any time without cause,'" nothing "prevent[s] the parties from agreeing to any limitation, otherwise lawful, on an employer's termination rights."[4]

In the present case the employer, after telling Dore his employment was "at will" went on to tell Dore what it meant by "at will." It told Dore: "This simply means that Arnold Communications has the right to terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications at any time."

If the contract contained only the first sentence stating Dore's employment was "at will" there would be no question it meant Arnold could terminate Dore at any time without cause. The term "at will" is well understood to have this meaning under California contract law.[5] But the contract contains a second sentence which explains the term "at will" "*simply means* that Arnold Communications has the right to terminate your employment *at any time* . . . ." (Italics added.)

In addition, the contract provides: "You will have a 90 day assessment with your supervisor at which time you will receive initial performance feedback. . . . After your assessment is complete, you and your supervisor will have the opportunity to discuss consideration for being named an officer of Arnold Communications."

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[3] Code of Civil Procedure section 1856, subdivisions (a), (b); *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 805.

[4] *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335-336.

[5] *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at page 336.

These two provisions taken together, along with the rule any ambiguities in the terms of a contract are to be construed against the party who drafted it,[6] convince us the term "at will," as used in Dore's contract did not mean "at any time for any reason" but only "at any time." This is the most fair reading of the explanatory sentence. Moreover, a contrary interpretation would conflict with the 90-day assessment provision which would be pointless if Dore could be fired at any time for any reason.

When an employment agreement contains a termination provision covering the duration of the agreement but is silent as to cause for termination parol evidence is admissible to show the parties' intent with respect to cause.[7]

If the agreement or a particular term is not intended to be the parties' complete and exclusive statement of the agreement or term then the agreement or term can "be explained or supplemented by evidence of consistent additional terms."[8] In *Gianelli Distributing* plaintiff beer distributors sued defendant manufacturer for breach of contract after defendant terminated plaintiffs' distribution contracts allegedly without cause. The distribution agreement stated: "This agreement will continue in effect unless and until terminated at any time after January 1, 1973 by thirty days written notice by either party to the other."[9] Reversing summary judgment for defendant the Court of Appeal held the evidence was "sufficient to establish that the agreement was not integrated and to create an issue of fact as to whether a good cause termination requirement was an implied term of the contracts."[10]

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[6] *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745.

[7] *Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 636-638; *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 729-730; *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1039 (hereafter *Ginanelli Distributing*); *Sherman v. Mutual Benefit Life Ins. Co.* (9th Cir. 1980) 633 F.2d 782, 784 (applying California law).

[8] Code of Civil Procedure section 1856, subdivision (b).

[9] *Gianelli Distributing*, *supra*, 172 Cal.App.3d at page 1037.

[10] *Gianelli Distributing*, *supra*, 172 Cal.App.3d at page 1039.

Even if the agreement or a particular term is intended to be the parties' complete and exclusive statement of the agreement or term extrinsic evidence is admissible to explain the meaning of the language used when the language is reasonably susceptible to more than one interpretation.[11]

In *Wallis v. Farmers Group, Inc.*, for example, plaintiff's agent appointment agreement with defendant provided the agreement "'may be terminated by either the Agent or [Farmers] on three (3) months written notice.'"[12] The court held the agreement was integrated with respect to the subject of termination but extrinsic evidence was admissible to determine whether the termination clause meant the agreement could be cancelled without cause or only for cause. The court found "the language of the parties' agreement was reasonably susceptible of either of these meanings."[13]

In *Sherman v. Mutual Benefit Life Ins. Co.*, the plaintiff sued defendant for breach of his general agency contract. Like the contract in the case before us, the contract in *Sherman* provided the agreement could be terminated "at any time" by either party.[14] Reversing the summary judgment for defendant the Ninth Circuit held the district court erred in interpreting the phrase "at any time" to necessarily mean Mutual could terminate with or without cause. "'At any time,'" the court explained, "could reasonably be interpreted as referring only to the duration of the agreement and not the permissible reasons for its termination. If the phrase 'at any time' is interpreted as referring only to duration, then the termination clause does not expressly state whether or not good cause is a prerequisite."[15] Given the evidence produced on the motion for summary judgment

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[11] *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage Etc. Co.* (1968) 69 Cal.2d 33, 37.

[12] *Wallis v. Farmers Group, Inc.*, *supra*, 220 Cal.App.3d at page 730.

[13] *Wallis v. Farmers Group, Inc.*, *supra*, 220 Cal.App.3d at pages 730-731.

[14] *Sherman v. Mutual Benefit Life Ins. Co.*, *supra*, 633 F.2d at page 783.

[15] *Sherman v. Mutual Benefit Life Ins. Co.*, *supra*, 633 F.2d at page 784.

the court found the termination clause was "reasonably susceptible to an interpretation requiring good cause for termination."[16]

B Dore's Deposition Testimony Does Not Bar Evidence Dore's Employment Could Only Be Terminated For Cause.

Arnold next argues Dore's evidence of an implied-in-fact agreement not to terminate except for good cause was inadmissible because it conflicts with his deposition testimony Arnold violated an express agreement not to terminate without good cause.[17]

The alleged conflict arises from Dore's deposition testimony in which he was asked, referring to the letter agreement: "Were any of the terms that were outlined in this document ever violated by Arnold Worldwide?" Dore answered: "Yes. . . . The 90-day performance assessment, which I never ended up receiving, if I'm understanding your question correctly." As part of this same answer, Dore explained: "After reviewing this letter, I was under the opinion that I would be provided with an assessment of my performance and . . . objectives. And that I would have long-standing employment with Arnold based upon the discussions of the Arnold management [sic], as long as I achieved the said objectives and my performance was indicative of that."

Arnold contends Dore cannot use the "at any time" language in the contract to support an implied agreement to terminate him only for cause because when asked whether the contract's terms were breached Dore did not point to this language but instead identified the 90-day assessment provision.

This argument borders on the frivolous. Dore was asked: "Were any of the *terms* that were outlined *in this document* ever violated[?]" Dore interpreted this question as asking whether any of the *express* terms in the agreement were ever violated by Arnold. This was a reasonable assumption because the question referred to "terms" which were

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[16] *Sherman v. Mutual Benefit Life Ins. Co.*, *supra*, 633 F.2d at page 783.

"outlined in this document" and because Dore's complaint alleged violation of "an express and an implied-in-fact employment contract." When Dore referred to the 90-day assessment provision he qualified his answer by stating "if I'm understanding your question correctly." Counsel for Arnold let the qualified answer go. She did not respond, "No, I'm asking you about any implied-in-fact terms." Arnold cannot now complain Dore gave an inconsistent answer to a question which was never asked. Furthermore, contention questions such as the one posed here are inappropriate at a deposition because they require the party deponent to make law-to-fact applications which are beyond the competence of most lay persons. If the deposing party wants to know facts, it can ask for facts, i.e., "Did you receive the 90-day assessment?" If the deposing party wants to know if deponent contends any express provisions of the contract were violated it should ask that question in an interrogatory so the answering party may, with the aid of counsel, marshal the facts and apply the legal reasoning relied upon for each contention.[18]

C. Dore Produced Sufficient Evidence To Raise A Triable Issue Of Fact As To Whether His Employment Could Only Be Terminated For Cause.

In arguing the contract cannot reasonably be interpreted to require good cause for termination Arnold relies solely on the contract language and the Labor Code presumption employment is at will, meaning it can be terminated at any time without cause.[19] We have determined, however, the contract is susceptible to an interpretation requiring good cause for termination[20] and the Labor Code presumption is rebuttable.[21]

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[17] See *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451 [in determining existence of triable issue of fact courts disregard declarations which conflict with witness's prior deposition testimony].

[18] *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1261-1262.

[19] Labor Code section 2922; *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at page 336.

[20] See discussion in subpart A, *ante*.

[21] *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677.

Dore submitted the following evidence in support of his contention the parties intended his employment to be terminable only for cause.

The contract was introduced into evidence. Its language supports Dore's interpretation. As previously noted, the contract contains the statement "your employment with Arnold Communications, Inc. is at will." As previously noted, if this was the only provision in the contract regarding termination Dore would be hard-pressed to show an implied-in-fact agreement not to terminate his employment except for good cause. But this is not the only provision. The contract goes on to define the term "at will" to mean "Arnold Communications has the right to terminate your employment at any time." A trier of fact could find that by defining the term "at will" to refer only to the duration of the contract when it otherwise would have referred to duration and cause, Arnold impliedly relinquished the right to terminate Dore without cause.

The contract's 90-day assessment period also supports Dore. This provision of the contract states after a 90-day assessment period Dore would be considered for a position as an officer of Arnold Communications. The implication is that during the 90-day probationary period Dore could be terminated for any or no reason but after 90 days, if confirmed for an officer position, Dore could only be terminated for cause. If this was not the parties' understanding it is difficult to see what purpose the 90-day provision served. If Dore could be fired at any time without cause no such probationary period would have been necessary.

As a condition of employment Arnold required Dore to sign a non-competition and non-disclosure agreement covering a period after his employment ceased equal to the lesser of two years or his actual length of employment. In *Foley v. Interactive Data*, our Supreme Court found such an agreement to be significant evidence in support of an implied-in-fact agreement not to terminate without cause: "The noncompetition agreement and its attendant [confidentiality agreement] may be probative evidence that 'it is more probable that the parties intended a continuing relationship, with limitations upon the employer's dismissal authority [because the] employee has provided some

benefit to the employer, or suffers some detriment beyond the usual rendition of service.'"[22]

The employer's assurances of job security are also relevant evidence of an implied agreement limiting the grounds for termination.[23] Arnold gave Dore such assurances in his hiring interviews. Francis Kelly, Arnold's Chief of Marketing, told Dore whoever was hired for his position "would play a critical role in growing the agency." Karen Driscoll, an executive vice president, told Dore Arnold was "being extremely cautious in filling the position, as they needed a long-term fix, not a Band-Aid." Paul Nelson, an account supervisor, stated the Los Angeles office needed a "long-term solution." A senior vice president, John Castle, emphasized Arnold's "family atmosphere."

Evidence of Arnold's actual employment practices is a further indicator employees at the management level were not terminated arbitrarily.[24] At the time Arnold hired Dore, Kelly had been with the company more than 20 years; Driscoll 25 years and Castle over 10 years. This longevity is particularly relevant in light of Arnold's statement in Dore's employment contract "all of our company employees" are employed "at will." Dore also learned during his job interviews the last two persons to hold his position were terminated for cause: one for "financial indiscretions" the other at the insistence of one of Arnold's major accounts.

Finally, evidence Dore held his position for more than two years and received a promotion and a salary increase, while not dispositive, are factors supporting an implied agreement not to terminate except for cause.[25]

Viewing the totality of the circumstances surrounding Dore's employment we conclude a triable issue of fact has been established as to the existence of an implied-in-fact agreement not to terminate without good cause.[26]

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[22] *Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at page 682, quoting from *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 326, first set of brackets added.

[23] *Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at page 681.

[24] *Foley v. Interactive Data Corp.*, *supra*, 47 Cal.3d at page 680.

[25] *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at page 342.

II. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER ARNOLD FALSELY PROMISED DORE HIS EMPLOYMENT COULD ONLY BE TERMINATED FOR GOOD CAUSE.

Dore's complaint alleges Arnold induced him to leave his longstanding, secure employment with an advertising agency in Denver, decline another viable offer of employment and relocate to Los Angeles by promising Dore his employment would continue indefinitely so long as he performed in a proper and competent manner, he would not be demoted or discharged except for good cause and he would be given notice and a meaningful opportunity to respond to any unfavorable evaluations of his performance. Dore alleges these promises were false in that Arnold had no intention of performing them at the time they were made. Dore, however, justifiably relied on Arnold's promises and suffered damages when Arnold failed to perform.

Arnold contends it was entitled to summary judgment on this cause of action for promissory fraud because "*Dore* has produced insufficient evidence to establish that there was any misrepresentation;" "*Dore* has produced no evidence of an intent not to perform;" and "*Dore* has produced no evidence of justifiable reliance."

The highlighted portions of Arnold's argument illustrate the first reason why its motion for summary judgment fails. It is not *Dore*'s responsibility to produce any evidence in support of his cause of action until Arnold "has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action."[27] A defendant may make this showing by presenting evidence conclusively negating an element of the cause of action or "by showing"

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[26] Because summary judgment and summary adjudication address complaints and causes of action, not the theories underlying them, (Code Civ. Proc., § 437c, subds. (a), (f)) we have no need to consider Dore's claim Arnold breached its implied covenant of good faith and fair dealing in the manner in which it terminated his employment. The relationship between the theories of breach of an implied-in-fact agreement not to terminate without cause and breach of the implied covenant of good faith and fair dealing are discussed in *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at pages 352-353.

[27] Code of Civil Procedure section 437c, subdivision (p)(2).

through evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence[.]"[28] Arnold failed to make either showing.

On the misrepresentation element, Arnold produced no evidence of its own to prove the alleged promises were not made by its officers. Rather it relied on Dore's deposition testimony in which he admitted no one at Arnold specifically told him he would have continued employment so long as his work was satisfactory or that he could only be fired for good cause. Arnold also submitted excerpts from Dore's testimony in which he stated his allegations about the promises made to him were based on his being told if hired he would become part of the "Arnold family;" Arnold was "looking for some stability in the L.A. office;" and the position had been open for eight months because Arnold could not find a qualified person to fill it. Dore testified these representations together with the salary and relocation benefits offered him led him to believe he was being offered long-term employment terminable only for cause.

Arnold argues the statements by company officials cited by Dore in his deposition testimony were too vague to constitute promises of continued employment so long as his work was satisfactory.

Arnold has not shown by evidence, however, this is all Dore has to offer on the misrepresentation element of his promissory fraud cause of action. It has not, in the words of our Supreme Court, "present[ed] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing."[29] Deposition questions and answers normally are not a successful way of presenting evidence of the plaintiff's inability to prove his case. The questions are often vague, ambiguous, or call for legal conclusions but the deponent is typically required to answer them anyway. "Contention" questions at a deposition are inappropriate for the reasons discussed

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[28] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853-854.

[29] *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at page 855; footnote omitted.

above.[30] The better procedure is to use a combination of requests for admissions and interrogatories to ferret out "all facts" on which a particular claim is based.[31]

Furthermore, even if the representations Dore referred to in his deposition testimony were all he had to support the fraud element of his cause of action we could not say the evidence was insufficient as a matter of law to raise a triable issue of fact. Representations the potential employee would be welcomed into the employer's "family" are relevant to show a false promise of continued employment[32] as are representations about opportunity and promotion.[33] It is also relevant to show the employer was aware the potential employee would be giving up secure employment elsewhere.[34] In addition, Arnold is incorrect in arguing Dore's subjective beliefs based on its representations are irrelevant.[35]

Arnold's argument on the intent element of promissory fraud suffers from the same evidentiary defect as its argument on the misrepresentation element—Arnold failed to show Dore does not possess and cannot reasonably obtain the needed evidence.[36]

Moreover, although proof a promise was made and not fulfilled is insufficient evidence of intent to survive a motion for nonsuit, it is sufficient to defeat a motion for summary judgment.[37]

Finally, Arnold argues Dore cannot establish justifiable reliance on its alleged promises of long-term employment and no termination without cause. Dore admits he read, signed and understood a letter stating the terms of his employment and this letter

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[30] See discussion at pages 9-10, *ante*.

[31] *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186; cited with approval in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at page 855, footnote 24.

[32] *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 636, 639.

[33] *Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 964.

[34] *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at page 964.

[35] See *Lazar v. Superior Court*, *supra*, 12 Cal.4th at page 635-636 ["Rykoff made representations to Lazar that led him to believe he would continue to be employed by Rykoff so long as he performed his job and achieved goals"].

[36] *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at page 854.

did not contain the promises he maintains were made. Indeed, the letter specifically stated Dore's employment was "at will." We have previously discussed the meaning of the term "at will" as used in the letter agreement and so we will not repeat our discussion here.[38] Even though Dore agrees his employment was not for a fixed period of time this does not contradict his contention Arnold promised him long-term employment so long as he performed satisfactorily because, if he performed satisfactorily, Arnold would have no good cause to terminate him.

III. DORE'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION.

Negligent misrepresentation is "[t]he assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true[.]"[39] Dore attempts to convert his cause of action for the intentional tort of promissory fraud[40] into a cause of action for negligent misrepresentation by alleging when Arnold represented to Dore he would have long-term employment and would be terminated only for cause Arnold had no reasonable ground for believing these representations to be true.

There is no such tort as negligent false promise.[41] This is because the law distinguishes between the culpability of a party who enters into a contract with no intent to perform it and a party who enters into a contract with an honest but unreasonable belief in its ability to perform.[42] The party who enters into a contract with no intent to perform is subjected to tort damages because the party acted in a deceitful manner to induce the other party to do or not do a particular thing. The party who entered into a contract with an honest but unreasonable belief in its ability to perform may be liable for contract

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[37] *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30-31.

[38] See discussion in Part I, *ante*.

[39] Civil Code section 1710 (2).

[40] See discussion in Part II, *ante*.

[41] *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 159.

damages if it does not perform but because it did not act deceitfully its conduct is not sufficiently blameworthy to warrant liability for tort damages.

IV. TRIABLE ISSUES OF FACT EXIST AS TO DORE'S CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Arnold sought summary judgment on Dore's cause of action for intentional infliction of emotional distress on three grounds: (1) Dore's exclusive remedy for his alleged emotional injury is a claim under the Workers' Compensation Act; (2) Dore cannot establish Arnold acted in an extreme and outrageous manner; and (3) Dore cannot establish he suffered severe emotional distress. None of these grounds has merit.

A. Dore's Claim For Intentional Infliction Of Emotional Distress Arising Out Of His Employer's Fraudulent Misrepresentations Regarding His Job Is Not Barred By The Workers' Compensation Act.

As a general rule, if an employee's injury is covered by the Workers' Compensation Act recovery under the Act is the employee's exclusive remedy.[43] Workers' compensation preemption, however, does not apply when the employer's "misconduct exceed[s] the normal risk of the employment relationship,"[44] or violates fundamental public policy.[45]

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[42] *Tarmann v. State Farm Mut. Auto. Ins. Co.*, *supra*, 2 Cal.App.4th at page 159.

[43] *Shoemaker v. Meyers* (1990) 52 Cal.3d 1, 7, 18-20.

[44] *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 756.

[45] *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1085.

1. False promises made to induce Dore to leave Denver and accept a job in Los Angeles fall outside the "compensation bargain" and violate fundamental public policy.

Dore alleges Arnold made fraudulent misrepresentations about the length of time his employment would last and how criticisms of his performance would be handled in order to induce him to cross state lines to become an Arnold employee.

In *Lenk v. Total-Western, Inc.* the court held workers' compensation did not preempt the jury's award of damages to an employee for emotional distress arising from the employer's "misrepresentations related to the financial stability of a company, the company's future plans to relocate its operations, and the job applicant's promotion in the corporate ranks, all designed to induce employment[.]"[46] The court stated the "misrepresentations made to induce Lenk to become an employee [were] not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain."[47] This was because fraudulently inducing a person to become an employee "simply does not reflect matters that can be expected to occur with substantial frequency in the working environment."[48] Because Dore, like Lenk, alleges emotional distress resulting from his employer's fraudulent misrepresentations designed to induce him to accept employment we conclude Dore's injury, like Lenk's, was not incurred as a normal part of the employment relationship.

In the present case, Dore not only alleges Arnold made false representations to persuade him to accept a job offer, it induced him to cross state lines to do so. Labor Code section 970 provides, "No person . . . shall influence, persuade, or engage any person to change . . . from any place outside to any place within the State" for the purpose of taking a job "through or by means of knowingly false representations" concerning either "[t]he kind, character, or existence of such work" or "[t]he length of

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[46] *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at page 973.

[47] *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at page 972.

[48] *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at page 972.

time such work will last[.]"[49] In *Mercuro v. Superior Court* we held section 970 serves a fundamental public purpose "to protect the community from the harm inflicted when a fraudulently induced employment ceases and the former employee is left in the community without roots or resources and becomes a charge on the community."[50] When an employer's conduct is "contrary to public policy and sound morality" it "cannot be deemed 'a risk reasonably encompassed within the compensation bargain.'"[51] Accordingly, Dore's emotional distress resulting from Arnold's fraudulent inducement to cross state lines to accept employment is not exclusively subject to workers' compensation.[52]

Arnold objects to Dore relying on alleged misrepresentations concerning cause for termination to remove his cause of action for emotional distress from the workers' compensation system. It argues Dore's complaint did not rely on these alleged misrepresentations in pleading intentional infliction of emotional distress. Rather, the complaint cited false and defamatory statements about Dore and his job performance as the basis for his emotional injury. We are not persuaded by Arnold's characterization of Dore's complaint.

We agree a defendant moving for summary judgment should not have to try to hit a moving target. For this reason courts have held the pleadings determine the issues on summary judgment.[53] In this case, however, Dore pled Arnold's false promises about the length and nature of his employment in his cause of action for fraudulent misrepresentation which we discussed in Part II, above. That cause of action specifically alleged Dore was induced "to leave his former employer [and] relocate to Los Angeles from Denver, Colorado." The cause of action for intentional infliction of emotional

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[49] Labor Code section 970.

[50] *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 180, footnote omitted.

[51] *Gantt v. Sentry Insurance*, *supra*, 1 Cal.4th at pages 1100-1101.

[52] Compare *Gantt v. Sentry Insurance*, *supra*, 1 Cal.4th at pages 1100-1101 [tort remedies including emotional distress damages available to employee suffering sexual or racial discrimination].

distress alleges "[d]efendants did the acts described in this complaint . . . with the specific intent to injure [plaintiff] emotionally, mentally [etc.]." We believe this allegation, although perhaps not the most artful, was sufficient to put Arnold on notice Dore based his emotional distress cause of action, in part, on the false representations about the job.[54] In addition, Dore relied on Arnold's false representations about the job in his trial court opposition to summary judgment on the emotional distress cause of action. Thus, Arnold cannot claim unfair surprise or lack of opportunity to respond in the trial court.

2. Claims for emotional distress based on the employer's false statements about the employee and his job performance may fall outside the "compensation bargain."

In *Livitsanos v. Superior Court* our Supreme Court left open the question whether the Workers' Compensation Act preempts a cause of action for intentional and negligent infliction of emotional distress based on the employer's defamatory statements about the plaintiff.[55]

The answer to this question would appear to depend on whether the defamatory statements in a particular case were "outside the scope and normal risks of employment."[56] In *Cole v. Fair Oaks Fire Protection Dist.*, our Supreme Court observed: "In order to properly manage its business, every employer must on occasion review, criticize, demote, transfer and discipline employees."[57] On the other hand, in *Livitsanos* the court observed the seriousness of the employer's allegations against the employee,

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[53] See *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 66-67.

[54] Compare *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1277-1278 in which the court construed plaintiff's intentional infliction of emotional distress cause of action to be based on his claim for wrongful termination in violation of public policy because the allegations in the latter were incorporated by reference into the former.

[55] *Livitsanos v. Superior Court*, *supra*, 2 Cal.4th at page 756.

[56] *Livitsanos v. Superior Court*, *supra*, 2 Cal.4th at page 757.

[57] *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.

including charging him with embezzlement and sabotaging the company's product, raised an issue whether the employer's conduct was outside the compensation bargain.[58]

The answer is further complicated by a subsequent Court of Appeal decision, relying on *Livitsanos*, which held a cause of action for defamation was not barred by the Workers' Compensation Act but a cause of action for intentional infliction of emotional distress based on the defamation was bared by the Act.[59]

In the present case the cause of action for intentional infliction of emotional distress accuses Arnold of "fabricating and manufacturing stories that were false and defamatory regarding plaintiff, his performance, his work, work habits and personal integrity . . . in order to justify a cancellation of the contract and agreement with plaintiff." An earlier allegation, incorporated by reference into the emotional distress cause of action, states Arnold officers made "unfair, unfounded, and incomplete performance evaluations and false statements about plaintiff." Neither party presented any evidence on the summary judgment motion clarifying the nature of these "false statements" in terms of what was said, to whom it was said and when it was said.

Because the burden was on Arnold as the moving party to show "there is no triable issue as to any material fact and that [it was] entitled to judgment as a matter of law,"[60] the total lack of evidence regarding the false statements precludes us from finding the cause of action for intentional infliction of emotional distress is preempted by workers' compensation.

B. A Triable Issue Of Fact Exists As To Whether Arnold Engaged In Outrageous Conduct.

Arnold maintains Dore cannot establish Arnold acted in an extreme and outrageous manner.

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[58] *Livitsanos v. Superior Court*, *supra*, 2 Cal.4th at page 757.

[59] *Davaris v. Cubaleski* (1993) 12 Cal.App.4th 1583, 1587-1588, 1591.

[60] Code of Civil Procedure section 437c, subdivision (c).

The evidence Arnold presented in the trial court and the argument it made there and on appeal shows this contention is based on the faulty premise Dore's cause of action for intentional infliction of emotional distress arose from his termination. Although Dore admitted his termination was the event which triggered his emotional distress,[61] just as Lenk's termination triggered his,[62] Dore's cause of action, like Lenk's, did not arise from his termination but from his employer's false promises designed to induce him to leave his existing, secure employment and accept an offer of employment with the defendant.[63] Dore's termination without cause was simply the event by which he discovered Arnold's promises were false.

It remains a question of fact for a jury whether Arnold fraudulently induced Dore to accept its offer of employment and, if so, whether Arnold's conduct was sufficiently outrageous to warrant an award of damages for intentional infliction of emotional distress.[64]

C. A Triable Issue Of Fact Exists As To Whether Dore Suffered Severe Emotional Distress.

Arnold makes two arguments in support of its contention Dore cannot establish the severe emotional distress necessary to support an intentional infliction cause of action. It contends Dore failed to provide any evidence he suffered from severe emotional distress.

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[61] At Dore's deposition he was asked: "Why do you believe the emotional injuries were caused by Arnold Worldwide's actions?" Dore answered: "Well, the fact that I was, as I feel, wrongly terminated; it put me at great financial risk, potentially of losing my house; the quality of life, which I have worked so hard for was gone; I had a wife, she was pregnant, so, you know, I was – a lot of unknowns at the moment."

[62] *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at page 967.

[63] Compare *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at pages 967, 973.

[64] Compare *Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at pages 970-973 [upholding jury award of emotional distress damages for fraudulently inducing plaintiff to accept employment].

Furthermore, Dore's admissions his emotional distress was not "disabling" and that he did not seek medical attention for it show his distress, if any, was not severe.

We reject Arnold's first argument for the reasons explained in Part II of our opinion—Dore had no duty to provide evidence to support his claim of severe emotional distress until Arnold produced evidence showing Dore did not suffer such distress or evidence showing Dore did not possess, and could not reasonably obtain the needed evidence.[65]

As to Arnold's second argument—Dore's emotional distress was not "disabling" nor did he seek medical treatment—Arnold has cited no decision in California or elsewhere holding evidence of either is indispensable in establishing the severity of the plaintiff's emotional distress. Rather, the severity of a plaintiff's emotional distress is a jury question "inextricably related to the conduct causing that distress."[66] Behavior which may be considered outrageous includes abuse of a relationship or position which gives the defendant power to damage the plaintiff's interest.[67] If Dore can prove Arnold induced him to leave a long-time, secure position with an employer in Denver with false promises of job security a jury could, but not necessarily would, find Arnold's behavior exceeded the bounds of employer conduct tolerated by a decent society.[68]

V. ARNOLD WORLDWIDE PARTNERS WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE UNDISPUTED EVIDENCE SHOWS THERE IS NO BASIS FOR HOLDING IT LIABLE FOR ANY TORT OR BREACH OF CONTRACT ON THE PART OF ARNOLD WORLDWIDE, INC.

Dore named Arnold Worldwide Partners, Inc. (AWP) as an additional defendant in this action.

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[65] *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pages 853-854.

[66] *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 789, citation and internal quotation marks omitted.

[67] *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946.

AWP moved for summary judgment on the ground it never employed Dore and it had no relationship with Dore or Dore's actual employer, Arnold Worldwide, Inc., which could result in AWP's liability to Dore under any of his causes of action. The trial court granted the motion and entered judgment for AWP. The court found there were no triable issues of fact which could support AWP's liability to Dore under his complaint.

The following facts are undisputed.

Dore was initially employed by Arnold Communications, Inc. in April 1999. In the fall of 2000, while Dore was still its employee, Arnold Communications, Inc. changed its name to Arnold Worldwide, Inc. (Arnold). All of the individuals with whom Dore dealt before and during his employment were officers or employees of Arnold. Arnold issued Dore's paychecks and provided his employee benefits. Arnold has average annual revenue of $150 million.

AWP was established in January 2001. Its principal function is to act as a liaison between the various subsidiaries of Snyder Communications and Snyder's parent corporation, Havas a French conglomerate. Aside from being subsidiaries of the same corporation and having the same person as chief executive officer, there are no other relevant connections between Arnold and AWP. Each company has its own board of directors, employees, bank accounts and assets; each maintains its own books, has its own capital and makes its own hiring and firing decisions.

Based on these undisputed facts the trial court correctly granted judgment to AWP.

Dore contends the trial court abused its discretion in denying his motion for a continuance in order to conduct additional discovery into AWP's role in recruiting, employing and ultimately terminating him.[69] The court should have continued AWP's

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[68] *Agarwal v. Johnson*, *supra*, 25 Cal.3d at page 946.

[69] Code of Civil Procedure section 437c, subdivision (h) states in relevant part: "If appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then

August 2002 motion for summary judgment, Dore argues, because AWP "obstructed Mr. Dore's legitimate attempts to obtain statutorily authorized discovery." The record does not support Dore's argument.

Dore contends he was prejudiced because Charles Kiefer, who submitted a declaration in support of AWP's motion for summary judgment, was not mentioned as a person with knowledge of the facts in AWP's interrogatory responses. Had Kiefer been mentioned Dore would have had the opportunity to depose him prior to the hearing on the motion.

We do not find this argument persuasive for several reasons. Dore's interrogatory asked AWP to state the names, addresses and telephone numbers of all persons having knowledge of facts supporting its claim Dore was not an employee of AWP and had no employment or contractual relationship with AWP. AWP responded on April 29, 2002 with 11 names, not counting Dore's. Dore does not explain how he was prejudiced by not having the opportunity to depose Kiefer, who was not even an AWP employee, when he did have the opportunity to depose any of the 11 persons identified in the interrogatory answer. Furthermore, Dore knew from the time AWP filed its answer to the complaint in January 2002 AWP was denying it had any employment relationship with Dore. Dore did not have to wait for answers to interrogatories but could have immediately noticed the deposition of the person at AWP most knowledgeable as to that defense.[70]

Dore further argues AWP thwarted his discovery efforts by refusing to make available for depositions numerous persons who might have provided information helpful in establishing the relationship between him and AWP.[71]

Again, we are unpersuaded. In order to be entitled to a continuance under section 437c, subdivision (h), the party opposing the motion must show by affidavit "facts essential to justify opposition may exist." Thus, "[i]t was incumbent upon plaintiff to

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be presented, the court shall deny the motion or order a continuance to permit affidavits to be obtained or discovery to be had . . . ."

[70] Code of Civil Procedure section 2025, subdivision (d)(6).

show by affidavit that the extensive discovery requested," here 13 depositions, "could reasonably lead to evidence necessary to refute the essential facts" shown by AWP.[72] Dore's declaration in support of his request for a continuance does not show facts exist which could defeat AWP's motion much less than taking the 13 proposed depositions could reasonably lead to such facts. Rather, as he admits, the purpose of the depositions is "to cross-examine and test the foundation of the allegations contained in the declaration filed in alleged support of [AWP's] motion for summary adjudication." The desire to conduct discover for this purpose does not establish good cause for a continuance, however, because with a few exceptions not applicable here, "summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of summary judgment . . . ."[73] Furthermore, the reason why the party seeking a continuance to conduct discovery must show facts essential to justify opposition may exist is to prevent a party who may be "hot on the trail" of evidence which would counter the summary judgment motion from being unfairly prejudiced by the opposing party scheduling a hearing on the motion before the necessary discovery can be completed. Continuances are not intended to allow a party to do what Dore is attempting to do here—wait on discovery until the other party moves for summary judgment and then use that party's declarations in support of its motion as a guide to conducting discovery in opposition to the motion. If this strategy was permitted summary judgment motions could be continued for months if not years while the opposing party engaged in its discovery.

We are also less than sympathetic to Dore's contention AWP deliberately delayed complying with his discovery requests to obtain an advantage on its summary judgment motion. The Discovery Act contains remedies in the form of motions to compel and for sanctions when the other side attempts to abuse the discovery process. As the trial court

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[71] See *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 174-175.

[72] *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 326.

[73] Code of Civil Procedure section 437c, subdivision (e).

pointed out, Dore did not pursue any of these remedies. Because Dore failed to diligently enforce his right to discovery when he had the opportunity to do so, the trial court did not abuse its discretion in denying Dore's untimely petition for relief after the motion for summary judgment had been filed.

Finally, it was disingenuous for Dore to claim in mid-August he needed more time to conduct discovery in opposition to AWP's summary judgment motion when in July he had urged AWP to file its motion "forthwith," suggested a hearing date "in early August" and even chided its counsel for "wait[ing] so long to file such a motion."

DISPOSITION

The judgment in favor of Arnold Worldwide Partners is affirmed as to its liability and reversed as to costs. The judgment in favor of Arnold Worldwide, Inc. is reversed. The cause is remanded to the trial court with the following directions. The court shall amend the judgment in favor of Arnold Worldwide Partners to award it its proportionate share of the costs of suit. The court shall vacate its order granting summary judgment to Arnold Worldwide, Inc. and issue a new order granting summary adjudication on the cause of action for negligent misrepresentation only. Arnold Worldwide Partners is awarded its costs on appeal from appellant. Appellant is awarded his costs on appeal from Arnold Worldwide, Inc.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J. WOODS, J.