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United States District Court,
E.D. Michigan,
Southern Division.
Joan MENOSKY, et. al., Plaintiffs,
v.
CITY OF FLINT, Defendant.

Civil Action No. 10–CV–11804.
Oct. 18, 2012.

Gregory T. Gibbs, Gregory T. Gibbs Assoc., Flint, MI, for Plaintiffs.

Thomas L. Kent, City of Flint Department of Law, Flint, MI, for Defendant.

AMENDED OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DKT.48) [CORRECTED]

MARK A. GOLDSMITH, District Judge.

I. Introduction & Background

***1** Plaintiffs, surviving spouses of individuals who retired from employment with Defendant City of Flint, have sued the City and other Defendants (collectively, “the City”) for breach of contract, promissory estoppel, violation of the Public Health Services Act, 42 U.S.C. § 300bb1–8, *et seq.,* and violation of their civil rights under 42 U.S.C. § 1983, the Fourteenth Amendment, and the Michigan Constitution. Their claims result from the discontinuation of certain benefits. Specifically, the City had provided Plaintiffs with health insurance benefits upon the deaths of their respective spouses, and Plaintiffs continued to receive these benefits, some for as long as 35 years. On or about February 17, 2010, the City notified Plaintiffs that their benefits were being terminated because they were not entitled to them. Am. Compl. (Dkt.34).

Plaintiffs filed two lawsuits: *Menosky, et al v. City of Flint,* No. 10–cv–11804 (E.D. Mich., filed April 27, 2010 and removed to federal court May 4, 2010) and *Ashley, et al v. City of Flint, et al.,* No. 11–cv–12588 (E.D. Mich., filed as an original case in U.S. District Court on June 14, 2011). They were consolidated in this Court pursuant to Federal Rule of Civil Procedure 42(a) (Dkt.36). Plaintiffs seek an order preventing the City from terminating benefits and/or seek an award of money damages .[FN1]

FN1. According to the parties, the City and the *Menosky* Plaintiffs have agreed that the City will continue to provide health insurance coverage pending the disposition of this litigation. In contrast, the City has ceased providing benefits to the *Ashley* Plaintiffs, who seek damages relating to the termination of their health insurance coverage. *See* Pls.' Resp. at 3–4 (Dkt.51).

The City has filed a motion for summary judgment (Dkt.48), contending that (i) no contract for health insurance benefits existed between the City and Plaintiffs; (ii) Plaintiffs' state and federal constitutional claims fail because they have no property interest in continued health benefits; and (iii) Plaintiffs cannot prevail on a theory of promissory estoppel. Plaintiffs have filed a response (Dkt.51), but the City did not file a reply. The Court heard argument on the matter on June 15, 2012. Subsequent to the hearing, the parties filed supplemental briefs (Dkts.52, 53). For the reasons that follow, the Court denies the City's motion.

II. Discussion

a. Legal Standard

Summary judgment should be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). As the Sixth Circuit has explained,

> The burden is generally on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by “showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotation marks omitted). In re-

EXHIBIT D

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viewing a summary judgment motion, credibility judgments and weighing of the evidence are prohibited. Rather, the evidence should be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, the facts and any inferences that can be drawn from those facts[ ] must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

***2** *Biegas v. Quickway Carriers, Inc.,* 573 F.3d 365, 373 (6th Cir.2009) (quotation marks omitted).

b. Plaintiffs' Third–Party Beneficiary Breach of Contract Claim

Plaintiffs contend that the **collective bargaining agreements** ("CBAs") that covered Plaintiffs' deceased husbands at the time of their retirements render them eligible to receive benefits as intended third-party beneficiaries of such agreements under Mich. Comp. Laws § **600. 1405**, which governs Michigan's third-party beneficiary law. At oral argument, the Court inquired whether Plaintiffs' complaint put the City on notice of a claim premised on a third-party beneficiary theory. Plaintiffs subsequently filed a supplemental brief in which they argue that the *Ashley* complaint provides notice of a third-party beneficiary claim in the following paragraph: "As beneficiaries of **collective bargaining agreements** negotiated between spouses of Plaintiffs and Defendants, Plaintiffs are entitled to relief based on the past practice of offering Plaintiff health insurance benefits ..." *Ashley* Compl. ¶ 73. Plaintiffs further argue that the City, by its inquiries into Plaintiffs' husbands' **collective bargaining agreements**, showed that it was on notice of Plaintiffs' third-party beneficiary claims.

In their supplemental brief, Plaintiffs cite *Ridgeway v. Ford Dealer Computer Services, Inc.,* 114 F.3d 94 (6th Cir.1997), in which the Sixth Circuit found a complaint properly alleged a third-party beneficiary claim, even though it did not expressly mention a third-party beneficiary theory. "Although this claim is not artfully worded, it adequately set[ ] forth the third-party beneficiary theory and provided notice to [the defendant] of the nature of the claim." *Id.* at 96.

The Court concludes that Plaintiffs have adequately put the City on notice of the nature of their third-party beneficiary claim. As Plaintiffs noted, the *Ashley* complaint alleges that Plaintiffs are "beneficiaries of **collective bargaining agreements** negotiated between spouses of Plaintiffs and Defendants." *Ashley* Compl. ¶ 73. Furthermore, although not mentioned by Plaintiffs, the Court notes that the *Menosky* amended complaint states: "Defendants' termination of Plaintiffs' health insurance benefits constitutes a breach of the contractual rights owed to Plaintiffs' as third party beneficiaries of the contractual rights vested in their husbands as of the date of their retirements and subsequent deaths." Am. Compl. ¶ 61 (Dkt.34). Accordingly, although it could have been clearer, Plaintiffs' claim of breach of contract under a third-party beneficiary theory is sufficiently pleaded to meet the notice requirement.

Having determined that a third-party beneficiary claim is sufficiently pleaded, the Court turns to the City's argument that Plaintiffs' spouses' CBAs do not provide the third-party health insurance benefits to surviving spouses that Plaintiffs allege. Plaintiffs agree that the CBAs do not expressly provide for health benefits for surviving spouses. *See* Resp. at 6 (Dkt.51). However, Plaintiffs argue that the City's past practices modified the terms and conditions of employment to add this benefit.

***3** Under Michigan law, a past practice may become a binding term or condition of employment if the CBA is ambiguous or silent on the issue and there is a "tacit agreement that the practice would continue." *Port Huron Educ. Ass'n, MEA/NEA v. Port Huron Area Sch. Dist.,* 452 Mich. 309, 550 N.W.2d 228, 237–238 (Mich.1996) (quoting *Amalgamated Transit Union v. Southeastern Mich. Transp. Auth.,* 437 Mich. 441, 473 N.W.2d 249, 255 (Mich.1991)). The City argues that none of the CBAs to which Plaintiffs' deceased spouses were parties provided for the continuation of health insurance to their surviving spouses.

However, Plaintiffs rely on the law of past practice, which applies regardless of whether a CBA explicitly provides for additional benefits, as long as the CBA does not "unambiguously cover[ ] a term of employment that conflicts with a parties' past behavior." *Port Huron,* 550 N.W.2d at 238. The City has not claimed that the CBAs are inconsistent with Plaintiffs' alleged past practice, only that they are silent as to this

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issue. As discussed in further detail below regarding Plaintiffs' promissory estoppel claim, the evidentiary record in this case provides support for the position that the practice of the City was to provide health insurance benefits to surviving spouses. Georgia Steinhoff, a former employee of the City's Retirement Office, provided the following affidavit testimony: "If the retiree elected a survivorship option, the surviving spouse was entitled to continued health insurance benefits after the death of the retiree. This continued to be the policy through my retirement in September of 1990....During my employment with the City of Flint Payroll and Retirement Office it was the practice that when we were notified of the death of the retiree one of the steps we took was to change the Blue Cross/Blue Shield contract to place it in the name of the retiree's surviving spouse." Steinhoff Aff., Ex. G to Pls.' Resp. (Dkt.51–7).

Furthermore, the City of Flint's Employee Retirement System and the Department of Finance Payroll & Retirement Division sent Plaintiffs letters each which contain statements such as: "Your pension benefit will continue for your lifetime." Letters, Ex. F to Pls.' Resp. (Dkt.51–6).

Finally, Plaintiffs Joann Menosky, Cleo Bauder, Nellie Potts, Beverly Hager, Veronica Brissette, and Joan Menosky actually did receive health benefits that continued after the deaths of their spouses. Comp. ¶¶ 15, 25, 35, 43, 52 (Dkt.1–2); admitted by Defendants in Answer ¶¶ 15, 25, 35, 43, 52 (Dkt.2).

Because a finder of fact could reasonably find a past practice of extending health benefits to a surviving spouse after the death of the retiree, the finder of fact could also reasonably conclude that this practice was a term or condition of employment. Given this genuine issue of fact, summary judgment is not warranted on the third-party beneficiary breach of contract claim.[FN2]

FN2. The City argues, alternatively, that the contract may be rescinded due to mutual mistake of fact. City Mot. at 9 (Dkt.48). However, the City has not pointed out any "fact" about which the parties were mistaken. At most, the City argues that there was some "mistake" by the City in the way it sought to enact legislation for the health benefits that it intended to provide. The City has presented no authority upholding rescission in such circumstances, based on a theory of mutual mistake of fact.

c. Plaintiffs' Claim for Deprivation of a Property Interest Without Due Process

***4** Plaintiffs' claim under 42 U.S.C. § 1983 is premised on an alleged deprivation of Plaintiffs' property interest without the due process of law, giving rise to a procedural due process claim under the Fourteenth Amendment. Plaintiffs also claim a violation of the due process clause of the Michigan Constitution, Article I, § 17.

To prevail on a procedural due process claim, a plaintiff must show (i) a deprivation of a property or liberty interest (ii) that was committed without due process of law. *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). "[T]here are two questions in determining whether a plaintiff has a constitutionally protected property interest sufficient to support a § 1983 claim: first, is there a property interest, stemming from 'an independent source such as state-law rules,' and second, whether that interest, if any, 'rises to the level of a constitutionally protected property interest." *Albrecht v. Treon,* 617 F.3d 890, 896 (6th Cir.2010).

The City contends that Plaintiffs have no cognizable property interest in continued health insurance benefits, and thus their procedural due process claim fails. Def. Br. Mot. for Summ. J. 10 (Dkt.48). Plaintiffs, on the other hand, contend that they have a property interest stemming from (i) the 1976 and 1978 Resolutions passed by the City (Dkt.48–4), and (ii) "mutually explicit understandings" and Plaintiffs' reasonable reliance on promises made by the City. Pl. Resp. Br. 16, 18 (Dkt.51).

i. 1976 and 1978 Resolutions

In 1976, the mayor of the City proposed, and the City Council passed, a resolution:

> that the Director of Finance is hereby authorized to make available Blue Cross/Blue Shield benefits to all retirees, (except Hurley Medical Center retirees) and to surviving spouses receiving pension benefits, excluding those whose spouses retired from Hurley Medical Center.

1976 Resolution (Dkt.48–4). In 1978, a resolution

was passed, which provided:

> that the Director of Finance is hereby authorized to make available a Blue Cross Prescription Rider to all retirees, (except Hurley Medical Center retirees) and to surviving spouses receiving pension benefits, excluding those whose spouses retired from Hurley Medical Center.

1978 Resolution (Dkt.48–4).

Plaintiffs claim that these Resolutions created a property interest in continued health insurance benefits for surviving spouses. The City argues that only an ordinance or a CBA—but not a resolution—may bind the City. Therefore, argues the City, a health insurance benefit provided for by a resolution is a legal nullity and cannot be sustained as a constitutionally protected property interest.

As discussed above, it is state law that determines whether the resolution created a property interest. *Albrecht,* 617 F.3d at 896. The parties agree that the Flint Charter § 3–307 governs. Flint Charter (Dkt.48–5). The charter provides that an ordinance is required for any action "[a]mending or repealing ordinances previously adopted." *Id.* The charter provides that "[o]ther acts may be done either by ordinance or resolution." *Id.* The parties dispute, however, whether the Resolutions amend or repeal an ordinance previously adopted. The ordinance in question is Chapter 35 of the City's Code of Ordinances, which details the City's retirement system (Dkt.48–5). In the City's view, any change with respect to the persons eligible for coverage, or the extent of that coverage, modifies the pre-existing retirement system; thus, the Resolutions are void. In support, the City points to changes to coverage for surviving spouses of "charter retirees" (members of the police and fire departments)—when the City added coverage for surviving spouses, it did so via ordinance. *See* Code of Ordinances § 35–16.2.1 (Dkt.48–5). In the City's view, this method was what was required with respect to non-charter employees.

***5** The Court agrees with the City that the Resolutions amend the pre-existing retirement system, and that the Resolutions are null and non-binding on the City for that reason. The case of *McKane v. City of Lansing,* No. 96–2228, 1998 WL 25002 (6th Cir. Jan.14, 1998) is on point. The City of Lansing's charter, like the Flint Charter, required an ordinance for any action that would amend or repeal any ordinance previously adopted. *Id.* at *4. The Sixth Circuit affirmed the district court's order nullifying the resolution because McKane, the mayor, proposed (and the Lansing City Council passed) a resolution that affected McKane's own retirement benefits, which were already subject to an ordinance previously adopted. The Sixth Circuit held that, in such circumstances, no property interest was created in those retirement benefits. *McKane,* 1998 WL 25002, at ——4–5.

Chapter 35 of the Flint City Code discusses the benefits of retirees. *See* Code of Ordinances § 35–15 (Dkt.48–5). The 1976 and 1978 Resolutions at issue here establish health benefits for both retirees and surviving spouses. Because the 1976 and 1978 Resolutions purported to alter the retirement benefits available to retirees under Chapter 35, the Resolutions amend a prior ordinance and are therefore void ab initio under the Sixth Circuit's decision in *McKane.*

Plaintiffs, however, argue that:

> Section 35–6 defines retirement with a reference to pensions, but without any reference to health insurance benefits. *See* § 35–6 (defining retirement as "[a] member's withdrawal from the employ of the city with a pension payable by the retirement system."). Nor does the language establishing the retirement system make any reference to health insurance benefits, even as it specifically enumerates the other benefits that will be covered by the system. See § 35–7 ("The city employees retirement system, hereinafter referred to as the retirement system, is hereby established **for the purpose of providing retirement allowances and death benefits** to persons holding elective office, the Chief Administrator, appointees of the City Council or appointees of the mayor ...").

Pl. Resp. Br. 14, n. 5 (Dkt.51) (emphasis added). Therefore, Plaintiffs seem to argue that because the retirement system established in Chapter 35 does not specifically mention health insurance benefits, it would be permissible to amend Chapter 35 by resolution as long as the resolution merely adds new material (such as health insurance benefits) instead of altering existing material. *Id.* at 14–15. However, Plaintiffs do not offer any support for this contention, and the Court declines to draw a distinction between altering existing material in an ordinance and adding new material to the subject matter—retirement benefits—that the

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ordinance covers.

Plaintiffs also argue that Chapter 35 is silent with regards to surviving spouses of noncharter retirees, and that the Resolutions were therefore valid in regards to the provisions for surviving spouses. Pl. Resp. Br. At 15 (Dkt.51). However, Chapter 35, which was established by ordinance, created a comprehensive retirement system. A change in persons covered by the system or the extent of coverage constitutes an amendment of the retirement system as a whole. The Court notes that extending retirement benefits to surviving spouses was paired with increasing the retirement benefits for non-charter employees, indicating that the resolutions at issue were intended to alter the retirement system in place. This alteration, however, required an ordinance. *See* *McKane,* 1998 WL 25002, at *4.

***6** Furthermore, the general rule in Michigan is that "resolutions are for implementing ministerial functions of government for short-term purposes. Ordinances are for establishing more permanent influences on the community itself." *Rollingwood Homeowners Corp. v. City of Flint,* 386 Mich. 258, 191 N.W.2d 325, 329 (Mich.1971) (citing *Kalamazoo Mun. Utils. Association v. City of Kalamazoo,* 345 Mich. 318, 76 N.W.2d 1 (1956)). In *McKane,* the Sixth Circuit held that an amendment to a retirement plan—despite affecting only a small group of municipal employees—had long-term effects on the city and its finances, and that "[s]uch long-term, lasting effects cannot be deemed ministerial in nature." [FN3] *McKane,* 1998 WL 25002, at *5. *McKane* indicates that changing retirement benefits is a "long-term" decision that is more suited to action by ordinance than by resolution. Because the Resolutions at issue enacted a long-term, non-ministerial decision, and because they amended a prior ordinance, they should have been enacted by ordinance. The Resolutions are therefore ineffective and did not create a property interest in the benefits.

> FN3. Plaintiff contends that "there is nothing inherently (or remotely) legislative about providing survivor benefits to the spouses of deceased retirees." Pl. Resp. Br. At 13 (Dkt.51). However, this contention is contradicted by the holding of *McKane* .

ii. Mutually Explicit Understandings and Reliance

Promissory estoppel can be used to establish a constitutional property interest for due process purposes. *McKane,* 1998 WL 25002, at *6 ("In some cases, promissory estoppel may be a basis for a property interest under the Due Process Clause.") A constitutional property interest may be found for due process purposes where "there are such rules or mutually explicit understandings that support [the] claim of entitlement to the benefit." *Perry v. Sindermann,* 408 U.S. 593, 601 (1972). Courts have emphasized that property interests "can arise through legitimate and reasonable reliance on a promise from the government." *Hannon v. Turnage,* 892 F.2d 653, 658 (7th Cir.1990) (citing *Perry,* 408 U.S. at 602). Plaintiffs argue that even without the Resolutions, the Court should find that they have a legally cognizable property interest in continued health benefits because of their reliance on the City's representations. The City has not replied to Plaintiffs' contentions regarding a property interest premised on these doctrines.

The Court concludes in its discussion of the promissory estoppel claim below that a trier of fact could find that Plaintiffs reasonably relied on the representations and promises of the City. Thus, a procedural due process claim premised on the same reliance is similarly cognizable. Accordingly, summary judgment for Defendants is not warranted on Plaintiffs' due process claim under 42 U.S.C. § 1983 and Article I § 17 of the Michigan Constitution.

c. Promissory Estoppel

"Under Michigan law, promissory estoppels requires: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Battah v. ResMAE Mortg. Corp.,* 746 F.Supp.2d 869, 875 (E.D.Mich.2010) (citing *Novak v. Nationwide Mut. Ins. Co.,* 235 Mich.App. 675, 599 N.W.2d 546, 552 (1999)). Plaintiffs contend that City officials made promises that they would receive continued health insurance benefits, while the City contends that "Plaintiff cannot establish any actual, clear and definite promise that their health care benefits are interminable or will last forever." City's Mot. at 15 (Dkt.48).

***7** The Court finds that Plaintiffs have presented

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evidence of a promise. Plaintiffs point to letters sent to them bearing letterheads from the City of Flint's Employee Retirement System and the Department of Finance Payroll & Retirement Division, which contain statements such as: “At the time of his retirement, [your spouse] elected Option B that provided $2,625,12 per month. **As beneficiary you will begin receiving that same pension benefit, $2,625.12, per month.** Your pension benefit will continue for your lifetime.” Letters, Ex. F to Pls.' Resp. (Dkt.51–6) (emphasis in original). Plaintiffs have also submitted an affidavit by Georgia Steinhoff, a former employee of the City's Retirement Office, who testified that “[i]f the retiree elected a survivorship option, the surviving spouse was entitled to continued health insurance benefits after the death of the retiree.” Steinhoff Aff., Ex. G to Pls.' Resp. (Dkt.51–7).

Thus, while the City contends that the representations of City employees “make no promises of lifetime benefits” and that Plaintiffs have not explained how these representations induced reasonable reliance, City's Mot. at 15–16, the Court finds that a factfinder could easily conclude that the City made such promises and that the nature of the promises were such that the City should reasonably have expected to induce action in Plaintiffs.

The City contends that the representations made to Plaintiffs in letters from the retirement offices—signed by employees with the titles including “Payroll Technician” and “Employee Benefits Coordinator”—were “unauthorized,” “a mistake,” and not made “by someone authorized to make such a promise.” *Id.* However, a mistake by the City is not fatal to Plaintiffs' claim as long as there was a promise that induces reasonable reliance. In the instant case, it was not unreasonable for a layperson, who has no reason to suspect any impropriety on the part of the city official providing her with information as to her health benefits, to rely on such information. The City argues that the benefits were “something that Plaintiffs knew, or should have known, was not available through their spouse's CBA.” *Id.* The Court disagrees. It is unreasonable to argue that the Plaintiffs should have known that they were not entitled to health benefits when City officials widely shared the view that Plaintiffs were, in fact, entitled to such benefits. *See* City's Mot. at 9 (“Here, both the City and the Plaintiffs were under the mistaken belief that widows of City retirees were entitled to continuation of health insurance benefits after the death of the retiree.”). Given that City officials believed—and represented to Plaintiffs—that Plaintiffs were entitled to health benefits, Plaintiffs cannot be faulted for sharing that belief.[FN4]

FN4. The City's reliance on *Systematic Recycling L.L.C. v. City of Detroit, 685 F.Supp.2d 663 (E.D.Mich.2010)* is misplaced. In that case, the court held that parol statements made by city officials before a written agreement with the city was signed could not be used to undermine the written agreement. Here, there is no issue of a variance between the written agreement and earlier parol statements of city officials; rather, in our case, there is an uncontradicted record of representations of health care benefits.

Thus, the Court concludes that there is ample room for a factfinder to find that the City's representations and practices constituted express or implied promises to Plaintiffs, and that Plaintiffs' reliance was reasonable. Accordingly, summary judgment is not warranted on the promissory estoppel claim.

III. Conclusion

***8** For the foregoing reasons, the City's motion for summary judgment (Dkt.48) is denied.

SO ORDERED.

E.D.Mich.,2012.
Menosky v. City of Flint
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