STATE OF MICHIGAN

COURT OF APPEALS

KARYNN SIKKEMA,

Plaintiff-Appellant,

V

PROFESSIONAL BENEFITS SERVICES, INC., doing business as VARIPRO,

Defendant-Appellee.

UNPUBLISHED
November 24, 2020

No. 352295
Kent Circuit Court
LC No. 18-010856-CB

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

In this civil case concerning a breach of contract claim, plaintiff appeals as of right the trial court's order granting summary disposition to defendant, under MCR 2.116(I)(2). On appeal, plaintiff argues that the trial court erred because the conditions precedent that triggered her severance payment were either satisfied or impossible to perform. We affirm.

I. BACKGROUND

The contract that is the cornerstone of this case is the employment contract that went into effect on January 19, 2017, between the parties. The contract was an at-will employment agreement and set out terms for a potential severance payment to plaintiff if three conditions were met. First, plaintiff had to be terminated without cause "on or prior to December 31, 2018." Second, plaintiff had to "resign as an officer, director, resident agent and representative" of defendant. Third, plaintiff had to sign and deliver to defendant a "separation agreement and release of all claims" that was "in a form acceptable" to defendant. If all three conditions were satisfied, plaintiff would receive a severance payment of $137,300; however, she would receive nothing if any of the conditions were not satisfied.

On November 15, 2018, Tina Pelland, defendant's president, held a meeting with Craig Young, a director for defendant, and plaintiff. At the meeting, plaintiff was informed she was being terminated, and Pelland provided a separation agreement that had a cover sheet ("termination

notice") explaining what plaintiff would be provided as severance if she signed the agreement.[1] The termination notice stated that defendant had **"**made the decision to end [plaintiff's] at-will employment relationship with [defendant] effective January 1, 2019," and it informed plaintiff that she would "continue to receive [her] current salary and benefits through December 31, 2018." The termination notice also had proposed terms for a new separation agreement, which included a $5,000 severance payment, defendant paying for plaintiff's January 2019 COBRA payments, and plaintiff being paid out for 34 hours of accrued paid time off (PTO). However, the bottom of the notice warned plaintiff that her failure to agree to the new separation agreement by December 6, 2018, would result in her "employment end[ing] involuntarily on January 1, 2019," and she would "not receive a separation payment."

On November 16, 2018, plaintiff sent an e-mail to Pelland that stated plaintiff would respond to the offer she received, but plaintiff was willing to go to court to obtain the $137,300 severance payment in her employment contract. The same day, Pelland responded to plaintiff's e-mail, stating that plaintiff would be considered an employee of defendant "through December 31, 2018."

On November 19, 2018, Pelland sent a revised separation agreement that had the same terms as the November 15 agreement except it increased the proposed separation payment from $5,000 to $10,000. The next day, Pelland sent an e-mail to all of defendant's employees, informing them of plaintiff's "departure" and that plaintiff "will still be part of the [defendant's] team . . . through December 31, 2018."

On December 4, 2018, plaintiff's counsel sent a letter to Pelland, informing her that plaintiff was demanding the $137,300 severance payment. Additionally, plaintiff was willing to resign from her positions and execute a release of claims. The following day, Pelland e-mailed plaintiff to "clarify" the separation agreement, stating that defendant was going to terminate plaintiff at the end of the workday on January 1, 2019. Pelland also explained that all of plaintiff's health benefits would run through the end of January 2019. Pelland sent another e-mail to plaintiff on December 6, 2018, reiterating the statements from her e-mail the day before.

---

[1] The statements made during this meeting are relatively immaterial to the resolution of this case. Any statement made by the parties would have been irrelevant because the proposed agreement had a merger clause. See *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 168-171; 721 NW2d 233 (2006) ("Where the parties have included an express integration or merger clause within the agreement, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud . . . or where an agreement is obviously incomplete on its face . . . .") (quotation marks and citation omitted).

Additionally, since the new agreement was never signed, everything said in the meeting should be considered negotiations that did not result in a contract, making them nonbinding. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992) ("Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract.").

On December 7, 2018, Pelland informed plaintiff that defendant was rescinding the new separation agreement presented to plaintiff. Defendant passed a resolution on December 17, 2019, that stated plaintiff's date of termination was January 1, 2019, and that she would no longer be a director of defendant retroactive to November 15, 2018.

On January 2, 2019, defendant informed plaintiff via letter that she was terminated at the close of business on January 1, 2019, she was removed as a trustee from defendant's board of trustees, and she would receive her final paycheck on January 17, 2019. Defendant also informed plaintiff that she would only be paid out for 24.5 hours of PTO, in accordance with defendant's vacation policy, and that her medical and vision insurance coverage would continue until January 31, 2019.[2] On January 7, 2019, plaintiff's counsel informed defendant that plaintiff would not accept any payment from defendant for January 1, 2019, and plaintiff would tender back to defendant any compensation it provided for that day. However, plaintiff never officially resigned as an officer, director, resident agent, or representative. Plaintiff also never signed a separation agreement provided by defendant, and she never produced and sent a separation agreement to defendant.

On December 6, 2018, plaintiff filed her initial complaint, claiming that defendant breached the terms of her employment contract. The complaint stated that defendant terminated plaintiff's employment without cause on or before December 31, 2018, and defendant had materially breached plaintiff's employment contract by refusing to make the required severance payment to plaintiff.

Subsequently, plaintiff filed a motion for summary disposition under MCR 2.116(C)(10), stating that plaintiff was due the $137,300 severance payment from her employment contract. Plaintiff argued that defendant exercised its right to terminate plaintiff with the termination notice, and her date of termination was December 31, 2018, not January 1, 2019. Conversely, defendant argued that summary disposition should be entered in its favor. Defendant asserted that it did not breach plaintiff's employment contract because there were three conditions that had to be satisfied to trigger the $137,300 severance payment, and none of these conditions had been met.

The trial court entered an order of summary disposition in favor of defendant. The court agreed that there was no genuine issue of material fact, and it concluded that the three conditions required to trigger the $137,300 severance payment were not satisfied, so defendant did not breach the employment contract by withholding the severance payment. Plaintiff now appeals.

II. DISCUSSION

On appeal, plaintiff argues that her termination date was December 31, 2018, and that she was not required to satisfy the resignation and release of claims conditions in her contract to trigger the $137,300 severance payment. Accordingly, plaintiff asserts defendant breached the contract

[2] Defendant's PTO policy stated that "[e]ach employee may carry 24 hours of accrued and unused PTO over into the next calendar year." The half-hour was provided to plaintiff for the January 1, 2019 workday.

by not paying plaintiff the severance amount agreed to in her original employment contract, meaning summary disposition in favor of defendant should be reversed. We disagree.

A. STANDARD OF REVIEW

Trial court rulings regarding a motion for summary disposition are reviewed by this Court de novo, and this Court "must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party." *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). When reviewing a motion under MCR 2.116(C)(10), if the "evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "A material fact is an ultimate fact issue upon which a jury's verdict must be based." *Belmont v Forest Hills Pub Sch*, 114 Mich App 692, 696; 319 NW2d 386 (1982). When reviewing a ruling regarding a motion for summary disposition, "[t]here is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Accordingly, "when a relevant factual dispute does exist, summary disposition is not appropriate." *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

Questions or issues about the "interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). When determining the meaning of a contract, this Court must "give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id.*

B. DATE OF TERMINATION

Plaintiff claims that defendant breached the terms of her employment contract because defendant did not pay plaintiff the $137,300 severance payment required by the contract's terms. "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in [injury] to the party claiming breach." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 164; 934 NW2d 665 (2019) (quotation marks and citation omitted; alteration in original). It is undisputed that an employment contract existed between plaintiff and defendant. According to the contract, plaintiff was owed the $137,300 severance payment if (1) she was fired without cause on or before December 31, 2018, (2) she resigned from the multiple positions she held upon termination or shortly thereafter, and (3) she signed and delivered a release of all claims to defendant upon termination or shortly thereafter. The first issue on appeal focuses on whether plaintiff was terminated without cause on December 31, 2018, or January 1, 2019.

The document that essentially creates this dispute is the notice of termination defendant provided plaintiff on November 15, 2018, which informed plaintiff that defendant had decided to terminate plaintiff's employment. "Generally, either party to an at-will employment agreement may terminate it at any time and for any, or even no, reason." *Psaila v Shiloh Indus, Inc*, 258 Mich App 388, 391; 671 NW2d 563 (2003). The notice of termination provided that defendant made the decision to terminate plaintiff's employment effective January 1, 2019, and that plaintiff would

receive her salary and benefits through December 31, 2018. This notice was an offer to modify the existing employment agreement because the notice provided a definite termination date and a lower separation payment, compared to the indefinite employment period and higher separation payment in the employment agreement. Plaintiff did not assent to the offer, so it never came into effect. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372, 373; 666 NW2d 251 (2003). In a later communication, defendant clarified that plaintiff's employment will end at the end of business on January 1, 2019, and that plaintiff would be paid for her work on that day. Plaintiff was in fact terminated at the end of business on January 1, 2019, consistent with her at-will employment agreement. Accordingly, the trial court properly determined that plaintiff was terminated on January 1, 2019.

C. CONDITIONS PRECEDENT

Plaintiff argues that the conditions required to trigger the $137,300 severance payment were not applicable or had been waived because of defendant's actions. We disagree.

A contract's language must "make[] clear that the parties intended a term to be a condition precedent" for this Court to "read such a requirement into the contract." *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006). A condition precedent "is a fact or event that the parties intend must take place before there is a right to performance." *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 131; 743 NW2d 585 (2007) (quotation marks and citation omitted). "If the condition is not satisfied, there is no cause of action for a failure to perform the contract." *Id.* However, "there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event," and, if a party does prevent the condition precedent from occurring, "the party, in effect, waives the performance of the condition." *Id.* (quotation marks and citation omitted). For a party to waive the performance of the condition precedent, the "party must . . . tak[e] some affirmative action, or . . . refus[e] to take action required under the contract." *Id.* at 132.

Additionally, "the terms of a contract must be enforced as written where there is no ambiguity." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Moreover, "[j]udicial conclusions regarding the 'reasonableness' of unambiguous contractual provisions cannot be used to evade enforcement of the contract as written." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199; 747 NW2d 811 (2008).

The employment contract between plaintiff and defendant had three apparent conditions precedent. Plaintiff's employment contract stated, in part:

> *if* your employment with the [defendant] is terminated without cause by the [defendant] on or prior to December 31, 2018, the [defendant] will also pay you a one-time lump sum severance payment of $137,300.00 ("Severance Payment"), *provided that all of the following conditions are satisfied at the time of or promptly after your termination*:
>
> i. *you* resign as an officer, director, resident agent and representative of the Company; *and*

> ii. *you* execute and deliver to the Company a separation agreement and release of all claims against the Company, including employment-related claims, in a form acceptable to the Company, which is not revoked by you within seven (7) days of the full signing of any such separation agreement and release. [Emphasis added.]

The first condition precedent that applies to defendant's performance of providing the severance payment was created by the phrase "if your employment with the [defendant] is terminated without cause by the [defendant] on or prior to December 31, 2018," because the "term 'if' is a conditional conjunction, and thus signals a condition precedent." *McQueer v Perfect Fence Co*, 502 Mich 276, 292 & n 28; 917 NW2d 584 (2018). Moreover, the requirements that plaintiff resign and "execute and deliver" a separation agreement and release of claims to defendant are also conditions precedent because the language of the contract states that "all of the following conditions are satisfied at the time of or promptly after your termination." Thus, the contract's language shows a clear intention by the parties that defendant's performance of paying plaintiff the $137,300 severance payment had three applicable conditions: (1) defendant had to terminate plaintiff's employment without cause on or before December 31, 2018, (2) plaintiff had to resign from defendant's employment, and (3) plaintiff had to sign and deliver a release of claims to defendant.

Whether the first condition precedent was satisfied depends on the resolution of the issue concerning plaintiff's termination date, but all three conditions must be met for defendant to pay the $137,300 severance payment. As discussed above, plaintiff was terminated on January 1, 2019. Thus, plaintiff did not satisfy the first condition precedent; however, we will discuss the remaining two conditions.

Turning to the second condition that "[plaintiff] resign as an officer, director, resident agent and representative of the [defendant]," plaintiff did not satisfy this condition. Although plaintiff contests that defendant had made this condition unnecessary or impossible to perform due to defendant passing a resolution to remove plaintiff as a director,[3] the language of the contract does not support this assertion for two reasons.

First, the phrase "you resign" at the start of the condition shows that plaintiff herself had to take some kind of action in the resignation process. If the condition had language to the effect of "a resignation is submitted on behalf of plaintiff" or "plaintiff is deemed resigned," plaintiff's assertion would be more persuasive.

Second, defendant did not pass a resolution to remove plaintiff from all of her positions, so plaintiff still had to provide some kind of resignation. We agree that plaintiff did not have to resign as a director because defendant's resolution to remove plaintiff as a director was passed before plaintiff was terminated, making it impossible for plaintiff to resign as a director at or promptly after her termination. See *Roberts v Farmers Ins Exch*, 275 Mich App 58, 74; 737 NW2d 332 (2007) (explaining that a "supervening impossibility" occurs after the contract is formed and

[3] The phrasing provided by the resolution stated that "[plaintiff's] last date of employment with the Company will be the end of business of January 1, 2019 and she will no longer be a director of the Company effective retroactive to November 15, 2018."

that absolute impossibility is not required for the impossibility doctrine to apply, as impracticability suffices in the right circumstances). However, plaintiff was still a member of defendant's board of trustees before she was informed by the January 2, 2019 termination letter that she had been removed from that position on January 1, 2019. Arguably, plaintiff's resignation from the board of trustees was also impossible because plaintiff could resign from her position "at the time of or promptly after [her] termination," but there could be a debate whether her failure to resign from the board one or two days after her termination showed that she failed to resign promptly. However, even if it was impossible for plaintiff to resign as a director and trustee of the board, plaintiff, at a minimum, would have had to resign as a "representative of the [defendant]" because she was defendant's CFO, one of the highest-ranking employees of defendant.[4] Since plaintiff never provided any kind of resignation from her position as CFO, this condition precedent was not satisfied.

As for the third condition that plaintiff sign and deliver a release of claims, this condition was not satisfied either. Plaintiff argues that this condition could not be satisfied because plaintiff was never given a separation agreement that had a $137,300 severance payment in its terms, and the terms of the contract state that the separation agreement must be "in a form acceptable to the [defendant]." However, plaintiff never signed any separation agreement and release of claims presented to her, and she did not produce and provide her own separation agreement and release of claims to defendant. It was discussed at the summary disposition hearing that plaintiff could have crossed out the dollar figure on the separation agreement she was provided and written in the $137,300 amount she wanted, showing she at least attempted to provide a release of claims to defendant. Accordingly, if plaintiff would have provided a separation agreement that had the $137,300 amount and provided a resignation letter to defendant, there would be a much stronger argument that defendant was actively blocking these condition precedents from occurring, meaning the conditions were waived by defendant.[5]

Ultimately, the conditions for the severance payment had been agreed upon by the parties and put into the employment contract, and there has been no argument that the formulation of the employment contract was coerced or improperly created. Accordingly, all the conditions required to trigger the $137,300 severance payment were binding to the parties, and plaintiff failed to satisfy the two conditions that required action from her. Therefore, defendant was not required to pay out the $137,300 severance payment based on the employment contract.

[4] "A characteristic of an agent is that he is a business representative. His function is to bring about, modify, accept performance of, or terminate contractual obligations between his principal and third persons." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 448; 678 NW2d 638 (2004).

[5] See *Gronda*, 277 Mich App at 132 (explaining that a condition precedent is waived if the other party takes "affirmative action" to prevent a condition from occurring).

III. CONCLUSION

The trial court did not err by granting summary disposition in favor of defendant because plaintiff did not satisfy the conditions precedent in her employment contract to trigger the $137,300 severance payment from defendant.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola