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2014 IL App (3d) 130460-U

Order filed June 11, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

STEPHEN M. SMITH, M.D.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois.
	)	
v.	)	Appeal No. 3-13-0460
	)	Circuit No. 12-L-286
CENTRAL ILLINOIS RADIOLOGICAL ASSOCIATES, LTD., an Illinois medical corporation,	)	The Honorable
	)	David J. Dubicki,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The retirement clause, in paragraph 3 of the 2009 "Additional Vacation Time" Memorandum, did not negate the section 2.1 provisions for termination without cause as set forth in the 2000 employment contract.

¶ 2 In 2000, plaintiff-appellant Dr. Stephen M. Smith entered into a full-time employment agreement with defendant-appellee Central Illinois Radiological Associates, Ltd. (CIRA), a medical corporation. The 2000 contract allowed either party to terminate the agreement by

providing 180-days written notice to the other party and was automatically renewable on an annual basis. In 2009, the parties executed a two-page "Memorandum" increasing plaintiff's vacation time, reducing plaintiff to part-time status, and listing alternative potential retirement dates for plaintiff during the next four or five years. Before plaintiff reached the earliest date for retirement in 2013, CIRA issued plaintiff a 180-day written notice terminating plaintiff's employment, without cause, pursuant to section 2.1 of the 2000 contract, effective June 2, 2012. Count I of plaintiff's 2012 complaint sought damages for lost wages and benefits, from June 2, 2012, until January 2014, based on breach of contract.[1]

¶ 3 The court granted CIRA's motion to dismiss count I, pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)), after finding the 2000 contract affirmatively established CIRA's contractual right to terminate plaintiff's services following the 180-day written notice. We affirm.

¶ 4 BACKGROUND

¶ 5 On September 26, 2000, plaintiff entered into a 15-page employment agreement (the 2000 contract) with CIRA requiring plaintiff to maintain regular office hours and work for the corporation on a full-time basis. Section 3 of the 2000 contract did not detail plaintiff's compensation or benefits, but indicated plaintiff's compensation and benefits were "set forth in [CIRA's] Senior Physician Employee Compensation Policy (the 'Compensation Policy')," attached as Exhibit A to the contract. Section 3 of the 2000 contract also stated the Compensation Policy could be amended by CIRA "from time to time."[2] Section 2.1 of the 2000

[1] Counts II and III are not part of this appeal.

[2] Plaintiff's separate "Compensation Policy" is not included as part of the appellate record.

contract included an automatic annual renewal clause with provisions for termination without cause, conditioned on 180 days written notice from either party. Specifically, section 2.1 of the 2000 contract stated:

> "The term of this Agreement [2000 contract] shall commence on the Effective Date and shall continue through December 31, 2000, and shall automatically be renewed from year to year thereafter for successive one-year terms. Notwithstanding the foregoing, either party shall have the right to terminate this Agreement by giving the other party written notice of such termination, by registered or certified mail, return receipt requested, at least one hundred eighty (180) days prior to the effective date of such termination; provided, however, that this Agreement shall also be terminated in accordance with the remaining provisions of the Section 2."

¶ 6 On December 16, 2009, CIRA sent out a "Memorandum" (the 2009 agreement), to all relevant CIRA shareholders noting the "Subject" of this memorandum as "Additional Vacation Time." The document revealed the vacation time for plaintiff and another senior physician, Dr. Carter Young, would increase from 12 to 20 weeks per year beginning on January 1, 2010. Further, the agreement documented that both doctors agreed to accept a corresponding reduction in both compensation and benefits due to their change in status from full-time to part-time employment. Paragraph 3 of the 2009 agreement provided:

> "[Plaintiff] and Dr. Young agreed that they will retire effective January, 2013, or January, 2014. Neither [plaintiff] nor Dr. Young will work in this capacity beyond January, 2014."

Section 4 of the 2009 agreement required quarterly reviews of this part-time arrangement, and provided that the shareholders could discontinue this arrangement if they decided it was not in CIRA's best interest.

¶ 7 Before either contemplated retirement date occurred, CIRA sent plaintiff "Written Notice of Termination, Without Cause," dated December 2, 2011. The 2011 notice informed plaintiff his employment would be terminated, without cause, 180 days after receipt of the notice of termination, pursuant to section 2.1 of the 2000 contract, and advised plaintiff his employment duties would continue for the next 180 days absent further written notice from CIRA.

¶ 8 Subsequently, on April 9, 2012, CIRA sent another letter to plaintiff instructing him, as follows: "Commencing April 9, 2012[,] and extending for the duration of the Notice Period (as defined in the attached correspondence),[3] Dr. Smith shall take any and all remaining personal leave/vacation time for calendar year 2012. Said Notice Period expires on June 2, 2012."

¶ 9 On September 17, 2012, plaintiff filed a three-count complaint against defendant, alleging breach of contract (count I), violation of the Illinois Wage Payment and Collection Act (820 ILCS 115/5 (West 2012)) (count II), and a request for declaratory relief regarding the construction and application of the terms of the 2000 employment agreement (count III). In count I, relevant to this appeal, plaintiff alleged all parties treated the 2009 agreement as "altering, amending, or modifying [the 2000 contract] by setting, accepting, and modifying pay following the issuance of [the 2009 agreement]." Plaintiff argued the 2009 agreement itself operated as the sole required notice of termination without cause by creating a deadline for retirement in January 2014, thereby negating the ability of either party to end the 2000 contract

[3] This "attached correspondence" is not included in the appellate record.

prior to 2014, pursuant to section 2.1 of the 2000 contract. Count I asked the court to award damages resulting from the early termination of plaintiff's employment.

¶ 10 On October 22, 2013, CIRA filed a "Motion to Dismiss Count I of Plaintiff's Complaint," pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), with supporting legal authority and argument. CIRA argued the 180-day notice provision for termination without cause, contained in section 2.1 of the 2000 contract, remained in full force and constituted an affirmative matter allowing CIRA to terminate plaintiff's employment without cause before 2014, after giving plaintiff 180 days written notice.

¶ 11 Following a hearing on CIRA's section 2-619 motion to dismiss, the court issued a six-page handwritten order, finding:

> "The parties agree, for purposes of this motion, that [the 2009 agreement] is to be considered an amendment to [the 2000 contract], and that the modified contract is regarded as creating a new single contract consisting of the terms of the prior contract as the parties have agreed not to change, in addition to the new terms on which they have agreed."

Based on this premise, the court construed both instruments together, and found:

> "Retirement at a specified age or time is but one method of terminating employment. The other methods, set forth in Section 2 of [the 2000 contract], remain in place. Such construction is the only way to give meaning and effect to Section 2 of [the 2000 contract].
>
> The modification provided by Section 3 of [the 2009 agreement] is not inconsistent with the termination provisions of Section 2 of [the 2000 contract]. Richard W. McCarthy Trust, [citation] (modification must be

> inconsistent with a term of a prior contract before such prior term is considered 'rescinded.') As noted above, Section 3 of [the 2009 agreement] simply added mandatory retirement dates [emphasis in original], which dates had not been set in [the 2000 contract]. Setting such mandatory retirement dates in no way rescinds Section 2 of [the 2000 contract]."[4]

The court then granted CIRA's section 2-619 motion to dismiss count I of plaintiff's complaint.

¶ 12 On March 19, 2013, by stipulation of the parties, the court order included Rule 304(a) language (S. Ct. R. 304(a) (eff. Feb. 26, 2010)) and found there was no just reason to delay enforcement or the appeal of the ruling granting CIRA's motion to dismiss count I of plaintiff's complaint, while counts II and III remained pending. Plaintiff filed a timely appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, the parties agree the language incorporated into the 2009 agreement was unambiguous. They further agree the modification did not affect annual automatic renewal provisions contained in section 2.1 of the 2000 contract. Plaintiff submits the 2009 agreement acted as a modified, new 5-year notice of "termination without cause" that operated to rescind and replace the 180-day notice requirement contained in section 2.1 of the 2000 contract. Therefore, plaintiff contends the trial court could not rely on the rescinded portion of section 2.1 of the 2000 contract, allowing for termination without cause upon 180 days written notice, as an affirmative matter warranting the dismissal of count I pursuant to section 2-619(a)(9). 735 ILCS 5/2-619(a)(9) (West 2012).

[4] Section 2.2 details 10 separate grounds for CIRA to immediately terminate an employee for cause without notice.

¶ 15 CIRA argues the length of advance notice set out in section 2.1 of the 2000 contract was not modified by the 2009 agreement. Consequently, CIRA did not breach the modified contract by termination of plaintiff's employment in 2012 following 180-days written notice. Therefore, CIRA submits section 2.1 of the 2000 contract constituted an "affirmative matter" warranting the involuntary dismissal of count I, pursuant to section 2-619(a)(9) of the Code.

¶ 16 The involuntary dismissal of actions pursuant to section 2-619(a)(9) provides a mechanism to dispose of issues of law or easily proved issues of fact early in the litigation. *Coles-Moultrie Electric Co-op v. City of Sullivan*, 304 Ill. App. 3d 153, 158 (1999). This section permits involuntary dismissal where the "claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). An "affirmative matter," under section 2-619(a)(9) of the Code, "refers to something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Rogalla v. Christie Clinic, P.C.*, 341 Ill. App. 3d 410, 422 (2003) (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999)).

¶ 17 We review *de novo* the trial court's granting of a section 2-619 motion to dismiss. *Id.*; *Guzman v. C.R. Epperson Construction, Inc.*, 196 Ill. 2d 391, 397 (2001). Further, any issue concerning the construction, interpretation, or legal effect of a contract is also a matter to be determined by the court as a question of law and is subject to *de novo* review on appeal in accordance with the general rules applicable to contract law. *Avery v. State Farm Mutual Automobile Insurance, Co.*, 216 Ill. 2d 100, 129 (2005); *Richard W. McCarthy Trust v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 534-35 (2011).

¶ 18 Existing case law provides guidance with respect to whether a subsequent agreement cancels provisions of a previous contract between the same parties. This court held:

> "A modification of a contract is a change in one or more aspects of a contract that introduces new elements into the details of the contract or cancels some of them but leaves the general purpose and effect of the contract undisturbed. [Citation]. Parties to a contract are generally free to modify the contract by mutual assent or agreement, as long as the modification does not violate law or public policy. [Citation]. 'Under Illinois law, a valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration.' [Citation]. When a modification is inconsistent with a term of a prior contract between the same parties, the modification is interpreted as including an agreement to rescind the inconsistent term in the prior contract. [Citation]. 'The modified contract is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed.' " *Richard W. McCarthy Trust v. Illinois Casualty Co.,* 408 Ill. App. 3d 526, 533-34 (2011) (quoting *Schwinder v. Austin Bank of Chicago,* 348 Ill. App. 3d 461, 468-69 (2004)).

¶ 19 Before construing the 2009 agreement together with the 2000 contract in order to ascertain the intention of the parties to the modified contract, we next consider the meaning of the term "retirement." In *Dow v. Columbus-Cabrini Medical Center,* the court recognized "[r]etirement is not exclusively the act of concluding one's employment, but is also a status

based on age and length of service which distinguishes an employee from the class of active employees." *Dow v. Columbus-Cabrini Medical Center,* 274 Ill. App. 3d 653, 658 (1995). Moreover, the *Dow* court held "the act of retirement is itself neutral, and may be either voluntary or mandatory." *Id.*

¶ 20 We agree with the rationale in *Dow* and also recognize retirement is a unique method to end longstanding employment relationships due to the advancing age of an employee that can be unrelated to job performance. Here, in 2000, the parties did not include any provisions concerning plaintiff's retirement. Thus, for the reasons discussed below, we affirm the trial court's dismissal of count I.

¶ 21 First, the purported newly created five-year notice to terminate without cause exceeds the 12-month duration of the entire contract, subject to automatic annual renewal. It seems illogical to end a one-year contract with a five-year notice.

¶ 22 Second, it is apparent the 2009 agreement memorialized CIRA's decision to allow plaintiff's request for a workload reduction. Thus, the 2009 agreement had a narrow purpose to modify plaintiff's status from full-time to part-time, subject to quarterly review, and adopted a flexible, but long-term plan for plaintiff to be allowed to retire in January 2013 or January 2014.

¶ 23 Third, if we construe the modified contract as plaintiff suggests, it would be impossible for plaintiff to provide CIRA with a five-year notice of his intent to retire in four years on January 2013. Thus, plaintiff's proposed interpretation is contrary to the intent expressed in the 2009 agreement, which clearly allowed for plaintiff to potentially retire, four years in the future, in 2013.

¶ 24 Fourth, when construing contract language, the case law instructs that courts will "avoid the friction that would be caused by compelling an employee to work, or an employer to hire or

retain someone against their wishes." *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill. App. 3d 901, 905 (1979). Clearly, the 2000 contract contemplated a one-year contractual relationship, subject to automatic renewal, rather than a finite, five-year commitment from plaintiff or CIRA. To construe this 2009 agreement as suggested by plaintiff, would be contrary to public policy and would compel plaintiff to remain an employee of CIRA for four or five years, even though the contract bound each party to each other, for one year, subject to automatic renewal.

¶ 25 After carefully reviewing and construing the language of both the 2000 contract and the 2009 agreement together, it becomes clear that the 2009 agreement added a long term, but somewhat indefinite, contingency plan for plaintiff's future retirement. Applying the rules of construction, we conclude the indefinite language of the 2009 agreement relating to plaintiff's future retirement was not intended to modify section 2.1 of the 2000 contract. In fact, it seems the 180-day written notice, set out in section 2.1, would be the appropriate method for either party to elect a date of plaintiff's retirement, during the month of January, in either 2013 or 2014.

¶ 26 Therefore, we conclude CIRA complied with the viable language contained in section 2.1 by serving plaintiff with the required 180-days advance written notice advising plaintiff his services would no longer be needed after June 2, 2012. Since CIRA complied with the unmodified provisions of the 2000 contract, this compliance constituted an affirmative matter warranting the involuntary dismissal of count I as provided by section 2-619(a)(9) of the Code.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the decision of the trial court granting CIRA's motion to dismiss count I of plaintiff's complaint.

¶ 29 Affirmed.