No. 1-09-1704

FOURTH DIVISION
April 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARNI WILLENSON, Plaintiff-Appellant, v. MINER, BARNHILL & GALLAND, P.C., an Illinois professional corporation, JUDSON H. MINER, CHARLES BARNHILL, JR., GEORGE F. GALLAND, JR., LAURA E. TILLY, WILLIAM A. MICELI, SARAH E. SISKIND, JEFFERY I. CUMMINGS, and ROBERT LIBMAN, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 06 CH 159763 Honorable Peter Flynn, Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment.

ORDER

HELD: Trial court properly granted judgment on the pleadings because the shareholder agreement was unambiguous and did not apply to plaintiff;

trial court properly dismissed breach of fiduciary duty claims in second amended complaint.

This appeal arises from orders of the circuit court granting a motion to dismiss plaintiff Marni Willenson's breach of fiduciary duty claim for failure to state a claim and a motion for judgment on the pleadings on plaintiff's contractual claims raised in her second amended complaint. Final judgment was entered in favor of defendants, Miner, Barnhill & Galland, P.C. (MBG) and Judson Miner, Charles Barnhill, Jr., George Galland, Jr., Laura Tilly, William Miceli, Sarah Siskind, Jeffrey Cummings and Robert Libman, on May 22, 2009. For the following reasons, we affirm.

BACKGROUND

Plaintiff joined MBG as an associate in July 2000. Subsequently, she became an equity partner in January 2004 and entered into a written shareholder agreement (agreement) with the other partners of the firm. Nine months later, plaintiff told the partners that she was leaving MBG and voluntarily resigned from the firm 16 months after becoming an equity partner. On August 8, 2006, plaintiff filed suit against MBG, alleging that the agreement entitled her to be paid post-departure compensation out of fees received by the firm after she left under Section 6 of the agreement entitled "Salary Continuation Agreement."

Section 6 of the agreement provides, in pertinent part:

> "Upon the termination of employment of a Shareholder by the Corporation for any reason, including the death or permanent disability of a Shareholder or liquidation of the Corporation, the Corporation shall have a continuing obligation, which shall be

> unfunded and unsecured, to make salary continuation payments to such terminated Shareholder or to his estate or personal representative in accordance with and subject to the following terms and conditions: * * *."

Plaintiff's second amended complaint, filed on May 31, 2007, alleged four contract-based claims against MBG: a damage claim for breach of the agreement (Count I), a claim for specific performance of the agreement (Count II), a claim for an accounting (Count III), and a claim seeking to impose a constructive trust on the firm's receipts (Count IV); and a claim against each of MBG's shareholders (who are named individually as defendants) for breach of fiduciary duty (Count V).

MBG filed a verified answer, moved for judgment on the pleadings with respect to Counts I-IV and moved to dismiss Count V for failure to state a claim. Plaintiff responded with a conditional motion for summary judgment on Counts I-IV.

The trial court granted defendants' motion to dismiss the breach of fiduciary count for failure to state a claim on November 6, 2007. Regarding the contract-based claims against the firm, the trial court held that the agreement unambiguously gave no right of post-departure compensation to shareholders who voluntarily terminate their employment but ruled that it would provisionally consider extrinsic evidence addressing whether the unambiguous language contained a latent ambiguity. Subsequently, after considering such extrinsic evidence, the trial court ruled that there was no ambiguity in the agreement and granted defendants' motion for judgment on the pleadings for the remaining four counts of the second amended complaint on

May 12, 2009. Final judgment was entered on May 22, 2009, and this timely appeal followed.

DISCUSSION

On appeal, plaintiff contends that the trial court erred in granting defendants' motion to for judgment on the pleadings as to her contract-based claims under Section 2-615(e) (735 ILCS 5/2-615(e) (West 2008)), because Section 6 of the agreement contains a latent ambiguity. She additionally contends that the trial court erred in granting defendants' motion to dismiss her breach of fiduciary duty claim for failure to state a claim under Section 2-615 (735 ILCS 5/2-615 (West 2008)).

Plaintiff first contends that the trial court erred in granting defendants' motion for judgment on the pleadings for her contract-based claims because the agreement's provision regarding continuation of shareholder compensation was latently ambiguous.

A motion for judgment on the pleadings tests the sufficiency of the pleadings by determining whether the plaintiff is entitled to the relief sought by the complaint or, alternatively, whether the defendant by his answer has set up a defense which would entitle him to a hearing on the merits. *Village of Worth v. Hahn*, 206 Ill. App. 3d 987, 990 (1990). The motion requires an examination of the pleadings to determine the existence or absence of an issue of fact, or whether the controversy can be resolved as a matter of law. *Village of Worth*, 206 Ill. App. 3d at 990. When a party moves for judgment on the pleadings pursuant to section 2-615(e), it concedes the truth of the well-pled facts in the plaintiff's pleadings. *Parkway Bank and Trust Co. v. Meseljevic*, ___ Ill. App. 3d ____, _____, 346 Ill. Dec. 215, 223 (2010). We review a trial court's order granting judgment on the pleadings *de novo*. *Parkway Bank and Trust Co.,* ___ Ill. App. 3d at _____, 346 Ill. Dec. at 223.

The dispute in the case at bar surrounds the meaning of the phrase "termination of employment" and whether its use in section 6 of the agreement applies equally to voluntary or involuntary termination. In the trial court, plaintiff argued that the wording applied to both, regardless of the use of the phrase "by the corporation" in section 6 of the agreement. Plaintiff concedes in her brief to this court that the word "termination" can apply to voluntary or involuntary terminations. However, she argues that as used in section 6, there is no distinction made and the additional phrase "by the corporation" is of no consequence to the meaning. Defendants argued, and the trial court agreed, that the phrase "termination of employment of a shareholder by the corporation for any reason" was not susceptible to more than one meaning and was quite clear as an expression in the English language. Additionally, the trial court concluded that other sections of the agreement specifically differentiate between terminated employment by the corporation (involuntary) and terminating employment by the shareholder (voluntary), and that section 6 clearly applied to involuntary terminations.

The primary objective of contract construction is to give effect to the intention of the parties. *Srivastava v. Russell's Barbecue, Inc.*, 168 Ill. App. 3d 726, 730 (1988). That intention should be ascertained from the language of the contract. *Srivastava*, 168 Ill. App. 3d at 730. If the language of the contract is clear and unambiguous, the judge must determine the intention of the parties solely from the plain language of the contract and may not consider any extrinsic evidence outside the document itself. *Owens v. McDermott, Will & Emery,* 316 Ill. App. 3d 340, 344 (2000). Clear and unambiguous contract terms must be given their plain and ordinary meaning and contracts must be interpreted as a whole, giving meaning and effect to each of its provisions. *Owens*, 316 Ill. App. 3d at 344.

In the case at bar, the trial court concluded that under the plain language of the agreement, termination of employment of a shareholder by a corporation as stated in section 6 did not include shareholders who voluntarily resign from the firm. We note that the agreement does not define the word "termination." Therefore we must give it is common and generally accepted meaning. *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483 (2009). Black's Law Dictionary defines "termination" as the "act of ending something" and "termination of employment" as "[t]he complete severance of an employer-employee relationship." Black's Law Dictionary 1482 (7th ed. 1999). Webster's Dictionary defines "termination" as CLOSE, CESSATION, CONCLUSION" and "the act of terminating" as "bringing to an end or concluding" as in "voluntary [termination] of an agreement." Webster's Third New International Dictionary 2359 (1986). Accordingly, giving "termination" its plain and ordinary meaning in an employment context, it means an end to employment and could mean a voluntary resignation, an involuntary termination or both.

This definition is supported by the language used in section 3 of the agreement. That section, entitled "Termination of Employment of Shareholder," provides in pertinent part as follows:

> "The employment by the Corporation of any Shareholder may be terminated, with or without cause, at any time upon not less than 30 days' prior written notice given either by the terminating Shareholder or by the Corporation. Approval of termination of employment of a Shareholder by the Corporation shall require the affirmative act of the Board of Directors. Upon the effective date

> of such termination (other than a termination by reason of death or disability as provided in Section 4), the terminating or terminated Shareholder * * *"

Therefore, it is clear that the phrase "termination of employment" under the agreement does apply both to voluntary or involuntary termination. However, the agreement makes a distinction between termination of employment by a shareholder (voluntary) and termination of employment by the corporation (involuntary). Section 3 references both with the wording "termination of employment."

However, section 6 of the agreement does not simply state termination of employment; it has the additional language of "by the Corporation." Reading section 6 in its entirety and in context with the agreement as a whole, "termination of employment of a shareholder by the corporation" as used therein is not ambiguous. It clearly refers to an involuntary termination and not a voluntary resignation. Accordingly, we find that the trial court properly concluded that section 6 of the agreement was unambiguous and did not apply to plaintiff's voluntary resignation.

Alternatively, plaintiff contends that section 6 of the agreement contains a latent ambiguity and that the trial court improperly found the contrary after considering provisionally admitted extrinsic evidence. Moreover, plaintiff contends that the court erred by not allowing additional extrinsic evidence to aid in its determination of ambiguity.

Generally, a contract is deemed ambiguous if it is susceptible to more than one reasonable construction. *Owens*, 316 Ill. App. 3d at 348. If, after considering the language of an agreement, a court determines that the document is ambiguous, the court may then look beyond the

agreement to ascertain the intent of the parties. *Owens*, 316 Ill. App. 3d at 348. However, contract language is not ambiguous simply because the parties do not agree upon its meaning. *Srivastava*, 168 Ill. App. 3d at 732.

In the case at bar, the trial court employed the provisional admission of extrinsic evidence to address plaintiff's alternate argument that the language of section 6 contained a latent ambiguity. Under the provisional admission approach, " 'although the language of a contract is facially unambiguous, a party may still proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract.' " *Eichengreen*, 325 Ill. App. 3d at 522 quoting *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 463 (1999). As we have already concluded that section 6 was unambiguous, we find that the trial court was under no obligation to consider any extrinsic evidence to aid in its construction and any such consideration was unnecessary. Accordingly, the trial court properly granted defendants' motion for judgment on the pleadings as to plaintiff's contract-based claims.

Plaintiff next contends that the trial court erred in dismissing her claim for breach of fiduciary duty against each of the individual defendants as stated in her second amended complaint because it did not correctly apply the law relating to fiduciary duty claims. She argues that if Section 6 applies to employees who voluntarily terminate their employment, then each of the individual defendants has violated their fiduciary duty to her. Thus her breach of fiduciary duty claim is dependent upon the resolution on her contract-based claims.

A motion to dismiss brought under section 2-615 attacks the legal sufficiency of a complaint and alleges only defects on the face of the complaint. *Doe ex rel. Ortega-Prion v.*

Chicago Board of Education, 339 Ill. App. 3d 848, 853 (2003). The question to be decided when ruling on a section 2-615 motion to dismiss is whether the plaintiff has alleged sufficient facts which, if proved, would entitle the plaintiff to relief. *Doe ex rel. Ortega-Prion*, 339 Ill. App. 3d at 853.

In determining whether to grant a motion to dismiss, a court must take as true all well-pleaded allegations of fact contained in the complaint and construe all reasonable inferences therefrom in favor of the plaintiff. *Player v. Village of Bensenville*, 309 Ill. App. 3d 532, 536 (1999). A cause of action should not dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Player*, 309 Ill. App. 3d at 536. Our standard of review on a motion to dismiss is *de novo* as the resolution of the question is a matter of law. *Doe ex rel. Ortega-Prion*, 339 Ill. App. 3d at 853.

In her second amended complaint, plaintiff alleged that at all relevant times, the individual defendants controlled and directed MBG; that the individual defendants' fiduciary duties to plaintiff as a withdrawing member included the duty to give her reasonable access to MBG's financial records and time records in a timely manner; and that the individual defendants' misstated fees received by MBG, failed to give her reasonable access to the firm's time and financial records, all of which constituted a breach of fiduciary duty.

In order to plead a cause of action for breach of a fiduciary duty, a complaint must allege that: (1) a fiduciary duty exists; (2) the fiduciary duty was breached; and (3) such breach proximately caused the injury of which the plaintiff complains. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 32 (2003). See also *Neades v. Portes*, 193 Ill. 2d 433, 444 (2000).

Here, we have already determined that section 6 of the agreement did not apply to

plaintiff as she voluntarily resigned her employment from MBG. As such, any fiduciary duty owed to her by the individual defendants terminated upon her resignation. If defendants had no duty, it follows then that there could be no breach of duty nor could plaintiff's injury be proximately caused by such breach. Accordingly, we conclude that the trial court properly dismissed plaintiff's breach of fiduciary duty claim for failure to state a cause of action.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.