IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GLORIA NYE, individually and as personal representative of the Estate of John C. Nye,	)	C.A. No. 02C-12-065JRJ
Plaintiff,	)	
UNIVERSITY OF DELAWARE, MELVYN D. SCHIAVELLI, and THOMAS M. DiLORENZO,	)	
Defendants.	)	

Submitted: April 2, 2003.
Decided: September 17, 2003.

O P I N I O N

Upon Defendants' Motion to Dismiss for failure to state a claim—**DENIED**.

Gary W. Aber, Esquire, Aber, Goldlust, Baker & Over, 702 King Street, Suite 600, P.O. Box 1675, Wilmington, Delaware 19899, for Plaintiff.

Rebecca L. Butcher, Esquire, Landis, Rath & Cobb, LLP, 919 Market Street, Suite 600, P.O. Box 2087, Wilmington, Delaware 19899, for Defendants.

JURDEN, J.

At bar is Defendants' Motion to Dismiss pursuant to Civil Rule 12(b)(6), for failure to state a claim upon which relief may be granted. "Dismissal under Superior Court Rule 12(b)(6) is appropriate only where it appears with reasonable certainty that [the plaintiff] would be unable to prevail on any set of facts inferable from the complaint."[1] Plaintiff has set forth sufficient factual allegations to survive defendants dispositive challenge and the Motion to Dismiss is therefore **DENIED**.

I. Factual Background

In February 2000, the late Dr. John C. Nye ("Dean Nye") approached the end of his second five-year term as Dean of the College of Agriculture and Natural Resources at the University of Delaware ("University").[2] Intent on retaining his position as Dean of the College, Dean Nye and his wife Dr. Gloria T. Nye ("Dr. Nye" or "plaintiff") entertained the prospect of building a new home; anticipating a mutual benefit including the entertainment of University guests on behalf of the college. Poised to purchase a new property and begin construction, Dean Nye and his wife approached University President David Paul Roselle ("Roselle") with inquiries regarding the prospects of a third term as Dean. Plaintiff maintains that Roselle's personal pledge quelled any concern the Nyes had about the University's intent to renew Dean Nye's appointment.

The Nyes purchased the property. Dean Nye's appointment was not renewed and this lawsuit followed.

Apparently, the story leading to the alleged breach of Dean Nye's alleged employment agreement begins in 1995. At that point, defendant Dr. Melvyn D. Schiavelli ("Dr. Schiavelli"),

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[1] *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).
[2] Formerly College of Agricultural Sources of the University of Delaware.

Provost of the University and senior program officer at Harrisburg Polytechnic Development Corporation, was dedicated to spearheading a biotechnology initiative for the University. Dean Nye, responsible for the College of Agriculture and Natural Resources was equally committed to biotechnology developments and opportunities for the University; the field fertile for unprecedented advances and growth. It was against this backdrop that the University received a $9 million Advanced Technology Grant for the Agricultural Biotechnology Center.

Dr. Schiavelli, as Provost, immediately announced that he would control the grant and the biotechnology initiative. University President Roselle, however, had different plans and decided that the initiative would be managed by the College under Dean Nye as “principal investigator.” After Roselle’s decision, Dr. Schiavelli allegedly threatened Dean Nye, declaring that this would never happen again; presumably referring to Dean Nye’s perceived usurpation of Dr. Schiavelli’s position.

Plaintiff claims that over the following years, Dr. Schiavelli’s alleged resentment of Dean Nye’s success in leading the College ripened into a desire to force Dean Nye to relinquish his position as Dean of the College of Agriculture. As plaintiff tells it, Dr. Schiavelli’s opportunity for revenge presented itself in the summer of 2000, when the University decided the question of Dean Nye’s reappointment.

Plaintiff asserts that in the summer of 2000, Dr. Schiavelli, in his capacity as Provost, appointed an evaluation committee to review Dr. Nye’s performance. Dr. Schiavelli then appointed defendant Dr. Thomas M. DiLorenzo (“Dr. DiLorenzo”) as chair of this committee. Plaintiff alleges that Dr. Schiavelli encouraged faculty members to circulate a petition of “no confidence” against Dean Nye. Though the petition supposedly garnered only limited support, Drs. Schiavelli and DiLorenzo told the evaluation committee that most respondents indeed

lacked confidence in Dean Nye and were opposed to his reappointment. They purportedly refused to allow members of the committee to see internal or external letters or the petition results, refused to allow Dean Nye to meet with the committee, and lied to Dean Nye by telling him that the committee was not interested in his side of the story with respect to his job performance.

Plaintiff claims that Dr. Schiavelli personally appeared before the committee and demanded the rejection of Dean Nye's reappointment; it is allegedly highly unusual for the University Provost to appear before such a committee. According to plaintiff, Dr. Schiavelli threatened to destroy the College if Dean Nye was re-appointed. Against precedent, Dr. DiLorenzo as committee chair, and in alleged complicity with Dr. Schiavelli, voted against Dean Nye's reappointment.

Meanwhile, the Nyes were in settlement on their new house. The Nyes were stunned when the appointment was not renewed and immediately sought explanation.

At a meeting Dr. Schiavelli told Dean Nye that he would be allowed to finish his term as Dean, ending June 30, 2001. Dr. Schiavelli later confirmed this by letter. Dean Nye was apparently also to continue serving as director of the Cooperative Extension Program until his replacement was appointed. Additionally, Dr. Schiavelli agreed that Dean Nye would receive a salary for the director position of $162,500 for the period July 1, 2001 through June 30, 2002. He was entitled to a year of administrative leave from July 1, 2002 to June 30, 2003, at a salary of $162, 500. The period July 1, 2003 to August 31, 2003 would be bridged by his accumulated vacation time. On September 1, 2003, Dean Nye was to return to his tenured faculty position.[3]

[3] *See* attachment, *Pl.'s Supp. Br.* The Court notes that plaintiff's counsel, in response to defendants' Motion to Dismiss, has attached additional material not previously presented in its complaint. For obvious reasons, this material should have been attached to the complaint and will not now act to transform defendants' preference for a Motion to Dismiss into an evaluation of the merits to plaintiff's benefit.

This lawsuit followed. Plaintiff alleges that Dean Nye's professional enemies called into doubt his professional performance before a specially appointed committee. Plaintiff complains that "[d]ue in part to the stress resulting from the defendant's duplicitous conduct in manipulating the decision not to renew his contract as Dean, Dean Nye suffered a cerebrovascular hemorrhage which killed him on April 10, 2002."[4] Ultimately, plaintiff contends that Dean Nye's promised administrative leave, semester of sabbatical leave, and accrued vacation time, all totaling more than a year and a half of pay, has been wrongfully withheld. Plaintiff contends that since her husband's death, the University has repeatedly refused to pay her sums due for the year of administrative leave and the additional vacation-equivalent promised Dean Nye for his service as director of Cooperative Extension.

Plaintiff alleges five claims; (i) breach of implied covenant of good faith and fair dealing against the University; (ii) breach of contract against the University; (iii) promissory estoppel against the University; (iv) violation of the Delaware Wage Payment and Collection Act by the University; and (v) intentional interference with Dean Nye's contractual relations with the University by Drs. Schiavelli and DiLorenzo.[5]

Defendants' claim that plaintiff's claims are patently meritless. Defendants' arguments with respect to each allegation will be addressed individually below.[6]

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[4] Pl.'s Compl. at 2.

[5] Pl.'s Compl. ¶¶ 49-59.

[6] The decision in this matter has been long coming as a result of numerous arguments and the request of additional briefing. Defendant filed a Motion to Dismiss the Complaint in its entirety on January 28, 2003. On March 10, 2003, Nye filed a response to the defendants' motion to dismiss. Oral argument was heard on the defendants' motion on March 17, 2003. Following oral argument, the Court requested supplemental briefing on Counts III (promissory estoppel against the University) and V (intentional interference with Dr. Nye's contractual relations with the University by Drs. Schiavelli and DiLorenzo). Additional material was received by fax and mail thereafter. In keeping with this Court's tradition of expeditious review of the matters before it, the Court apologizes to the parties for the delay.

II. Analysis and Discussion

When presented with a Motion to Dismiss under Civil Rule 12(b)(6) the Court will consider all well-pleaded facts in the complaint and accept them as true.[7] In viewing the facts, the court must draw "all reasonable inferences in favor of the non-movant."[8] When evaluating the sufficiency of plaintiff's complaint the Court must determine "whether [the] plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[9] Delaware is a notice pleading jurisdiction and the complaint need only give general notice as to the nature of the claim asserted against the defendant in order to avoid dismissal for failure to state a claim.[10] With this standard in mind, the Court proceeds to an evaluation of plaintiff's assertions.

A. Breach of the Covenant of Good Faith and Fair Dealing

Plaintiff alleges that defendants "maliciously used falsified grounds to bring about [Dean Nye's] removal from t[he] position" of Dean of the College in violation of the covenant of good faith and fair dealing.[11] Defendants argue that the University did not have a contractual relationship with Dean Nye and therefore no such covenant existed.[12] They assert that Dean Nye has not alleged that the University reappointed him for a third term as Dean, or that the University had any other contractual duty to reappoint him. Consequently, defendants argue that

[7] *Crowhorn v. Nationwide Mut. Ins.*, 2001 WL 695542, at *2 (Del. Super.) (citing *Spence v. Funk*, 369 A.2d 967, 968 (Del. 1978)).

[8] *Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at * 2 (Del. Super.) (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. Super. 1998)).

[9] *Crowhorn,* 2001 WL 695542, at *2.

[10] *Cornish v. Del. State Police*, 1995 Del. Super. LEXIS 240 (Del. Super.) (citing *Diamond State Tel. Co. v. University of Del.*, 269 A.2d 52 (Del. Super. 1970)).

[11] Pl.'s Compl. at 1.

[12] Def.'s Mot. to Dismiss ¶ 4.

the University, therefore, could not breach an implied covenant.[13] Defendants also assert Dean Nye's faculty contract is a collective bargaining agreement to which the implied covenant does not apply because it is preempted by statute.[14] Plaintiff contends that the University, through its agents, fraudulently, deceitfully and intentionally misrepresented and manipulated Dean Nye's performance record to influence the evaluation committee. Plaintiff asserts that precedent in this jurisdiction[15] supports a claim of a breach of the implied covenant of good faith and fair dealing.

To begin, every employment contract includes an implied covenant of good faith and fair dealing.[16] Breach of this implied covenant, however, requires bad faith; an aspect of fraud, deceit or misrepresentation by the employer.[17] An employer acts in bad faith by inducing "another to enter into an employment contract through actions, words, or withholding of information, which is intentionally deceptive in some way material to the contract. Such conduct constitutes 'an aspect of fraud, deceit or misrepresentation.' "[18]

The Court in *Hudson v. Wesley College, Inc.*,[19] addressing a similar issue in academia, held that a former professor's allegations that he was unfairly denied tenure after intentional misrepresentations made by the president of the college to the board of trustees was sufficient for a breach of the implied covenant of good faith and fair dealing. Hudson claimed that the board relied on the president's incorrect and unfair misrepresentations and used improper tenure

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[13] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992).

[14] To this end plaintiff invokes DEL. CODE ANN. tit. 19, §§ 1301- 1319 (Supp. 2003).

[15] *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 442-444 (Del. 1996).

[16] *Merrill*, 606 A.2d 96 at 101.

[17] *Id.* at 101 (citing *Magnan v. Anaconda Industries, Inc.*, 429 A.2d 492, 494 (Conn. Super. 1980)).

[18] *Id.* at 101.

[19] *Hudson v. Wesley College, Inc.*, 1994 WL 469138, at *3 (Del. Ch.).

criteria, which resulted in a denial of tenure evidencing sufficient fraud, deceit or misrepresentation. Hudson alleged that the intentional misrepresentations were made because of the president's personal and professional dislike for him.[20]

In *Merrill v. Crothall-American, Inc.*,[21] the Delaware Supreme Court implicated a heavy presumption that employment contracts are at-will in nature, lasting indefinitely unless expressly stated. Notwithstanding this presumption, the implied covenant of good faith and fair dealing has evolved as an exception to the harshness of the employment at-will doctrine.[22] The covenant of good faith and fair dealing may be breached (1) by termination of employment when the termination violates public policy, (2) where the employer misrepresents important facts inducing an employee to either stay or accept a new position, (3) when an employer uses its superior bargaining power to deprive the employee of clearly identifiable compensation related to the employee's past service, (4) or the employer falsifies or manipulates employment records to create fictitious grounds for termination.[23]

The Court finds that plaintiff has sufficiently plead a claim for breach of the implied covenant of good faith and fair dealing. Plaintiff alleges that the University falsified grounds to engineer the removal of Dean Nye. The pleadings allege that the University, through Drs. Schiavelli and DiLorenzo, made misrepresentations to the evaluation committee which influenced its decision not to renew Dean Nye's contract. The pleadings further allege the University circulated the petition against Dr. Nye, notified the committee that those surveyed

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[20] *Hudson*, 1994 WL 469138 at *3.

[21] *Merrill*, 606 A.2d 96, 102.

[22] *Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000).

[23] *Id.*, citing *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 442-444 (Del. 1996).

were against reappointment, and refused to allow the committee to see internal and external letters or survey results.

Plaintiff has sufficiently plead a reasonably conceivable set of circumstances that, if true, warrant recovery. Further, any alleged contract was not a collective bargaining agreement and does not fall within the purview of the Delaware statute; Dean Nye negotiated his own agreement.

B. Breach of Contract

Plaintiff claims that the University breached its contractual agreement to pay Dean Nye compensation for administrative leave and vacation. Plaintiff's Complaint avers that Dean Nye accepted the appointment and reappointment as Dean based on the University's unwritten policy of administrative leave and that Dean Nye would have no responsibilities to the University while on administrative leave.[24] Plaintiff also claims that the University's failure to pay the administrative leave is a breach of covenant of good faith and fair dealing. Defendants reply that the University's agreement was for personal services and both parties were released upon Dean Nye's death.

In *Dupont v. Standard Arms Co.*, the Court of Chancery of Delaware indicated that contracts for personal services for stated periods are terminated by the death of the employer or employee.[25] Further, the death of either party is an implied condition of the contract; therefore, the death of either party terminates the agreement negating any remedy for damages for termination.[26] These long settled principles are inapplicable, however, to contracts for services

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[24] Pl.'s Compl. at ¶¶ 51-52.

[25] *DuPont v. Standard Arms Co.*, 81 A. 1089 (Del. Ch. 1912).

[26] *Id.* at 1090.

that have already been rendered. The *Standard Arms* case specifically states that a claimant "cannot recover for compensation for services not rendered."[27] But here the plaintiff has sufficiently alleged that the services for which Dean Nye was to be compensated have already been adequately performed. The alleged compensation agreement made by Dr. Schiavelli could have easily been in consideration for Dean Nye's past service as Dean of the University. In fact, the confirmation letter seems to indicate just that. Therefore, currently, this claim also survives a motion to dismiss.

C. Promissory Estoppel

Defendants argue that the complaint does not contain sufficient allegations of detrimental reliance. They contend plaintiff's allegations that Dean Nye abandoned searching for other jobs does not constitute detrimental reliance since Nye did not allege any specific job offer that Dean Nye declined in reliance on the University's promises.[28]

Plaintiff alleges that a valid contract existed and that the University is estopped from denying that it promised Dean Nye compensation based on its actions and assurances. In opposing the motion to dismiss her promissory estoppel count, plaintiff alleges detrimental reliance on the University's promises in three instances.[29] First, she and Dean Nye incurred a large debt and purchased a larger home to engage in entertainment appropriate for his position as Dean in reliance on Roselle's assurance that the University wanted Dean Nye to continue as Dean of the College.[30] Second, she alleges Dean Nye served the balance of his term as Dean, and served as Director of Cooperative Extension, in reliance on the University agreement that he

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[27] *Id.* at 1091.

[28] Letter dated 3/20/03 from J. Boudreau to Judge Jurden.

[29] *See* Pl.'s Compl.; Pl.'s Mem. In Opposition to Motion to Dismiss at 3.

[30] Pl.'s Compl. at ¶¶ 23-27.

would be entitled to administrative leave, accrued vacation, and sabbatical leave.[31] Third, Dean Nye accepted the appointment and reappointment as Dean in reliance on the University's unwritten administrative leave policy.[32]

The Delaware Supreme Court has held that to establish a claim of promissory estoppel, a "plaintiff must show by clear and convincing evidence that (1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promissee; (3) the promissee reasonably relied on the promise and took action to his detriment; and (4) that such promise is binding because injustice can be avoided only by enforcement of the promise."[33]

Ultimately, the Court finds that plaintiff has sufficiently averred a claim for detrimental reliance in order to overcome a motion to dismiss. The assurance from Roselle and the plaintiff's and her husband's alleged reliance thereon is sufficiently plead to withstand defendants' Motion to Dismiss.[34]

D. Violation of the Wage Payment Compensation Act

Plaintiff asserts that defendants violated Delaware's Wage Payment Compensation Act ("WPCA"),[35] as the act covers any monies due or paid on account of services rendered by an employee. Plaintiff also alleges that the WPCA provides a remedy for the University's breach of

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[31] Pl.'s Compl. at ¶¶ 43-44.

[32] Pl.'s Compl. at ¶¶ 51-52.

[33] *Lord*, 748 A.2d 393, 399 (citing *Keating v. Bd. of Educ. Of Appoquinimink Sch. Dist.*, 1993 Del. Ch. LEXIS 244, *10-11).

[34] *See Lord*, 748 A.2d 393, 398-400 (Del. 2000).

[35] DEL. CODE ANN. tit. 19, § 1101(a)(2) (2003).

promises. Again, defendants rely on the argument that plaintiff's agreement with the University was for personal services and terminated upon Dean Nye's death.

Under WPCA, wages are compensation for services rendered by an employee. Section 1109 provides:

> (a) Any employer who is a party to an agreement to pay or provide benefits or wage supplements to any employees shall pay the amount or amounts necessary to provide such benefits or furnish such supplements within 30 days after such payments are required to be made; provided, however, that this section shall not apply to employers subject to Part I of the Interstate Commerce Act [49 U.S.C. § 10101 et seq.].
> (b) As used herein, "benefits or wage supplements" means compensation for employment other than wages, including but not limited to, reimbursement for expenses, health, welfare or retirement benefits, and vacation, separation or holiday pay, but not including disputed amounts of compensation subject to handling under dispute procedures established by collective bargaining agreements.[36]

Further, section 1113 of the WPCA provides a civil remedy for employees to recover where payments under section 1109 are not timely made. [37]

Our analysis of this claim is similar to our analysis of plaintiff's breach of contract claim. Plaintiff has alleged that Dean Nye's services had already been rendered at the time of his death. The alleged compensation agreement made by Dr. Schiavelli could have been in consideration for services already performed. If plaintiff's allegations are taken as true, then it is conceivable that the University was already obligated to pay such wage supplements before Dean Nye's death. Accordingly, plaintiff's complaint sets forth a possible cause of action under the WPCA.

E. Intentional Interference with Dean Nye's Contractual Relations

Nye alleges that individual defendants Drs. Schiavelli and DiLorenzo intentionally interfered with Dean Nye's contract with the University. The University asserts that the

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[36] DEL. CODE ANN. tit. 19, § 1109 (Supp. 2003).

[37] *Dep't of Labor v. Green Giant Co.*, 394 A.2d 755 (Del. Super. 1978).

individual defendants are immune from an action for intentional interference with Dean Nye's contract because they were acting in the course and scope of their employment and did not exceed the scope of their authority, even if they acted for personal reasons.[38] The defendants argue that plaintiff has not adequately alleged that the actions of Drs. Schiavelli and DiLorenzo were outside the scope of their employment by acting for personal motives (rather than in the University's interest) to establish personal liability for intentional interference of a contract. Defendants conclude that officers can only be liable for tortuous interference with their own company's contract if they exceed the scope of their authority.[39]

Plaintiff counters that the defendants ignore the law as stated in *Smith*[40] and *Nelson*[41] and the Restatement (Second) of Agency § 228[42] as adopted in Delaware. Plaintiff contends that actions based on personal motives and not by the interests of the employer are outside the scope

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[38] *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1182-83 (Del. Ch. 1999).

[39] *Wallace*, *supra* note 1.

[40] *Celebration Fireworks, Inc. v. Smith*, 727 N.E. 2d 450 (Ind. 2000).

[41] *Nelson v. Fleet Nat. Bank*, 949 F. Supp. 254 (D.Del. 1996).

[42] Restatement (Second) of Agency § 228 (2000) which states:
(1) Conduct of a servant is within the scope of employment if, but only if:
(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not expectable by the master.
(2) *Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.* (emphasis added).

of employment.[43] To that end, plaintiff argues that this Court should follow the ruling in *Wilson*,[44] although done in part to serve the purposes of the servant or a third person, such action may be within the scope of employment if the employer's business actuates the employee to any appreciable extent.[45] Ultimately, plaintiff argues that the allegations in the complaint surpass this test in showing that the individual defendants acted beyond the scope of their employment by acting on personal, selfish or retaliatory motives rather than on behalf of the interests of the University.

Generally, the scope of employment depends upon the nature of task for which the employee is hired and it includes all necessary means of performing properly the job for which the employee is hired.[46] An act that is considered outside the scope and course of the employment is an act that is different than that authorized under that person's employment.[47] The act must be committed beyond the authorized boundaries of the person's employment and must not be motivated by that person's employment. Acts that are considered outside the course

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[43]Restatement (Second) of Agency § 228 cmt. b, d (2002), states in part:
(b) Proof that the actor was in the general employment of the master does not of itself create an inference that a given act done by him was within the scope of employment...all the facts must be considered to determine responsibility for his conduct, as bearing both upon the question of whether or not his conduct is absence of specific evidence of the purposes of the servant, he has the purpose of acting within the employment. *(d) The question whether or not the act done is so different from the act authorized that it is not within the scope of the employment is decided by the court if the answer is clearly indicated; otherwise it is decided by the jury.* (emphasis added).

[44]*Wilson v. Joma, Inc.*, 537 A.2d 187, 189 (Del. 1988).

[45]*Id.*

[46]*Graham v. Commercial Credit Co.*, 200 A.2d 828 (Del. Super. 1964).

[47]See *Supra* note 5.

and scope of one's employment are often those which are carried out for an employee's own personal motives and benefit and not for their employer.

Plaintiff has clearly alleged facts sufficient to sustain this claim.

III. Conclusion.

Plaintiff has set forth reasonably conceivable sets of circumstances susceptible of proof in the complaint to survive Defendants' Motion to Dismiss as to each claim. Therefore, Defendants' Motion to Dismiss under Civil Rule 12(b)(6) for Failure to State a Claim Upon Which Relief May Be Granted is **DENIED**.

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Jan R. Jurden, Judge