In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

06-19-00107-CV

DENNIS SMITH, Appellant

V.

HERITAGE CONSTRUCTORS, INC., Appellee

On Appeal from the 102nd District Court
Bowie County, Texas
Trial Court No. 18C0696-102

Before Morriss, C.J., Burgess and Moseley,* JJ.
Memorandum Opinion by Chief Justice Morriss

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*Bailey C. Moseley, Justice, Retired, Sitting by Assignment

MEMORANDUM OPINION

In conjunction with the sale of his stock in Heritage Constructors, Inc., Dennis Smith executed an employment agreement with Heritage. Almost eight months later, Heritage terminated Dennis's employment. Dennis filed this suit for damages and alleged that Heritage had breached the employment agreement when it terminated his employment without cause. In this appeal, Dennis complains that the trial court erred when it granted Heritage summary judgment and dismissed his claims. Because we find that the employment agreement allowed Heritage to terminate Dennis's employment without cause, we affirm the trial court's judgment.

In 1980, Dennis founded Heritage, which builds water and wastewater treatment plants in Arkansas, Oklahoma, and Texas. Dennis co-owned Heritage until 1985, when he became its sole shareholder. In the late 1980s, Dennis's brother, Carl, began buying into the business. By the early 1990s, Dennis and Carl were co-owners, with Dennis owning fifty-one percent of the stock and Carl owning the remaining forty-nine percent.

In the spring of 2017, Lamar Companies, LLC (Lamar), began negotiating with Dennis and Carl to purchase Heritage. As set forth in a letter of intent (LOI),[1] Lamar initially proposed to purchase the assets of Heritage and to employ Dennis and Carl by written employment agreements committing to be employees of Lamar for five years, with five-year non-competition agreements in favor of Lamar. Ultimately, Lamar bought all of the stock of Heritage owned by Dennis and

[1]The LOI contained two parts. Part One was titled "Non-Binding Provisions," and Part Two was titled "Binding Provisions." Part One included provisions that Heritage would sell substantially all of its assets to Lamar, that Dennis and Carl would execute employment agreements and agree to be employees of Lamar for five years, that Dennis and Carl would execute five-year non-competition agreements in favor of Lamar, and that Lamar would lease the real property occupied by Heritage for twelve months.

Carl through a stock purchase agreement (SPA) in which Dennis received $510,000.00 and Carl received $490,000.00. The SPA also required Dennis and Carl to execute the employment agreement with Heritage.

The employment agreement was effective July 1, 2017. It set forth the term of employment as follows:

> **Section 2. Term of Employment.** Unless earlier terminated in accordance with the terms of this Agreement, and even though Employee is currently employed by the Company, for purposes of this Agreement, the Employee's employment with the Company shall be deemed to have commenced on July 1**,** 2017 (the **"Employment Date")** and shall end on the fifth-year anniversary of the Employment Date (hereinafter the "**Initial Employment Period");** provided, however, that the Company and the Employee may mutually agree in writing to extend the term of this Agreement for successive one-year periods following the Initial Employment Period. The Initial Employment Period and any renewal periods (individually and collectively, the **"Employment Period")** are subject to the termination provisions of this Agreement.

Regarding termination of employment, the employment agreement provided:

> **Section 5. Termination of Employment.**
>
> (a) All Accrued Benefits[2] to which the Employee (or his estate or beneficiary) is entitled as of the date of termination shall be payable in cash promptly on termination of the Employee's employment, except as otherwise specifically provided herein, or under the terms of any applicable policy, plan or program. Further, if Employee's employment with the Company is terminated by the Company without Cause before the termination of the Initial Employment Period, any Annual Bonus earned, but not yet paid, for the calendar year

[2]The employment agreement defines "Accrued Benefits" as

> (i) all salary earned or accrued through the date that the Employee's employment is terminated, (ii) reimbursement for any and all monies advanced in connection with the Employee's employment for reasonable and necessary expenses incurred by Employee through the date the Employee's employment is terminated and (iii) all other compensation and benefits earned by the Employee under the terms of any applicable compensation arrangement or benefit plan or program of the Company through the date the Employee's employment is terminated.

preceding the year of termination will be payable in cash within ninety (90) days from the date of termination.

(b) Any termination by the Company, or by the Employee, of the Employee's employment shall be communicated by written notice of such termination in compliance with the requirements of Section 20 herein.

(c) If, prior to the expiration of the Initial Employment Period, the Employee's employment is terminated by the Company for any reason (other than Cause, or a termination as a result of the Employee's death or permanent disability) then, if within ten (10) days of termination of employment the Employee executes and provides to the Company a Release the Employee shall be entitled to receive from the Company a pro rata amount of the Annual Bonus that would have been paid to him in accordance with the terms of the Annual Bonus had Employee been employed for the applicable full year period. Such pro rata Annual Bonus, if any, shall be paid at the time that the annual Bonus would have been paid to the Employee had he remained employed for the full year period. For the avoidance of doubt, if the Employee would not have been entitled to an Annual Bonus had he remained employed with the Company, then the Employee shall not receive anything under this clause 5(c)(ii).

(d) Notwithstanding anything else contained herein, if the Employee voluntarily terminates his employment, the Company terminates the Employee's employment for Cause, or the Employee's employment is terminated by reason of death or permanent disability, all of Employee's rights to any prorated Annual Bonus for the year in which Employee's employment is terminated shall terminate immediately.

(e) The terms of Section 6 (Confidentiality), Section 7 (Non-compete), and Section 13 (Non-Disparagement) will survive the termination of this Agreement.

The employment agreement set forth ten acts or omissions by Dennis that were defined as "Cause."[3] It also contained a merger clause:

[3]Section 1 of the employment agreement provided:

> "Cause" means (i) the Employee's conviction of any crime or pleas of *nolo contendere* (other than for minor traffic offenses and other similar minor infractions and other than the Employee's first conviction or plea of *nolo contendere* for driving while intoxicated or a similar offense; it being understood that any additional convictions for such offense shall constitute "Cause"), (ii) the

> **Section 23. Entire Agreement.** This Agreement and those documents expressly referred to herein constitute the entire Agreement among the parties and supersede any prior correspondence or documents evidencing the negotiations between the parties, whether written or oral, and any and all understandings, agreements or representations by or among the parties, whether written or oral, that may have related in any way to the subject matter of this Agreement.

The only document expressly referred to in the employment agreement was the SPA.

Before the stock purchase by Lamar, wastewater treatment plant projects valued between two and five million dollars had been Heritage's "sweet spot." Dennis and Carl were the only employees of Heritage capable of bidding on multimillion-dollar wastewater treatment plants. Nevertheless, between July 1, 2017, and March 27, 2018, Dennis did not independently bid on any such projects that were valued over two million dollars. Dennis testified that he successfully bid on seven projects in the last half of 2017 and two projects in the first quarter of 2018 that had a combined value of about $475,000.00.

> Employee's breach of his obligations under this Agreement, (iii) the Employee's refusal or failure to perform his duties as an employee of the Company for a reason other than mental or physical disability, (iv) the failure by the Employee to perform such duties as are reasonably requested by your supervisor (including oral or other instructions), (v) the failure by the Employee to observe Company policies, (vi) the unauthorized absence of Employee from work (other than for sick leave or disability) for a period of 30 working days or more during any period of 45 days during the term of this Agreement; (vii) the Employee's negligence; (viii) Employee's fraud, dishonesty, willful misconduct, breach of fiduciary duty involving personal profit, willful violation of any law, rule or regulation, or action (or omission) involving moral turpitude and reflecting unfavorably upon the public image of Company and/or its Subsidiary, or action (or omission) aiding or abetting a competitor, supplier, or customer of Company or its Subsidiaries to the detriment of Company or its Subsidiaries, (ix) the misconduct by Employee that could be injurious in any significant respect to the reputation of the Company or its Subsidiaries, as determined in good faith by the Board, or (x) Employee's publication of a statement, whether oral or written, to anyone other than a member of the Company, which statement would libel, slander, disparage, defame, denigrate, ridicule, or criticize the Company, any of its affiliates, or any of their employees, officers or directors. Notwithstanding the above, the occurrence of events specified in clauses (ii), (iii), (iv) and (v) above that are capable of being cured shall not constitute Cause unless the Company gives the Employee written notice that such event constitutes Cause, and the Employee thereafter fails to cure such event within thirty (30) days after receipt of such notice.

In March 2018, Sanderson Farms (Sanderson) invited Heritage to bid on a project in Tyler. Carl instructed Dennis to attend the pre-bid conference. Dennis attended the pre-bid conference, and after a conversation with Sanderson's engineer, he decided not to bid on the project. When Brad Drake, the chief executive officer of Lamar, learned that Dennis had not bid on the Sanderson project, he went to Heritage's office and gave Dennis a letter terminating his employment. The termination letter stated that Heritage was terminating Dennis's employment as of March 27, 2018, and explained:

> Your employment is at-will, which allows Heritage to end the employer-employee relationship without notice and without reason. This letter serves as a confirmation of such termination and is being provided in accordance with Section 5(b) of the Employment Agreement. As required by the Employment Agreement, Heritage will pay you all Accrued Benefits (as that term is defined in the Employment Agreement) through March 27, 2018.

Dennis filed this suit and alleged that Heritage had breached the employment agreement by terminating his employment before the end of the five years.[4] Dennis contended at trial and contends on appeal, that Heritage breached the employment agreement when it terminated his employment without cause. Heritage filed a motion for summary judgment and asserted that, as a matter of law, there was no breach since the employment agreement allowed Heritage to terminate Dennis's employment without cause and that it was undisputed that Heritage had paid Dennis everything required by the employment agreement required for a without-cause termination.[5] After a hearing, the trial court granted Heritage's motion and dismissed Dennis's cause of action.

[4]Dennis also sought a declaratory judgment that the non-compete clause in the employment agreement was unenforceable. However, Heritage asserted, and Dennis did not dispute, that the issues regarding that claim had been resolved by the parties.

The grant of a summary judgment is subject to de novo review by appellate courts. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In our review, we deem as true all evidence which is favorable to the nonmovant, we indulge every reasonable inference to be drawn from the evidence, and we resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When the trial court does not specify the basis for its ruling, we must affirm a summary judgment if any of the grounds on which judgment is sought are meritorious. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

To be entitled to traditional summary judgment, a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Once the movant produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010). "Where, as here, a trial court does not specify the grounds on which it granted the motion for summary judgment, we must affirm if any of the grounds asserted in the motion are

[5]In his brief, Dennis does not dispute that he was paid all that was owed to him under the employment agreement for a without-cause termination.

meritorious." *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017) (citing *Provident Life*, 128 S.W.3d at 216).

It has long been the rule in Texas "that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee for good cause, bad cause, or no cause at all." *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (citing *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (per curiam); *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 723 (Tex. 1990); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734–35 (Tex. 1985); *East Line & R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888)). To overcome this presumption, it must be shown that the employer has "unequivocally indicate[d] a definite intent . . . to be bound not to terminate the employee except under clearly specified circumstances." *Midland Judicial Dist. Cmty. Supervision & Corrections Dep't v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002) (per curiam) (quoting *Brown*, 965 S.W.2d at 502).

This case requires that we construe the provisions of the employment agreement. "We construe unambiguous contracts as a matter of law." *Hansen*, 525 S.W.3d at 681 (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). We will enforce an unambiguous contract as written, and we will not consider parol evidence "for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *Id*. (quoting *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008)). We consider only the parties' interpretation of the contract and extrinsic evidence to determine the meaning of the contract's terms after we have determined the contract is ambiguous. *Id*. (citing *Haden*, 266 S.W.3d at 450–51).

Summary judgment is proper "[w]hen the controversy can be resolved by proper construction of an unambiguous document." *Id*. (citing *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000)). However, "if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent." *Id*. (quoting *J. M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996))).

To determine the parties' intent, we examine the entire writing and attempt to harmonize all the relevant provisions of the contract so that all are given effect and no provision is rendered meaningless. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (citing *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951)). "No single provision taken alone will be given controlling effect; rather all the provisions must be considered with reference to the whole instrument." *Id.* (citing *Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962); *Citizens Nat'l Bank in Abilene v. Tex. & P. Ry. Co.*, 150 S.W.2d, 1003, 1006 (Tex. 1941)).

Dennis asserts that the trial court erred in granting Heritage summary judgment because (1) any presumption of an at will contract was rebutted, and (2) conflicting contract provisions created a fact issue. We disagree.

Section 2 of the employment agreement provides that Dennis will be employed by Heritage, "[u]nless earlier terminated in accordance with the terms of this Agreement," for an

"Initial Employment Period" (Initial Period) of five years beginning July 1, 2017.[6] It also provides that the parties may agree in writing to extend the employment agreement for successive one-year periods after the Initial Period and that both the Initial Period and any renewal periods "are subject to the termination provisions of this Agreement."

Sections 4 and 5 of the employment agreement set forth the varying consequences of Dennis's termination of employment, depending on the manner of termination. Section 5(a) provides that, if Dennis was terminated by Heritage "*without Cause*" before the end of the Initial Period, then Dennis would receive any accrued benefits to which he was entitled and any earned annual bonus from the preceding year that had not already been paid. Under Section 5(c), if Dennis was terminated by Heritage "*for any reason (other than Cause)*"[7] and Dennis provided Heritage a release within ten days of the termination, Dennis could also receive a pro rata amount of the annual bonus that would have been paid to him had he worked the "applicable full year period." Finally, under Sections 4(b) and 5(d), if Dennis voluntarily terminated his employment or if Heritage terminated his employment "*for Cause*," Dennis would not be paid a prorated annual bonus, and, if the aggregate net-net income of Heritage at the time of termination was a net loss, Dennis would owe Heritage the lesser of fifteen percent of the net loss or the aggregate of all

[6]A contract for employment that provides for the payment of a certain sum per a certain period of time does not always constitute a promise of employment for that period of time, but "is presumed to be at-will in Texas absent an unequivocal agreement to be bound for that [period of time]." *Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 332 (Tex. 2006) (citing *Midland Judicial Dist. Cmty. Supervision v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002) (per curiam)).

[7]Under an employment contract that provides that employment may be terminated "without cause," termination of employment may be based on any reason or no reason at all. *See Hansen*, 525 S.W.3d at 683. Consequently, under the employment agreement, if Dennis was terminated without cause, or for any reason other than cause, he could receive the benefits provided in both Sections 5(a) and 5(c) if he met the other conditions set forth in those sections.

annual bonuses previously paid to him. As previously noted, the employment agreement defines "Cause" as any of ten specified acts or omissions by Dennis.

No other provision in the employment agreement[8] or the SPA addresses the rights of the parties to terminate Dennis's employment. Construing Section 2 with Section 5, the employment agreement provides that, during the initial five-year period, Dennis's employment could be terminated by Heritage either without cause or for cause (as defined in the employment agreement), or by Dennis's voluntary act. There is no language in Sections 2, 4(b), or 5, or in the definition of "Cause," that indicates Heritage intended to bind itself to only terminate Dennis's employment for cause.

In reviewing the employment agreement and the SPA, we find that they do not unequivocally indicate the intent that Heritage be bound not to terminate Dennis's employment except for clearly specified reasons. To the contrary, the employment agreement unambiguously indicates that Heritage had the right to terminate Dennis's employment without cause.

Nevertheless, Dennis argues that the employment agreement was part of the purchase price under the SPA and that the parties intended that Dennis would be employed by Heritage for five

[8]Dennis asserts that Section 7 also addresses the parties' termination rights. He argues that Section 7 significantly limited his ability to terminate his employment without continuing liability, i.e., he would not be able to compete with Heritage for two years. Section 7 is a non-competition provision that survives the termination of the employment agreement pursuant to Section 5(e). Section 7 provides that its terms apply during Dennis's employment "and for a period equal to two (2) years following [his] termination of employment with [Heritage]." Section 7 does not define the scope of "termination of employment." When construed with Sections 2 and 5, "termination of employment" appears to include termination by Heritage with or without cause, termination by Dennis, and termination as a result of the non-renewal of the employment agreement at the expiration of the term of the Initial Period or any subsequent renewal period. In Texas, an at-will employee may enter into an enforceable non-competition agreement. *See, e.g.*, *Sheshunoff v. Johnson*, 209 S.W.3d 644 (Tex. 2006). Consequently, the non-competition clause in the employment agreement does not address the termination rights of the parties. We do not express any opinion regarding the enforceability of Section 7 in this case.

years. However, the SPA does not support this contention. The purchase price is addressed in two sections of the SPA. Section 1.2 provides, "The purchase price . . . for the Shares is $1,000,000, and payable in cash to the Sellers, pro rata, at Closing." Dennis does not dispute that he received this payment. The SPA also requires that, at closing, Dennis and Carl, as sellers, were to deliver to Lamar, as buyer, "[a]n employment agreement with [Heritage] executed by each of" them. However, although the employment agreement was integral to the transaction, there is nothing in the SPA that indicates that Dennis was guaranteed to be employed by Heritage for five years or that Heritage could not terminate Dennis's employment except for clearly specified reasons.

Dennis also argues that we should consider the parties' testimony regarding the pre-agreement negotiations and the LOI and find that his employment and salary over five years was a part of the purchase price of his stock. However, we have determined that the employment agreement is unambiguous regarding Heritage's right to terminate Dennis's employment without cause. Consequently, we may not consider this extrinsic evidence. *See Hansen*, 525 S.W.3d at 681.

In addition, Section 23 of the employment agreement, as set forth above, provides that the employment agreement and the SPA constitute the entire agreement of the parties and supersede all prior documents, negotiations, agreements, and representations of the parties on the subject matter, whether written or oral. Such a clause is commonly referred to as a merger or integration clause. *Fitts v. Richards-Smith*, No. 06-15-00017-CV, 2016 WL 626220, at *13 (Tex. App.—Texarkana Feb. 17, 2016, pet. denied) (mem. op.). When an agreement contains such a clause, we presume that all prior agreements and negotiations have been merged into the agreement, and the

agreement "will be enforced as written, and cannot be added to, varied, or contradicted by parol evidence." *Id.* (quoting *Barker v. Roelke*, 105 S.W.3d 75, 83 (Tex. App.—Eastland 2003, pet. denied) (citing *Smith v. Smith*, 794 S.W.2d 823, 827–28 (Tex. App.—Dallas 1990, no writ))).

In support of his contention that the employment agreement contains conflicting provisions, Dennis asserts that our interpretation of Section 5 renders the definition of cause in the employment agreement meaningless, without explanation. However, it is clear that the definition of cause is important in determining Dennis's rights under Section 5, since those rights are dependent on whether he is terminated with cause or without cause.[9]

Dennis also dismisses Section 5 as merely an attempt by Heritage to limit its damages in the event it breached the employment agreement. However, Dennis does not explain how Section 5 can be construed to be a limitation of damages clause. Although Section 5 specifies what accrued benefits and annual bonus Dennis would receive if terminated without cause and that he would not receive any current year annual bonus if terminated for cause, there is no language in Section 5 that limits Dennis's entitlement to damages in the event of a breach by Heritage. We believe it is implausible to construe Section 5 as merely a limitation on damages in the event of breach.

Finally, Dennis argues that there is a fact question of whether Heritage had the right to terminate his employment without cause because he could not voluntarily terminate his own employment without penalty. Dennis asserts that "[t]he hallmark of an agreement that is at-will is that either party may terminate without any reason *or penalty* end [sic] their relationship."

[9]An employment contract may alter an at-will employee's rights conditioned on whether he is terminated with cause or without cause. *See Hansen*, 525 S.W.3d at 682–83 (providing for differing procedural rights when employee terminated for cause versus termination without cause).

However, Dennis does not cite any authority that supports his contention that requiring an at-will employee to pay a penalty (such as a portion of his annual bonus) if he resigns rebuts the presumption that the employment is at-will. At least one federal court applying Texas law has held to the contrary. *See Archibald v. Virginia Transformer Corp.*, No. 3:17-CV-00286, 2018 WL 3370656, at *3 (S.D. Tex. June 11, 2018) (mem. op.).

Dennis points to Section 4(b), which provides that, in the event Dennis voluntarily terminated his employment or Heritage terminated him for cause, and the aggregate net-net income of Heritage at the time of termination was a net loss, Dennis would owe Heritage the lesser of fifteen percent of the net loss or the aggregate of all annual bonuses previously paid to him. Although this section could have penalized Dennis in certain circumstances, nothing in this section unequivocally indicates an intent by Heritage to be bound to only terminate Dennis's employment for clearly specified reasons.

Our review of the employment agreement and the SPA shows that they do not unequivocally indicate the intent that Heritage be bound not to terminate Dennis's employment except for clearly specified reasons. Rather, the employment agreement unambiguously indicates that Heritage had the right to terminate Dennis's employment without cause. Consequently, we find that the trial court properly granted summary judgment. We overrule Dennis's issues.

For the reasons stated, we affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 3, 2020
Date Decided: July 14, 2020