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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000587-MR
AND
NO. 2012-CA-000604-MR

DR. PAUL JANSON — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 06-CI-00400

SUMMIT MEDICAL GROUP, INC. — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Dr. Paul Janson appeals the Kenton Circuit Court's judgment following a bench trial finding that he was terminated within the provisions of his employment contract. Summit Medical Group, Inc. (Summit) cross-appeals from the court's holding in favor of Dr. Janson, finding that

Summit's counterclaim for unjust enrichment was barred by the affirmative defense of laches. After careful review, we affirm the trial court's holdings in both instances.

In the mid-1990s, St. Elizabeth Medical Center (SEMC) decided to form Summit Medical Group, Inc. Summit was to be comprised of several primary care physician groups, one of which was a pediatrics group, Crestview Pediatrics, owned by Dr. Paul Janson (Dr. Janson). Crestview Pediatrics was at that time already a successful practice, composed of Dr. Janson and another member. On May 31, 1996, Dr. Janson agreed to sell Crestview Pediatrics to Summit and become an employee of Summit pursuant to an employment contract (hereinafter "Employment Contract").

On June 1, 1996, Dr. Janson signed the Employment Contract, which provided for an initial five-year term beginning on June 1, 1996, and ending on May 31, 2001. The contract provided for automatic one-year renewal terms unless otherwise terminated by the parties. Paragraph 11(a) of the contract provided that following the second year of the original five-year term, either party could terminate the agreement without cause by giving the other party 180 days prior written notice and paying a liquidated damages penalty. Specifically, paragraph 11(a) stated:

> [E]ither party may terminate this Agreement without cause at any time by giving not less than one hundred eighty (180) days prior written notice to the other party, provided that the termination date specified in such notice is at least two (2) years after the date of this

> Agreement. However, Employer agrees that such notice shall not be given except upon the vote of two-thirds of the members of its Board of Directors. If this Agreement is terminated by Employer without cause, Employer shall pay to Physician as liquidated damages an amount that is equal to twenty-five percent (25%) of Physician's then current annual salary. If this Agreement is terminated by Physician without cause, Physician shall pay to Employer as liquidated damages an amount that is equal to seventy percent (70%) of the unamortized amount of the goodwill purchased from Physician by Employer and set forth in Exhibit A. For purposes of this Subsection A, goodwill shall be amortized on a straight line basis over a ten (10) year period.

Exhibit A also accompanied the Employment Contract, and it provided that "on the fifth anniversary date and on each subsequent anniversary date, employment under this Agreement automatically shall be extended for an additional one (1) year period. Either party may terminate without cause or penalty at the end of the initial term or any one (1) year extension by giving ninety (90) days written notice prior to the expiration of said initial term or one (1) year extension." Exhibit A did not include any requirement that the Board approve the termination of the contract by a two-thirds vote.

Towards the end of the initial five-year period, in 2000, Summit's Board of Directors came to the conclusion that, due to problems with Summit's productivity and profitability, certain changes needed to be made to the physician's compensation model of the physicians' employment contracts. As such, the physicians formed a compensation committee to come up with a new compensation model for the physicians. An initial draft of a new proposed

physician contract, which contained the new physician compensation model, was tendered in early 2001. In July 2001, the Summit Board approved the new employment agreements and directed Dr. Garamy, Summit's President and CEO, to present the new agreement to the physicians.

At the September 17, 2001, meeting of the Board, Dr. Garamy reported that two physicians, Dr. Janson and Dr. Grober, did not plan to sign the new contract. Dr. Janson now claims that he did not sign the contract because he was still negotiating the terms of the new contract. Subsequently, Tim Maloney, the Chief Operating Officer of Summit at the time, sent Dr. Janson a letter dated November 30, 2001, notifying Dr. Janson that his employment was being terminated without cause effective May 31, 2002, which was the end of his one-year automatic rollover period.

Dr. Janson filed a breach of contract complaint in the instant action almost four years later, on February 14, 2006. There, he alleged that his contract was improperly terminated without the vote of two-thirds of the Summit Board prior to his notification. He claimed that the contractual requirement that a vote of two-thirds of Summit's Board be obtained prior to employment being terminated was vital to him because twelve out of the sixteen individuals on the Board were physicians. Dr. Janson felt this provided him with a great deal of job security, as he was confident that his fellow colleagues would not terminate his employment without good cause. Dr. Janson claims he would not have signed the Employment Contract without the contractual requirement that a vote of two-thirds of Summit's

Board of Directors be obtained during the initial five-year term, as well as during all one-year automatic renewal periods, prior to notification of termination of employment.[1]

With its answer to Dr. Janson's complaint, Summit filed a counterclaim for unjust enrichment. The basis for Summit's counterclaim was that Dr. Janson was overpaid $15,512.56 under Summit's severance pay plan. Under that plan, upon separation of employment, Dr. Janson was entitled to 5.8% of his base salary multiplied by his number of years of service. For purposes of the plan, "years of service" commenced on the plan's effective date, January 1, 1998.

Summit contends that upon the conclusion of his employment with Summit, Dr. Janson's severance pay was incorrectly calculated. Dr. Janson's severance payment should have been calculated using four years and five months as his years of service. However, the severance payment amount was incorrectly calculated using "six years of service." As a result of this incorrect calculation, Dr. Janson received $58,784.43 in severance pay. Summit now claims Dr. Janson should have received $43,300.00, and therefore he received $15,512.56 to which he was not entitled, which amounts to unjust enrichment.

The matter was tried before the Kenton Circuit Court without a jury. On February 29, 2012, the court entered its findings of fact, conclusions of law,

[1] Dr. Janson also alleged a claim for fraud by omission for Summit failing to disclose the existence of a report indicating that Summit would initially lose money and a claim for fraud by inducement regarding his bonus structure. As the trial court's holdings regarding the fraud by omission and fraud by inducement claim are not on appeal, we will not include the details of such claims in this opinion.

and judgment. In its order, the trial court found that there was no evidence that the Board specifically voted to terminate Dr. Janson's employment. Nevertheless, the Board's vote to approve a new agreement was, in effect, a vote not to renew the original physician contracts, including that of Dr. Janson. In light of the Board's action in adopting new contracts for its physicians, Dr. Janson had only two options available to him. He could agree to the new contract proposal or sever his ties with Summit. The trial court noted that there was testimony at the hearing that Dr. Janson would not have been allowed to continue working under the original 1996 Employment Contract. In light of this fact, the trial court found that requiring the Board to take a vote on Dr. Janson's individual contract would have been futile. In short, the failure of the Board to vote specifically to terminate Dr. Janson did not constitute a breach of the agreement.

The trial court also made findings concerning the liquidated damages portion of the agreement. The court stated:

> The base contract provided for liquidated damages in the event the Board terminated the agreement. Exhibit A allowed either party at the end of the initial term or any one-year extension to terminate the agreement without cause and without penalty. A liquidated damages clause for early termination during the original term of the contract is reasonable and understandable. The deletion of a liquidated damages clause upon termination at the end of the initial term or extensions of the contract is likewise reasonable. The Court finds that [Summit] was authorized by the agreement to terminate [Dr. Janson's] employment without cause and without penalty at the end of the one-year extension.

(Emphasis in original).

Regarding Summit's counterclaim, the trial court found that on November 30, 2001, Summit sent a letter notifying Dr. Janson of the termination of his employment and informing him that he would receive a severance benefit of $58,784.43, but in its counterclaim alleged that Dr. Janson was only entitled to $43,300.00 in severance. The trial court found that there was no evidence that Summit ever notified Dr. Janson of this apparent overpayment or demanded restitution until the filing of its counterclaim some four years after the severance payment was made. Noting that Dr. Janson had pleaded the equitable defense of estoppel, the trial court held that the doctrine of laches, rather than estoppel, was the appropriate equitable defense to the counterclaim. The trial court found that Summit's failure to assert the equitable claim of unjust enrichment for approximately four years was unreasonable and denied its counterclaim accordingly.

Dr. Janson now appeals the trial court's finding that a vote of two-thirds of the Summit Board was not required to terminate his employment with Summit. Summit cross-appeals the trial court's holding that the doctrine of laches prevented it from succeeding on its claim of unjust enrichment.

As this case was tried before the trial court without a jury, Kentucky Rules of Civil Procedure (CR) 52.01 provides the appropriate standard of review:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment…. Findings of fact shall not be set aside unless clearly erroneous, and due regard

> shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

CR 52.01. Thus, we review the findings of fact of the trial court under a clearly erroneous standard. A factual finding is not clearly erroneous if it is supported by substantial evidence. *See Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Id*. "Under this standard, an appellate court is obligated to give a great deal of deference to the trial court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *D.G.R. v. Commonwealth, Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012) (internal citation omitted).

A trial court's conclusions of law are reviewed under a *de novo* standard. *See Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). However, "when there are questions of fact, or mixed questions of law and fact, we review the trial court's decision pursuant to the clearly erroneous standard." *Cardiovascular Specialists, P.S.C. v. Xenopoulos*, 328 S.W.3d 215, 217 (Ky. App. 2010).

While Dr. Janson presents two arguments in his brief to this Court, they are really the same argument, namely that Summit was required to have a vote of two-thirds of the board before terminating his employment pursuant to the Employment

Contract. Because the Board did not have such a vote, Dr. Janson argues that the trial court's findings of fact and conclusions of law were in error.

Summit argues that Dr. Janson failed to preserve his argument that the Employment Contract required a two-thirds vote by the Board in order to terminate the agreement during a one-year renewal term by including it as an issue in his prehearing statement. Summit cites CR 76.03, which states that, "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." Dr. Janson's prehearing statement states:

> Dr. Janson is only appealing the trial court's determination that even though there was no "evidence that the Board specifically voted to terminate [his] employment…the vote to approve a new agreement was, in effect, a vote not to renew the original contracts… requiring the Board to take a vote on [his] individual contract would have been futile." The trial court's determination on other breach of contract claims, as well as fraud claims, will not be appealed.

A review of the prehearing statement and the record indicates that Dr. Janson did not waive this argument on appeal. While Summit encourages this Court to interpret CR 76.03(8) very strictly, we decline to do so in this instance.

In *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), the Kentucky Supreme Court addressed this issue. There, the plaintiffs' claims included theories of liability based on negligence and outrageous conduct in exposing the plaintiff to asbestos, causing an increased risk of future injury or

disease and severe emotional distress from the fear of developing cancer. *Id*. at 189. The Court held:

> The prehearing statement is part of the prehearing conference rule (CR 76.03), which is an informal procedure added to the appellate process in an effort to settle cases, or otherwise dispose of them, without the need of a full-blown appeal. While the [Plaintiffs] did not identify the tort of outrageous conduct per se in their prehearing statement, neither did they so identify negligence or failure to warn. Their issues statement tried to focus on, and briefly summarized, the key issues underlying their claims, which is precisely what the prehearing statement intends.

Id. at 196-197. In the instant case, Dr. Janson's argument on appeal is that there was a requirement for a two-thirds vote and that such a vote did not occur, thus indicating a breach of contract. We believe his prehearing statement, as detailed above, briefly summarized the issue he has presented on appeal, by quoting the trial court's rulings in this regard. Accordingly, we will address Dr. Janson's contentions on appeal.

Turning to the merits of Dr. Janson's argument, Summit argues that a two-thirds vote was not required to terminate Dr. Janson's employment after the initial five-year term and after the end of an automatic one-year renewal period. We agree. The first termination provision in the agreement, Paragraph 11(a), provided that following the second year of the original five-year term (i.e., during years three, four, and five), either party could terminate the agreement without cause by giving the other party 180 days prior written notice and paying a liquidated damages penalty. In addition, Paragraph 11(a) provided that notice of the

termination "shall not be given except upon the vote of two-thirds of the members of the Board of Directors." In contrast, the other termination provision, located in Exhibit A to the original agreement, stated that "at the end of the initial term or any one (1) year period," either party could terminate the agreement "without cause or penalty" by giving the other party 90 days prior written notice. Notably, this termination provision did not require a vote by the Board. We agree with Summit that the two termination provisions distinguished between terminating the agreement prematurely during the original five-year term and terminating the agreement upon the natural conclusion of either the original term or a subsequent one-year automatic renewal period. Because Dr. Janson's termination notification occurred during the latter, a two-thirds vote by the Board was not required under the terms of the Employment Contract.

While the trial court determined that a vote was not necessary because of the Board's implementation of a new contract, we note that it could also have found that Summit was terminating Dr. Janson's contract "with cause," which the above provisions of the Employment Contract do not address. Dr. Janson had not approved the terms of the new employment agreement, and thus Summit likely had cause to terminate his employment.

In his brief, Dr. Janson urges this Court to construe any ambiguities in the contract against the drafter, the Summit Board. However, he also contends that the Employment Contract language was clear and straightforward, and required the two-thirds vote in all instances of termination of employment. Dr. Janson also

argues that he would never have agreed to the terms of the original Employment Contract had he realized that a vote by the Board was not required in all instances. Dr. Janson reasons that the inclusion of the vote of the Board was vital to him, because twelve out of sixteen individuals on the Board were physicians, which provided him with a great deal of job security, as he felt confident that his fellow colleagues would not terminate his employment without good cause.

A review of the record indicates that the terms of the Employment Contract are not ambiguous. Thus, extrinsic evidence of Dr. Janson's intent cannot be considered. *See Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002) ("Absent an ambiguity…the parties' intention must be discerned from the four corners of the instrument without resort to extrinsic evidence.") (Citation Omitted). Therefore, it is of no merit that Dr. Janson agreed to the terms of the original Employment Contract because he felt it provided him job security.

The trial court explicitly found that "the failure of the Board to vote specifically to terminate the Plaintiff did not constitute a breach of the agreement." In order to set aside this finding, Dr. Janson must show that the finding is clearly erroneous, or that the record is devoid of substantial evidence to support it. Because a vote was not required under Exhibit A after the initial five-year term and any automatic one-year renewals, and because a new agreement had been reached by the Board negating the usefulness of the prior Employment Contract, Dr. Janson simply cannot show that a breach occurred. While the trial court's reasoning could have been strengthened by further analysis as detailed above, its findings of fact

and conclusions of law were not clearly erroneous. Accordingly, we will not disturb them on appeal.

Turning now to Summit's cross-appeal, Summit urges this Court to reverse the trial court's dismissal of its counterclaim for unjust enrichment. In support of this argument, Summit argues that Dr. Janson did not plead the doctrine of laches as an affirmative defense to Summit's counterclaim and did not raise the defense at any other time before the trial court.

In response, Dr. Janson argues that the trial court incorrectly found that his severance pay should have been based upon four years and five months of service instead of six years. In support of this argument, Dr. Janson contends that in his letter of termination, Mr. Maloney clearly explained the amount to which Dr. Janson was entitled under the severance plan upon the date of his last day of employment, which was $58,784.43. Dr. Janson argues that Mr. Maloney's references to a non-qualified deferred compensation plan indicate that the severance benefit was part of the deferred compensation plan, which existed in 1996. Thus, Dr. Janson argues that the trial court should have determined that the $58,784.43 was the proper amount of his severance.

Summit argues that the trial court correctly found that Dr. Janson was overpaid for his severance. Summit points out that the Severance Pay Plan was established on January 1, 1998, and that the time that elapsed between the effective date of the severance plan (January 1, 1998) and the conclusion of Dr. Janson's employment (May 31, 2001) was four years and five months. Summit argues that

the very basis of its counterclaim is that Mr. Maloney incorrectly calculated Dr. Janson's severance payment and provided documentation of the incorrect amount to Dr. Janson in his termination letter.

We agree with Summit and the trial court that Dr. Janson was overpaid money under the severance plan. The trial court's findings in this regard are supported by substantial evidence of record, and we will not disturb them on appeal. However, this does not end the inquiry.

An affirmative defense is waived if it is not raised in a responsive pleading. *See* CR 8.03; *Headen v. Commonwealth*, 87 S.W.3d 250, 254 n.16 (Ky. App. 2002) (citing *Underwood v. Underwood*, 999 S.W.2d 716, 720 (Ky. App. 1999). As Summit points out, Dr. Janson did not raise the affirmative defense of laches in his reply to Summit's counterclaim. However, Dr. Janson did raise the affirmative defenses of estoppel and waiver in his responsive pleadings. We agree with Dr. Janson that either of those doctrines bar Summit's counterclaim for unjust enrichment.

> The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of

> knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Fluke Corp. v. LeMaster, 306 S.W.3d 55, 62 (Ky. 2010) (citation omitted). In the instant case, Summit had knowledge of the truth of the amount of Dr. Janson's severance benefit—not only did Summit draft the Employment Contract which included the formula for calculation of the severance benefit, but they also actually calculated the amount of that benefit at the conclusion of Dr. Janson's employment. Summit had complete control over Dr. Janson's severance benefit. Mr. Maloney told Dr. Janson in writing that his severance benefit would be $58,784.43. Dr. Janson, after receiving such notification and being paid that amount, relied upon that assertion, as Summit could reasonably expect, and utilized the money.

We agree that Dr. Janson did not err with regard to his severance payment. There is no evidence in the record to indicate that Summit ever notified Dr. Janson of its error in calculating his severance benefit. In fact, Summit never demanded restitution until the filing of its counterclaim, some four years after the severance payment was made, when Dr. Janson filed his suit. Thus, we agree with Dr. Janson that the trial court could have easily dismissed the counterclaim based on the doctrine of equitable estoppel.

Additionally, the doctrine of waiver, as plead by Dr. Janson, also likely barred Summit's counterclaim. The United States Supreme Court defines waiver as an intentional relinquishment or abandonment of a known right or privilege. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Here, when Summit notified Dr. Janson that his severance would be $58,784.43, paid him such, and did not object for four years until Dr. Janson filed suit against them, it relinquished any right to demand recovery of the overpayment.

While the trial court dismissed Summit's counterclaim based on the doctrine of laches, we agree with Dr. Janson that the trial court could have dismissed the claim based on the doctrines of equitable estoppel and waiver. This Court has the authority to affirm a trial court's judgment based on different grounds, as long as the judgment is supported by the evidence of record. *American Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008) (footnote citation omitted). In the instant case, the evidence supports the trial court's dismissal of Summit's counterclaim, as it waited four years before ever alleging it had committed an error in calculating and paying Dr. Janson's severance pay. Accordingly, we affirm the trial court's judgment dismissing the counterclaim for unjust enrichment.

Based on the foregoing, we affirm the trial court's holding that Summit did not breach the Employment Contract when it terminated Dr. Janson's employment. We further affirm the trial court's dismissal of Summit's counterclaim for restitution based on unjust enrichment.

ALL CONCUR.

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