2018 IL App (1st) 170400-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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Appellate Court of Illinois,
First District,
SECOND DIVISION.

Kevin HENNING, et al., Plaintiffs–Appellants,
v.
SMITHFIELD CONSTRUCTION GROUP, INC., et al., Defendants–Appellees.

No. 1–17–0400
|
June 14, 2018

Appeal from the Circuit Court Of Cook County. No. 16 CH 1307, The Honorable Margaret Ann Brennan, Judge Presiding.

ORDER

JUSTICE NEVILLE delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court dismissed an employee's complaint against his former employer. The trial court found that the employee's rights at issue had not vested, because the employee had not worked for the employer for four years. Applying the last antecedent rule, the appellate court held that the four-year requirement took effect only if the employee voluntarily left the job, and not if the employer fired the employee without cause. Because the employee adequately alleged that the employer lacked cause to fire him, the appellate court reversed the order dismissing the complaint.

¶ 2 Kevin Henning filed a complaint against his former employer, Smithfield Construction Group (SCG), alleging in some counts that he had exercised an option to invest in an SCG affiliate, and the affiliate had refused to include him in its distribution of profits. The circuit court dismissed those counts of the complaint, finding that Henning had to work for SCG for four years to acquire a vested interest in the affiliate. We interpret the contracts in light of their punctuation and the last antecedent rule, and we find that the four-year requirement applied only if Henning turned down an offer to continue his employment with SCG, and not in the circumstances of this case, where SCG fired Henning. Accordingly, we reverse the circuit court's judgment and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On April 29, 2013, Henning and SCG entered into an agreement for Henning to work for SCG for three years in exchange for a salary of $120,000 per year. The employment agreement also gave Henning the opportunity to invest in certain affiliates of SCG. On December 31, 2013, Henning exercised the option. He signed a purchase agreement for a share of an SCG affiliate named Smithfield Chicago LaSalle LLC (SCL). Henning set up a corporation he named 1648 N. Fairfield LLC (Fairfield) to own his share of SCL.

¶ 5 On October 5, 2015, SCG sent Henning written notice of the termination of his employment, effective as of September 3, 2015. Henning's attorney sent SCG a letter accusing SCG of breaching the employment agreement. SCG answered that it had terminated Henning for cause, as defined in the employment agreement.

¶ 6 In October 2016, Henning and Fairfield filed a complaint, naming as defendants SCG, SCL, a member of SCL named the Level 5 Trust, and others. The plaintiffs alleged that on September 3, 2015, William Smith, owner of SCG, fired Henning without cause, and without giving any reason for firing Henning. The plaintiffs also alleged that SCL sold assets in June 2016, and SCL distributed the proceeds of the sale to its members other than Fairfield. In count I of the complaint, Henning sought compensatory damages for his lost wages and health insurance based on the termination of his employment. In count II, Fairfield charged SCL with breaching its operating agreement when it distributed sale proceeds to all members other than Fairfield. Fairfield accused SCL of improperly refusing Fairfield's request to inspect SCL's accounts in count III, and in count IV, Fairfield accused SCL of breaching its fiduciary duties to Fairfield. According to count V, Fairfield's share of the June 2016 distribution went to the Level 5 Trust, and Fairfield sought to recover its share

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from Level 5. Finally, in count VI, Fairfield sought to recover its share of the June 2016 distribution on a theory of conversion.

***2** ¶ 7 The defendants filed a motion under section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 2016)) for partial judgment on the pleadings. The defendants claimed that the documents attached to the complaint, including the employment agreement, the purchase agreement, and the termination notice, established that after September 3, 2015, Henning and Fairfield had no ownership interest in SCL. They claimed that a clause in the employment agreement provided that the plaintiffs' interest in SCL would not fully vest unless Henning worked for SCG for four years after he exercised the option to purchase a share of SCL. The defendants pointed out that counts II through VI of the complaint all depended on Fairfield's ownership interest in SCL. On February 9, 2017, the circuit court entered an order granting the defendants judgment on counts II through VI of the complaint. The court added a finding, pursuant to Illinois Supreme Court Rule 304(a)(eff. Nov. 1, 2017), that there was no just cause to delay appeal from the judgment, which completely disposed of all of Fairfield's claims. The plaintiffs filed a timely notice of appeal. The parties subsequently settled the remaining claims in count I of the complaint.

¶ 8 ANALYSIS

¶ 9 Supreme Court Rule 304(a) gives this court jurisdiction to decide the appeal. Ill. S. Ct. R. 304(a) (eff. Nov. 1, 2017). We review de novo the order granting the section 2–615 motion to dismiss the complaint. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. [Citation.] We also construe the allegations in the complaint in the light most favorable to the plaintiff. [Citation.] Thus, a cause of action should not be dismissed pursuant to section 2–615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall*, 222 Ill. 2d at 429.

¶ 10 The defendants argue that the purchase agreement incorporates the employment agreement, and the employment agreement establishes that by firing Henning less than four years after he exercised the equity participation option, SCG extinguished his equity participation in SCL. The plaintiffs argue that the purchase agreement does not incorporate the employment agreement. We find that even if the purchase agreement incorporates the employment agreement, we must reverse the judgment entered in favor of the defendants, because the employment agreement establishes that if SCG fired Henning without cause, his equity participation continues until he disposes of it.

¶ 11 The purchase agreement provides:

> "THIS PURCHASE AGREEMENT * * * is made as of December 31, 2013 by and between [the] TRUSTEE OF THE LEVEL 5 TRUST ('Assignor'), and 1618 N FAIRFIELD LLC('Assignee').
>
> * * *
>
> A. Assignor is a Member owning * * * interests (the 'Membership Interest') in SMITHFIELD CHICAGO LASALLE LLC, an Illinois limited liability company (the 'Company') * * *.
>
> B. Assignee is an Illinois limited liability company, the sole member of which is Kevin Henning, an employee of Smithfield Construction Group, Inc. pursuant to an Employment Agreement dated as of April 29, 2013 ('Henning Employment Agreement'). Under Section 3(a)(v) of the Henning Employment Agreement, Assignee may elect to purchase up to five percent (5%) of the ownership interest of an Affiliate (as defined therein and which would include Assignor) in certain real estate development entities formed during the Term of the Henning Employment Agreement, including the Company, subject to the Operating Agreement for the Company, and Assignee has elected to purchase five percent (5%) of Assignor's Membership Interest in the Company (collectively, the 'Henning Interest') * * *.
>
> NOW, THEREFORE, for and in consideration of the payment by Assignee of the sum of $219,098.25, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee agree as follows * * *.
>
> 1. Purchase, Sale and Assignment.

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(A) Assignor hereby unconditionally and irrevocably assigns, sells, conveys, grants, transfers and sets over to Assignee the Henning Interest in the Company, and Assignee agrees to assume all obligations pertaining thereto. * * *

***3** (B) The Purchase Price shall be payable by execution and delivery by Kevin Henning, personally, of a Principal Note."

¶ 12 The employment agreement states, "The term of Employee's employment hereunder shall commence on or about April 29, 2013, and shall continue until April 30, 2016 * * *, unless extended or sooner terminated as hereinafter provided." The section mentioned in paragraph A of the purchase agreement, section 3(a)(v) of the employment agreement, provides:

> "Employee may elect to invest sums required to purchase up to five percent (5%) of the ownership interest ('Equity Participation') owned by Smith, the Company or an Affiliate in each real estate development entity formed during the Term by Smith or the Company or an Affiliate ('Smith Entity'), provided that Smith owns or controls at least forty percent (40%) of the ownership interest of any such Smith Entity * * *. The Company may elect to notify Employee ('Notice to Renew') of the Company's desire to extend the Term of this Agreement. * * *

¶ 13 Notwithstanding anything to the contrary herein: (A) in the event Employee is terminated for Cause or terminates this Agreement and his employment with the Company pursuant to Section 4c of this Agreement, then any Equity Participation of Employee in an ongoing Transaction shall be assigned to an entity designated by Smith, and Employee shall be repaid any cash capital contribution Employee has made for such Equity Participation, and Employee shall have no further interest in any such entity, subject to (D) below; (B) in the event Employee receives a Notice to Renew from the Company, but elects not to accept such offer to extend this Agreement, then any Equity Participation of Employee in an ongoing Transaction shall be assigned to an entity designated by Smith, and Employee shall be repaid any cash capital contribution Employee has made for such Equity Participation and 50% of the Fair Market Value (as hereinafter determined) of his Equity Participation interests, and Employee shall have no further interest in any such entity; (C) in the event Employee does not receive a Notice to Renew from the Company, or Employee receives a Notice to Renew from the Company but does elect to extend this Agreement and Employee has owned an Equity Participation for at least four (4) years, then provided Employee is not terminated for Cause (as hereinafter defined), Employee shall maintain his Equity Participations in ongoing Transactions, subject to his obligation to repay any Equity Loans; and (D) distributions of cash or capital from any Transaction entity made prior to termination of this Agreement shall remain the property of Employee and will be irrevocable by the Company except in the event (i) Employee terminates this Agreement and his employment with the Company pursuant to Section 4c hereof prior to the end of the Term or (ii) Employee is terminated for Cause."

¶ 14 Section 3(a)(v) of the employment agreement sets out the terms for Henning's equity participation in projects like SCL. The section specifies the consequences of various possible ways in which Henning's employment with SCG might end. Subsection A establishes that if SCG terminates Henning's employment for cause, he receives only a refund of his investment for his equity participation. The defendants concede that Henning and Fairfield adequately pleaded that SCG lacked cause for terminating Henning's employment, and therefore subsection A does not justify the dismissal of counts II through VI of the complaint. Subsection B specifies the consequences that follow if SCG offers to renew Henning's employment, but Henning declines the offer. The parties agree that SCG did not offer to renew Henning's employment, so subsection B does not apply.

***4** ¶ 15 Subsection C applies to two different circumstances, including the circumstances described in the complaint. Subsection C applies "in the event Employee does not receive a Notice to Renew from the Company, or Employee receives a Notice to Renew from the Company but does elect to extend this Agreement and Employee has owned an Equity Participation for at least four (4) years." Under the last antecedent doctrine, the phrase "and Employee has owned an Equity Participation

for at least four (4) years" modifies only "Employee receives a Notice to Renew from the Company but does elect to extend this Agreement."

¶ 16 "The last antecedent doctrine, a long-recognized grammatical canon * * *, provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote." *In re E.B.*, 231 Ill. 2d 459, 467 (2008). Courts apply the doctrine generally to "all written instruments." *Storybook Homes, Inc. v. Carlson*, 19 Ill. App. 3d 579, 583 (1974). Here, the placement of commas reinforces the interpretation indicated by the last antecedent rule. No comma separates "Employee receives a Notice to Renew from the Company but does elect to extend this Agreement" from "and Employee has owned an Equity Participation for at least four (4) years." A comma separates "Employee does not receive a Notice to Renew from the Company," the phrase applicable to Henning, from the second circumstance described in Subsection C, and from the requirement of four years of equity participation. See *Advincula v. United Blood Services*, 176 Ill. 2d 1, 27 (1996).

¶ 17 Thus, under subsection 3(a)(v)(C) of the employment agreement, "in the event Employee does not receive a Notice to Renew from the Company, * * * then provided Employee is not terminated for Cause (as hereinafter defined), Employee shall maintain his Equity Participations in ongoing Transactions, subject to his obligation to repay any Equity Loans." The plain language of the employment agreement establishes the plaintiffs' right to maintain their equity participation, unless the defendants can prove that they terminated Henning's employment for cause as the employment agreement defines cause.

¶ 18 The defendants argue that the employment agreement cannot bear the meaning shown on its face, because the agreement would give Henning a "windfall" despite a "lack of consideration." The equity participation provision only permitted Henning to invest in SCL, with the risks inherent in any investment. Although Henning did not put up any cash for his investment, he signed a note promising to pay to Level 5 $219,098.25 for a share of the equity in SCL. The promissory note includes a promise to pay the debt, and that promise remains in effect even if SCL proves worthless. If the investment turned out poorly, Henning would have not a windfall but a loss. The promise to pay constitutes consideration for the exercise of the equity participation option. See *Community State Bank of Galva v. Hartford Insurance Co.*, 187 Ill. App. 3d 110, 114 (1989).

¶ 19 We find that the defendants have not established grounds for dismissing counts II through VI of the complaint. We reverse the dismissal of those counts and remand for further proceedings in accord with this order. However, we note that the last antecedent doctrine "is not an absolute and can assuredly be overcome by other indicia of meaning." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). We do not intend for this order to preclude the defendants from presenting evidence that the employment agreement misrepresents the understanding of the parties, by showing that Henning agreed that termination of his employment without cause less than four years after he exercised the option would extinguish his equity participation. Similarly, we do not mean to foreclose the plaintiffs from presenting evidence to show that the parties did not intend to incorporate the terms of the employment agreement into the purchase agreement.

¶ 20 CONCLUSION

***5** ¶ 21 The employment agreement, interpreted in accord with its punctuation and the last antecedent rule, provides that SCG's termination of Henning's employment without cause does not terminate Henning's equity participation in SCL. Accordingly, we reverse the judgment of the circuit court and remand for proceedings consistent with this order.

¶ 22 Reversed and remanded.

Presiding Justice Mason and Justice Hyman concurred in the judgment.

All Citations

Not Reported in N.E.3d, 2018 IL App (1st) 170400-U, 2018 WL 3015002

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