

**Antonio ATALIG**  
**vs.**  
**M.I.C. CORPORATION, dba**  
**ROTA PAU PAU HOTEL**

**Civil Action No. 86-905**  
**Commonwealth Trial Court**

**Decided December 22, 1987**

**1. Civil Procedure - Summary Judgment - Standard**

Summary judgment may be entered where there is no disputed issue of material fact and a party so moving is entitled to judgment as a matter of law. Com.R.Civ.P. 56.

**2. Fraud - Fraudulent Misrepresentation - Elements**

The elements of fraudulent misrepresentation are that: (1) defendant made the representation; (2) the representation was made concerning past or existing facts; (3) the representation was communicated to plaintiff; (4) the past or existing facts referred to in (2) above were material to the transaction and susceptible of knowledge on the part of the defendant; (5) the representation was false at the time it was made; (6) the representation was made with the intent to induce plaintiff to do or refrain from doing some act; (7) the representation was relied upon by plaintiff in that plaintiff believed it to be true and was induced to act or refrain from acting thereby and plaintiff would not have acted upon or refrained from acting in the absence of such representation; and (8) plaintiff suffered damage or injury as a result.

**3. Fraud - Fraudulent Misrepresentation - Elements**

There was no claim for fraudulent misrepresentation where: (1) the alleged misrepresentations concerned things that

were to happen in the future; (2) the representations were not intended to induce plaintiff to do anything; and (3) plaintiff suffered no damages as a result of the representation.

**4. Contracts - Enforcement**

An agreement to reach an agreement at some future time is not enforceable.

**5. Statute of Frauds - General**

When an oral agreement that by its terms is not to be performed within a year of its making is not in writing and subscribed by the party to be charged, it is invalid. 2 CMC §4914.

**6. Contracts - Promissory Estoppel**

Where there was no action or forbearance on plaintiff's part when the defendant's promise was allegedly made, there was no inducement to plaintiff and no injustice requiring enforcement of an obligation of the defendant.

**7. Restraint of Trade - Contracts**

A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation, but account is taken of such factors as the protection that it affords for the promisee's legitimate interests, the hardship that it imposes on the promisor, and the likely injury to the public.

**8. Restraint of Trade - Factors Considered**

An agreement between plaintiff and defendant for the plaintiff to provide lunches exclusively to the defendant's hotel was not a restraint of trade where: (1) the defendant had a legitimate interest in having the plaintiff do business exclusively with the defendant; (2) plaintiff was free to pursue his livelihood with other businesses after the expiration of his contract with the defendant; and (3) the public was not injured by the

arrangement between plaintiff and defendant.

**9. Restraint Of Trade - Factors Considered**

Before determining whether challenged practices are a restraint of trade, the plaintiff must show that the defendant's practices injured or decreased competition.

**10. Restraint of Trade - Factors Considered**

Where plaintiff alleged only that he suffered some detriment by virtue of defendant's actions, it was insufficient to establish a restraint of trade by defendant.

5p. *J. Phillips*

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS  
COMMONWEALTH TRIAL COURT

6	ANTONIO ATALIG,	)	CIVIL ACTION NO. 86-905(R)
7	Plaintiff,	)	
8	vs.	)	<u>ORDER GRANTING SUMMARY</u>
9	M.I.C. CORPORATION, dba)	)	<u>JUDGMENT</u>
10	ROTA PAU PAU HOTEL,	)	
11	Defendant.	)	

12 This matter was heard December 18, 1987, on defendant's  
13 motion for summary judgment. It argued that there is no genuine  
14 issue of material fact and defendant is entitled to judgment as a  
15 matter of law.

16  Summary judgment may be entered where there is no disputed  
17 issue of material fact and a party so moving is entitled to  
18 judgment as a matter of law. Rule 56, Com. R. Civ. P.

19 The court finds the following facts based on the pleadings  
20 on file in this case. The plaintiff is a resident of Rota; the  
21 defendant is a local corporation, operating a hotel business on  
22 Rota. Defendant's fiscal year runs from April 1st to March 31st.

23 On April 1, 1981, the parties entered into an oral  
24 year-to-year contract whereby plaintiff would supply "barbecue"  
25

1 lunches to defendant's hotel guests during sightseeing tours  
2 conducted by the defendant. Pursuant to their agreement  
3 defendant agreed to pay plaintiff \$5.00 per person served.

4 On April 1, 1983 plaintiff requested that the price per  
5 lunch be raised from \$5.00 to \$6.00 per person and defendant  
6 agreed.

7 Sometime in 1984 plaintiff told defendant, through an agent,  
8 that another hotel on Rota, the Coconut Village, had asked  
9 plaintiff to supply barbecue lunches. Defendant told plaintiff  
10 that the Pau Pau Hotel did not want plaintiff doing business with  
11 the Coconut Village.

12 In April of 1985 plaintiff approached defendant, through its  
13 agent, and requested another increase in the price per meal  
14 served. Defendant, through its agent, stated that the price for  
15 lunches could not be changed since the fiscal year for  
16 defendant's business had already started. However, defendant  
17 stated that an increase for the next year was possible.

18 In February of 1986 defendant advised plaintiff that the  
19 price per meal would not be increased as this price was tied to  
20 the price of a sightseeing tour package which was not going to be  
21 increased.

22 On April 1, 1986 plaintiff's contract was not renewed and  
23 defendant entered into a new agreement with a different vendor  
24 for the supply of barbecue lunches.

25 Plaintiff's opposition to defendant's motion for summary  
judgment does not dispute these facts.

PLAINTIFF'S FIRST CAUSE OF ACTION

1 In his first cause of action plaintiff contends that  
2 defendant intentionally and fraudulently induced plaintiff to  
3 provide lunches at a reduced cost with the promise of a contract  
4 for 1986 at an increased price. Since defendant did not renew  
5 plaintiff's contract for 1986 plaintiff allegedly lost the  
6 opportunity for profits that he would have made during 1985 and  
7 1986.

8 [2] In order for defendant's representations to be fraudulent,  
9 a trier of fact would necessarily have to find the following  
10 elements:

- 11 1. Defendant made the representation;
- 12 2. The representation was made concerning past or existing  
13 facts;
- 14 3. The representation was communicated to plaintiff;
- 15 4. The past or existing facts referred to in (2) above were  
16 material to the transaction and susceptible of knowledge  
17 on the part of the defendant;
- 18 5. The representation was false at the time it was made;
- 19 6. The representation was made with the intent to induce  
20 plaintiff to do or refrain from doing some act;
- 21 7. The representation was relied upon by plaintiff in that  
22 plaintiff believed it to be true and was induced to act  
23 or refrain from acting thereby and plaintiff would not  
24 have acted upon or refrained from acting in the absence  
25 of such representation;

8. Plaintiff suffered damage or injury as a result.

See Karp v. Cooley (D.C. TX, 1972) 349 F.Supp. 827, 837.

1 Plaintiff here alleges that defendant told plaintiff in 1985  
2 that if plaintiff would wait until April of 1986, defendant would  
3 agree to plaintiff's request to increase the price of the lunches  
4 provided.

5 [3] Plaintiff's claims fail to state a cause of action for fraud  
6 for several reasons. First of all, the representations made by  
7 defendant concerned things that were to happen in the future, not  
8 present or existing facts. Secondly, the representations made by  
9 defendant were not intended to induce plaintiff to do anything;  
10 plaintiff was already obligated to furnish lunches and was not  
11 asked to do anything new. Finally, plaintiff suffered no damages  
12 as a result of the representation since plaintiff was already  
13 committed to furnish lunches to defendant until March 31, 1986.

14 In his opposition to defendant's motion for summary judgment  
15 plaintiff states that his first cause of action "does not sound  
16 only in tort but is based on the contratual concept known as  
17 detrimental reliance or promissory estoppel". Thus, plaintiff  
18 appears to contend that this first cause of action is both a tort  
19 and a contract claim.

20 [4] In this case plaintiff and defendant agreed in April of 1985  
21 to come to an agreement later in April of 1986. Clearly this is  
22 an agreement to reach an agreement at some future time and is  
23 thus not enforceable. Western Airlines, Inc. v. Lathrop Co.  
24 (Alaska, 1972) 499 P2d 1013, 1019; Griffin v. Griffin (Colo,  
25 1985) 699 P2d 407, 409.

1           However, even if this April 1985 agreement can be construed  
2 to be a contract for services from April 1986 until March 1987 it  
3 still is invalid for want of any writing.

4           2 CMC §4914 states that "[t]he following contracts are  
5 invalid unless the same, or some note or memorandum thereof, is  
6 in writing and subscribed by the party to be charged or by his  
7 agent:

8           (a) An agreement that by its terms is not to be performed  
9 within a year of the making thereof..."

10           Likewise Restatement, Contracts 2d, §130(1) provides that:

11           "[w]here any promise in a contract cannot be fully performed  
12 within a year from the time the contract is made, all promises in  
13 the contract are within the Statute of Frauds until one party to  
14 the contract completes his performance."

15           Thus, it does not matter that plaintiff would have started  
16 the new contract within a year, the key point is that he could  
17 not have completed it within a year of the agreement. Since this  
18 agreement was oral and could not be completed within one year it  
19 is invalid pursuant to the Statute of Frauds. Similar cases have  
20 so held.

21 [5] Oral employment agreement which was not performable in one  
22 year was within statute of frauds and unenforceable. Mercer v.  
23 CA Roberts Co. (5th Cir., 1978) 570 F2d 1232, 1236. Enforcement  
24 of oral employment contract which called for a period of one year  
25 and which was to begin in the future was barred by the statute of  
frauds. McMorrow v. Rodman Ford Sales, Inc. (D.C. Mass., 1979)

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462 F.Supp. 947, 948. Oral contract of employment which is incapable of performance within one year are within the statute of frauds. Lewis v. Finetex, Inc. (D.C. S.C., 1977) 488 F.Supp. 12, 13. Personal employment contracts are subject to statute voiding oral agreement not to be performed within one year. Genesco, Inc. v. Joint Council (2nd Cir., 1965) 341 F2d 482, 486.

In McMorrow v. Rodman Ford Sales, Inc, supra, plaintiff and defendant orally agreed in July of 1977 that plaintiff would begin work for defendant on August 1, 1977 for a one year period. The court found that the contract could not be performed within a one year period and that enforcement was barred by the statute of frauds.

In this case, since plaintiff's oral employment contract could not be completed within one year of its making it is unenforceable based on the statute of frauds.

Plaintiff contends that defendant's promise of a new contract induced action or performance on plaintiff's part and this promise is enforceable notwithstanding the statute of frauds. In making this claim plaintiff relies on Restatement, Contracts 2d, §139 which provides as follows:

Enforcement by Virtue of Action in Reliance:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:



1 (a) the availability and adequacy of  
2 other remedies, particularly cancellation  
3 and restitution;

4 (b) the definite and substantial  
5 character of the action or forbearance  
6 in relation to the remedy sought;

7 (c) the extent to which the action  
8 or forbearance corroborates evidence of  
9 the making and terms of the promise, or  
10 the making and terms are otherwise  
11 established by clear and convincing  
12 evidence;

13 (d) the reasonableness of the action  
14 or forbearance;

15 (e) the extent to which the action or  
16 forbearance was foreseeable by the promisor.

17 [6] In the present case, the court is at a loss to find any  
18 action or forbearance on plaintiff's part. In April, 1985 when  
19 the promise was made, plaintiff was already obligated to provide  
20 lunches to defendant until March 31, 1986. Clearly this promise  
21 did not induce plaintiff to begin providing anything new.  
22 Further there is no "injustice" here as plaintiff did not lose  
23 anything by performing on a contract he was already bound to  
24 perform.

25 PLAINTIFF'S SECOND CAUSE OF ACTION

Plaintiff's second cause of action alleges that defendant  
unreasonably restrained plaintiff's right to trade by instructing  
plaintiff not to provide services to defendant's competition.  
Plaintiff contends that defendant used its superior capital and  
market position to intimidate plaintiff and prevent him from  
contracting with others.

Restatement, Contracts 2d, §186 (2) states that:

1 [7] "[a] promise is in restraint of trade if its performance  
2 would limit competition in any business or restrict the promisor  
3 in the exercise of a gainful occupation."

4 Comment a to §186 notes that "[e]very promise that relates  
5 to business dealings or to a professional or other gainful  
6 occupation operates as a restraint in the sense that it restricts  
7 the promisor's future activity... Account is taken of such  
8 factors as the protection that it affords for the promisee's  
9 legitimate interests, the hardship that it imposes on the  
10 promisor, and the likely injury to the public."

11 [8] In examining the above-cited factors the court notes, first  
12 of all, that defendant did have a legitimate interest in having  
13 plaintiff do business exclusively with the defendant. Clearly,  
14 plaintiff's lunches are unique and defendant would want him to  
15 work exclusively for defendant in order to attract business. If  
16 customers want to eat plaintiff's lunches they have to go to  
17 defendant's hotel. If plaintiff could work for defendant's  
18 competition, defendant would not derive any significant benefit  
19 from plaintiff's services.

20 Secondly, the court must determine what hardships were  
21 imposed on plaintiff. Plaintiff claims that he should be able to  
22 work for anyone he wants. In fact, plaintiff could do this but  
23 if he wanted to work for defendant's competition he could not  
24 work for defendant also. This is not a situation in which all of  
25 the hotels on Rota conspired and agreed not to hire plaintiff.  
That would be restraint of trade. Here defendant was only

1 seeking an exclusive relationship. If plaintiff wanted to work  
2 for another hotel after the expiration of his contract he was  
3 free to do so. Since plaintiff was able to freely pursue his  
4 livelihood the court finds no hardship here.

5 Finally the public was in no way injured by this  
6 arrangement. If the public enjoyed plaintiff's lunches, they  
7 would go to defendant's hotel. Thus, defendant's exclusive  
8 arrangement with plaintiff did not preclude public enjoyment of  
9 plaintiff's lunches.

10 Plaintiff contends that for purposes of a summary judgment  
11 motion it is inconsequential whether or not defendant actually  
12 did restrain trade, the question is whether defendant intended to  
13 restrain trade.

14 [9] However, in Ralph C. Wilson Industries v. Chronicle  
15 Broadcast. (9th Cir., 1986) 794 F2d 1359, a case which granted a  
16 summary judgment, the court stated that before determining  
17 whether challenged practices are a restraint of trade, the  
18 plaintiff must show that the defendant's practices injured or  
19 decreased competition. Id. at 1363.

20 [10] In this case, plaintiff alleges only that he suffered some  
21 "detriment" by virtue of defendant's actions. Plaintiff does not  
22 allege that defendant intended or actually did injure competition  
23 on Rota by seeking to maintain an exclusive arrangement with  
24 plaintiff. Plaintiff does not contend that he was unable to  
25 work, that defendant and others sought to fix prices paid for  
lunches, or that the market place for lunches in any way suffered

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due to defendant's actions. Thus, plaintiff has failed to state a cause of action upon which relief can be granted.

For the foregoing reasons defendant's motion for summary judgment is hereby granted.

Dated at Saipan, CM, this 22nd day of December, 1987.

  
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Jose S. Dela Cruz, Associate Judge