2012 IL App (3d) 110429-U

Order filed October 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

KEN LARY,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	
	)	
1ST AMERICA - U.S. OPERATIONS,	)	Appeal No. 3–11– 0429
INC., a foreign corporation, and 1ST	)	Circuit No. 10–L–288
METZ HOLDING COMPANIES, a	)	
foreign corporation,	)	
	)	Honorable Michael J. Powers,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment was inappropriate where the pleadings, depositions, and admissions on file, together with the affidavits established the moving party was not entitled to a judgment as a matter of law.

¶ 2 Plaintiff, Ken Lary, appeals from an order entering summary judgment in favor of defendants, 1st America - U.S. Operations, Inc., and 1st Metz Holding Co. We reverse and

remand for further proceedings.

¶ 3 FACTS

¶ 4 Plaintiff was hired by defendants on June 28, 2007, as a sales manager. The parties entered into a written employment contract (the contract). The contract provides, in pertinent part:

> "**1. Term**
>
> The term of employment shall begin on June 28, 2007 and will remain in tact until both parties agree on separation per the outlined criteria contained herein.
>
> ***
>
> **6. Termination**
>
> Employee's employment may be terminated as follows:
>
> a) Death: Employee's employment will terminate upon Employee's death[.]
>
> b) Inability to Perform: IST may terminate Mr. Lary's employment upon his incapacity or inability to perform the essential functions of his position, but only in the event that such inability shall continue for 60 consecutive days or periods aggregating 60 days in any 12 month period because of an impairment of Employee's physical or mental health[.]
>
> c) For Cause: IST may terminate Employee's employment immediately if, in IST's reasonable determination, Employee has

engaged in unlawful activities or any one or several of the following activities: gross neglect of his duties, misconduct, breach of a material provision of this Agreement[.]

d) By Employee: *** [Plaintiff] may terminate his Agreement by giving *** [defendant] two week written notice.

***

9. General Provisions

This agreement constitutes the entire Agreement between the parties and supersedes any other agreement written or oral. The terms of this Agreement may be modified only by subsequent written agreement signed by both parties. In the event that any part of this agreement is declared or rendered invalid by court decision or statute, the remaining provisions of the Agreement shall remain in full force and effect.

10. Governing Law

Illinois law shall govern the interpretation and construction of this Agreement.

¶ 5 According to defendants' vice president, Joe Ooten, defendants were in the process of reviewing implementation of an employee handbook at time plaintiff was hired. The employee handbook was completed after plaintiff was hired. The handbook was implemented on May 15, 2008, and a copy was distributed to each employee, including plaintiff. The handbook provided that all employees were at-will employees.

¶ 6 Defendants unilaterally terminated plaintiff's employment on July 15, 2009. By affidavit, Ooten testified that plaintiff was credited with two sales during his two-year period of employment with defendants. In response to the global economy, defendants began cutting payroll and restructuring its workforce. Plaintiff was one of the employees selected for termination. The basis for plaintiff's termination was poor sales performance.

¶ 7 Following his termination, plaintiff filed a one-count verified complain for breach of contract. Plaintiff alleged that defendants did not have the authority to unilaterally terminate his employment. Defendants filed an answer and motion for summary judgment, alleging that because the contract was indefinite in duration it was terminable at will.

¶ 8 Upon hearing argument, the trial court granted defendants' motion for summary judgment. Specifically, the court stated:

> "THE COURT: *** I think the language in the Supreme Court case of *Duldulao v. St. Mary Nazareth Hospital*[, 115 Ill. 2d 482 (1987)] is controlling. I previously read it to both counsel.
>
> And I think that the Court's interpretation that, where there is not a fixed duration, where my ruling is that there is no fixed duration, that it becomes an employment at will case. And my ruling is the plaintiff has not overcome [the] presumption through anything that has been presented to the Court. So I am going to grant the motion for summary judgment."

¶ 9 ANALYSIS

¶ 10 The sole issue on appeal is whether the trial court properly granted summary judgment for

defendants. We review an order granting summary judgment *de novo*. *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 234 (2005).

¶ 11 The dispute in the instant case arose over the terminability of the contract, with defendants contending the contract was terminable at will and plaintiff contending it could only be terminated for cause. On appeal, plaintiff argues that defendants' unilateral termination of his employment constitutes a breach of the contract because it expressly provided that "[t]he term of employment *** will remain in tact until both parties agree on separation per the outlined criteria contained [t]herein." In response, defendants allege the contract is an agreement with no stated duration and thus is terminable at will.

¶ 12 The supreme court in *Jespersen v. Minnesota Mining and Manufacturing Co.*, 183 Ill. 2d 290, 295 (1998) held that "[w]here parties have failed to agree on a contract's duration, the contract is construed as terminable at the will of either party because they have not agreed otherwise and it would be inappropriate for a court to step in and substitute its own judgment for the wisdom of the parties." The *Jespersen* court also held that "[w]here a contract is indefinite in duration, the delineation of instances of material breach in the context of a permissive and nonexclusive termination provision will not create a contract terminable for cause." *Jespersen*, 183 Ill. 2d at 295.

¶ 13 The distributor in *Jespersen* entered into an exclusive sales distribution agreement with a company that manufactured auto body trim, moldings, and decoration. The agreement provided that it "shall continue in force indefinitely" unless terminated in the manner provided in article IV. Article IV identified events upon which the company "may" terminate the agreement. After the manufacturer purchased the company, it unilaterally terminated the agreement with the

distributor. The distributor subsequently brought an action arguing that because the agreement included specific termination events it could be terminated only for cause. In rejecting this argument, the supreme court found that the agreement was indefinite in duration and thus terminable at will. *Jespersen*, 183 Ill. 2d at 294. Specifically, the court stated:

> "This termination provision is not sufficient to take this agreement of indefinite duration out of the general rule of at-will termination for two reasons. First, the language of the termination provision is permissive and equivocal; a party 'may' terminate for the stated grounds-the clear inference being that those grounds are not the sole or exclusive basis for termination. This is in stark contrast to a case in which the parties included an exclusive and specific right to terminate for cause in an contract otherwise of indefinite duration. [Citation.] Second, the termination events are themselves instances of material breach, and any contract is terminable upon the occurrence of a material breach." *Jespersen*, 183 Ill. 2d at 294.

¶ 14 While defendants rely on *Jespersen* for the proposition that the contract was terminable at will, we find *Jespersen* to be both factually and legally distinguishable. Like *Jespersen*, this contract contains a provision permitting it to be terminated only upon the occurrence of certain events. However, unlike *Jespersen* the contract does not limit those circumstances to material breaches of the contract, which the *Jespersen* court held could not alone convert the contract into one of definite duration. Stated another way, the *Jespersen* court found the termination provision

was insufficient to remove the contract from the rule that it was terminable at will because it merely stated the obvious fact that, like any contract, the distribution agreement was terminable by breach. The contract in the instant case, however, expressly contains a "for cause" provision, which in this case allows termination for reasons in addition to material defaults under the contract. This language acts to create specific occurrences which delimit the contract's term. See *Gateway Equipment Co. v. Caterpillar Paving Products*, Inc., 2000 U.S. Dist. LEXIS 8567 * 31 (2000).

¶ 15 Also unlike *Jespersen*, the contract in the instant case expressly contemplates a second agreement between the parties if (1) none of the certain events occur, and (2) the parties wish to end their employment relationship. Again, section 1 of the contract is entitled "**Term**" and provides that employment will continue "until both parties *agree* on separation." (Emphasis added.) We find the parties' use of the term "separation" in section 1 versus "termination" in section 6 significant. Clearly, the parties, through section 6, intended to define and therefore limit the events whereby defendants would be allowed to unilaterally "terminate" plaintiff's employment. Absent the occurrence of one of these events and defendants' subsequent enforcement of its permissive rights under section 6,[1] plaintiff's employment would continue until the parties agreed to "separate." We find these uncontested facts sufficient to convert the contract into one of definite duration.

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[1] We find the use of the term "may" in section 6 evidences the fact that defendants intended to reserve their right to excuse the occurrence of a "termination" event. Unlike the *Jespersen* court, we do not read the term "may" as evidence of the fact that the parties intended plaintiff's employment to be at-will. *Jespersen*, 183 Ill. 2d at 294.

¶ 16 While we have found *Jespersen* to be distinguishable, we believe our decision is in harmony with the intent espoused in *Jespersen*. The *Jespersen* court went to great lengths to explain that its holding merely reflected the intent of the parties. See *Jespersen*, 183 Ill. 2d at 294-96. It is universally accepted that our duty is to ascertain and give effect to the intent of the parties, which is best determined from the language of the contract. *Murbach v. Noel*, 343 Ill. App. 3d 644, 646 (2003). To hold plaintiff is an at-will employee violates the express intent of the parties and renders section 1 and section 6 of the contract meaningless and superfluous. Courts must construe a contract such that none of its terms are rendered meaningless or superfluous. *Salce v. Saracco*, 409 Ill. App. 3d 977, 982 (2011).

¶ 17 In coming to this conclusion, we offer no opinion on the impact of defendants' subsequent completion and distribution of their employee handbook.[2] We also offer no opinion on whether the alleged reasons for defendant's termination fall within the scope of section 6 of the contract. We only hold that plaintiff was not an at-will employee under the contract.

¶ 18 Accordingly, the trial court's award of summary judgment for defendants was improper and therefore requires reversal and remand for further proceedings.

¶ 19 Reversed and remanded.

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[2] In awarding summary judgment for defendants, the trial court relied upon the holding in *Duldulao*. *Duldulao* has no significant bearing on this appeal, however, as it involved the question of whether the defendant discharged the plaintiff in violation of the terms of an employee handbook. For purposes of this appeal, the *Duldulao* holding is only relevant to the extent that it provides "an employment relationship without a fixed duration is terminable at will by either party." *Duldulao*, 115 Ill. 2d at 489.