

2017 IL App (1st) 152358-U  
No. 1-15-2358  
March 21, 2017

SECOND DIVISION

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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MARY ANN O'DWYER,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellant,	)	
	)	No. 15 CH 7250
v.	)	
	)	The Honorable
JAMES CONSOLIDATED ENTERPRISES,	)	Mary L. Mikva,
INC., an Illinois corporation, WHEELS, INC.,	)	Judge Presiding.
an Illinois corporation, and JAMES S. FRANK,	)	
an individual,	)	
	)	
Defendants-Appellees.	)	

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Mason concurred in the judgment.

### ORDER

¶ 1 *Held:* An employee's failure to comply with her employer's written directives, after being afforded a reasonable opportunity to do so, constitutes a willful and continued failure to substantially perform her duties, which justifies a termination of the employee for cause pursuant to the Severance Benefit Agreement.

¶ 2 MaryAnn O'Dwyer sued the defendants, Frank Consolidated Enterprises (FCE), Wheels, Inc. (Wheels), and James Frank (Frank), and maintained that they violated the Severance

Benefit Agreement (SBA) when they terminated her without cause. The defendants maintained that they sent O'Dwyer a Transition Document on November 19, 2013, and Frank sent O'Dwyer written directives on March 3, and March 26, 2014, instructing her to delineate the job title for her position, the job duties for her position, and the compensation plan for the position, but O'Dwyer did not comply.

¶ 3 We find that O'Dwyer's failure to comply with Frank's written directives, after O'Dwyer had a reasonable opportunity to comply, constituted a willful failure to perform her duties. We also find that O'Dwyer's nonfeasance justified her termination for cause under the SBA. Therefore, the circuit court did not err when it granted the defendants' motion for summary judgment.

¶ 4 Background

¶ 5 O'Dwyer began her employment with Wheels in 1991, and during her employment with Wheels she was promoted to Vice President of Finance and Chief Financial Officer (CFO) in 1994, promoted to Senior Vice President of Finance and Operations in 1999, became a Director on the Wheels' Board of Directors in 2001, and was finally promoted to Senior Vice President for Customer Service in December 2004.

¶ 6 On January 5, 2004, Frank, Chief Executive Officer (CEO) of Wheels and FCE, Wheels' parent company, entered into a Severance Benefit Agreement (SBA) with O'Dwyer. The SBA provided, in part, as follows:

"Subject to the remaining provisions of this Agreement, the Benefit shall be payable upon any termination of your employment, whether such termination is

by Wheels or by you, excluding, however (a) a termination by Wheels for cause, or (b) a termination by you without good reason, both as herein defined.

For purposes of this Agreement, a termination by Wheels shall be deemed for 'cause' if it is based upon (a) willful and continued failure by you to substantially perform your duties after a written demand for performance is delivered to you from the Chief Executive Officer of Wheels, and a reasonable opportunity afforded to you to properly perform your duties or (b) your having willfully engaged in dishonest or disloyal conduct. A termination by you for 'good reason' shall be limited to a termination based upon action taken by Wheels (when there is no cause for termination by Wheels) including a reduction in your compensation, a demotion in your position or responsibilities, an assignment to you of duties which are inconsistent with your position, or a change in the location of the office at which you are based to one outside of the Chicago Metropolitan area.

The Benefit to be paid to you shall be in an amount equal to six months of 'compensation' (as defined below) for each full year that you have been employed by Wheels at the date of your termination of employment, but in no event in excess of 36 months of compensation."

¶ 7 In 2010, O'Dwyer told Frank that she planned to retire at age 60 or whenever Frank retired because she did not want to work for anyone else. In 2011, O'Dwyer and James discussed her retirement plans again, and O'Dwyer recommended that her subordinate, Shlomo Crandus (Crandus), succeed her as CFO of Wheels. On December 1, 2011, O'Dwyer

began experiencing symptoms for what she believed was a severe cold. In May 2012, O'Dwyer sent Frank an email informing him that she had been ill for several weeks, and she and Frank discussed the possibility of O'Dwyer working remotely from Arizona to accommodate her health issues.

¶ 8 In July 2012, O'Dwyer was diagnosed with an immunodeficiency disorder. She apprised Frank of her condition, and they agreed to limit her non-essential travel responsibilities. In December 2012, O'Dwyer requested a meeting with Frank during which she again suggested a restructure and reduction of her duties at Wheels to accommodate her health issues. O'Dwyer stated that she wanted to continue with their 2011 plan to transfer her CFO duties to Crandus. Frank proposed that O'Dwyer transfer to a position at FCE and continue to serve on the Wheels Board, but did not provide a specific title or compensation plan for the position.

¶ 9 On January 23, 2013, O'Dwyer sent her doctors an email in which she stated that she was struggling with fatigue and stamina issues requiring her to significantly modify her work and travel commitments as CFO of Wheels. She further stated that she was no longer working her typical 80 hour weeks and had taken steps to further reduce her responsibilities.

¶ 10 In May 2013, Frank informed O'Dwyer that he and his son, Daniel Frank, planned to "split" most of O'Dwyer's responsibilities in both Finance and Operations into two positions: the positions of CFO and COO. As CFO and COO of Wheels, O'Dwyer's base salary was \$340,000, and with her participation in Wheels' Executive Incentive and Equity Plan (EIEP) and Phantom Stock Plan, her income in 2013 was \$1.7 million. Frank further informed O'Dwyer that he had hired an executive recruiter to secure a candidate for the new COO position, and that the CFO position would go to Crandus, the current Vice President of Finance.

¶ 11 Crandus was promoted to CFO of Wheels in June 2013. On June 5, 2013, Frank sent an email to the Wheels staff announcing that O'Dwyer was transferring to FCE, Wheels' parent company, to serve as the company's CFO, Senior Vice President, and as a board member for the next four to six months. Frank stated that once the transition period ended, O'Dwyer would no longer be involved in the day-to-day operations or activities of Wheels, but she would continue to participate on the Wheels' Board of Directors.

¶ 12 Sandra Wilson (Wilson) began working as COO of Wheels on November 18, 2013, and O'Dwyer assisted Wilson in her transition. Once Wilson's started her job as COO, O'Dwyer no longer had any substantive duties at Wheels. The transition of responsibilities to Crandus and Wilson was completed by December 31, 2013, pursuant to Frank's and O'Dwyer's agreement.

¶ 13 Before O'Dwyer's transition was completed, Frank provided O'Dwyer with a Transition Document on November 19, 2013, which delineated her new job title, her new responsibilities, her compensation and her benefits at FCE:

MaryAnn Transition Document

November 2013

Transition Date: 1/1/2014

Current Salary and Benefits remain the same thru 12/31/13

As of 1/1/14

Title: CFO of FCE

Primary Responsibilities

- FCE and Wheels Board Administration
- Investment of FCE Funds

- FCE tax strategy
- JSF support and council

FCE M&A support and council

Compensation: \$100,000 per year for calendar 2014

To be reviewed, subsequently

Benefits

- Wheels Healthcare Plan – Family coverage
- One Vehicle per Wheels Officer Plan

IPP

Terminate:

- EIEP
- Phantom Stock

Other

- Office to be provided in Finance area
- E/A Support (Lisa for now ?)
- I/T Support

Jsf 11/18/2013

¶ 14 On November 23, 2013, Frank emailed the Transition Document to Joan Richards, Wheels Human Resources Department Director, and Crandus, and requested that Richards and Crandus coordinate an implementation strategy for O'Dwyer's transition from Wheels to FCE. On December 4, 2013, Wheels issued a press release naming the new COO of Wheels, and removed O'Dwyer's name and biography from the company's website.

¶ 15 On December 10, 2013, O'Dwyer sent Frank an email in which she stated that she had not agreed to the details of the Transition Document, which she believed was a "discussion document," and that she had not resigned from her employment or her seat on Wheels' Board of Directors. O'Dwyer also stated that she would provide Frank with a counterproposal in the near future.

¶ 16 On December 31, 2013, counsel for Wheels wrote a letter to O'Dwyer's attorney stating that Frank had not terminated O'Dwyer's employment with Wheels. On January 17, 2014, counsel for Wheels contacted O'Dwyer's attorney again stating that O'Dwyer remained employed.

¶ 17 On March 3, 2014, Frank wrote O'Dwyer a letter in which he acknowledged her dissatisfaction with the Transition Document, but he also stated that she had not provided him with a counterproposal delineating her desired duties. Frank also stated that O'Dwyer was still employed as Senior Vice President of Wheels and that she was paid the same salary that she was paid in her former positions of COO and CFO, even though she had been absent from the office since December 2013. Frank stated that Wheels could not continue to employ O'Dwyer if she refused to work, and he requested that O'Dwyer draft a written counterproposal delineating a position, the substantive job responsibilities, and a proposed compensation plan within the next week.

¶ 18 On March 26, 2014, Frank sent an email to O'Dwyer following up on his March 3, 2014 letter. Frank stated that he had not received a written plan from O'Dwyer detailing her desired position and substantive responsibilities. He further stated that O'Dwyer had not returned to the office nor had she performed any work for Wheels or FCE. Finally, Frank stated that if he

did not receive O'Dwyer's proposed plan by April 2, 2014, he would take appropriate action with regard to her employment.

¶ 19 On April 1, 2014, O'Dwyer responded to Frank's March 3<sup>rd</sup> and March 26<sup>th</sup> correspondence with an email stating that she had not failed to perform any duties because she did not have any duties, nor was she obligated to propose any new duties. O'Dwyer further stated that Frank instructed the human resources and finance departments to terminate her Wheels employment and benefits on November 23, 2013. Finally, O'Dwyer stated that she believed that Frank terminated her Wheels employment months beforehand, and his decision to continue paying her salary was a litigation strategy to avoid paying her severance benefits as required by the SBA.

¶ 20 On April 5, 2014, Frank sent O'Dwyer a letter notifying her that her employment with Wheels and FCE was terminated for cause due (i) to her failure to perform any duties outlined in the Transition Document, and (ii) to her refusal to provide a written plan detailing a desired position with substantive responsibilities.

¶ 21 On April 15, 2014, O'Dwyer filed a three count complaint against FCE, Wheels, and Frank: count I was to recover damages for breach of contract for terminating O'Dwyer without cause as defined by the SBA; count II was for violating the Illinois Wage Payment and Collection Act (IWPCA); and count III was for a breach of contract relating to the Phantom Stock Agreement.

¶ 22 On March 18, 2015, O'Dwyer filed a motion for summary judgment, pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005) (West 2014), arguing that she was entitled to the severance benefits because she was terminated without cause.



O'Dwyer attached her affidavit in which she averred that Frank terminated her employment on December 6, 2013 during a meeting in which he told her that "she didn't work here anymore." O'Dwyer also averred that, in January 2014, she received notice, pursuant to COBRA, apprising her of her right to continuing healthcare coverage. Finally, O'Dwyer averred that she believed Wheels sent the notice because the company was her only employer and the sponsor of her healthcare benefits.

¶ 23 On April 24, 2015, the defendants filed a response to O'Dwyer's motion for summary judgment, and also filed a cross-motion for summary judgment in which they argued that O'Dwyer was not entitled to benefits under the SBA because she voluntarily resigned. To support their position, the defendants attached Frank's affidavit in which he averred that (i) O'Dwyer recommended that her duties as CFO be transferred to her subordinate, Crandus; (ii) O'Dwyer assisted Wheels in recruiting her successor as Senior Vice President of Operations and Customer Service; (iii) the transition of O'Dwyer's responsibilities to Crandus and Wilson was completed by December 31, 2013; and (iv) O'Dwyer no longer had any substantive responsibilities at Wheels. In addition, the defendants attached O'Dwyer's deposition in which she testified that she sent an email to her brother on June 5, 2013, that stated, "I am so very thrilled to tell you that they announced my retirement today," and she also testified that she informed a friend on June 16, 2013 that she was retiring from Wheels by her own volition. The defendants also attached Joan Richards' affidavit in which Richards averred that during a June 2013 conversation with O'Dwyer, O'Dwyer stated that she had decided to retire from Wheels. Finally, the defendants attached Sandra Wilson's affidavit in which Wilson averred that O'Dwyer also told her that she planned to retire from Wheels.

¶ 24 The defendants also presented evidence to support their alternative position that even if the court were to conclude that O'Dwyer did not resign, she was still not entitled to benefits because she was terminated for cause on April 5, 2014. The defendants attached Frank's affidavit in which he averred that O'Dwyer was terminated for cause because she did not respond to his directives instructing her to provide a list of tasks she was able to perform.

¶ 25 On May 29, 2015, O'Dwyer filed her response to the defendants' motion for summary judgment. O'Dwyer alleged that the defendants cannot argue that she voluntarily resigned because they judicially admitted that she was terminated for cause. To support her position O'Dwyer attached the defendants' interrogatory answers as well as Frank's November 21, 2014 deposition and both indicate that Frank terminated O'Dwyer for cause and do not state that O'Dwyer voluntarily resigned. In his deposition, Frank testified that (i) he could not recall O'Dwyer using the word "retire;" (ii) he expected O'Dwyer to retire when Wheels hired a new COO; (iii) Frank recalled a conversation in which O'Dwyer said she could no longer perform her job functions; and (iv) O'Dwyer did not resign on December 31, 2013. O'Dwyer further argues that she did not resign from her employment within the meaning of the SBA, nor was she terminated for cause because she could not willfully refuse to perform her duties if all parties agree that she had no duties to perform.

¶ 26 On June 2, 2015, O'Dwyer filed a corrected reply and response in support of her motion and in opposition to the defendants' motion and reiterated the same arguments and presented the same evidentiary materials that she presented in her May 29, 2015 reply and response.

¶ 27 On June 19, 2015, the defendants filed their reply and maintained that O'Dwyer attempted to retract her resignation and, while trying to resolve this dilemma, they terminated her for cause after she willfully refused to adhere to directives from Frank. The defendants

presented excerpts from O'Dwyer's emails that she sent to her family, friends, and colleagues expressing her need to retire to accommodate her health issues.

¶ 28 On July 20, 2015, the court granted the defendants' motion for summary judgment pursuant to section 2-1005 of the Code. The court found that O'Dwyer constructively resigned her position when she requested to be relieved of her duties due to her medical condition. The court also found that despite her constructive resignation, she remained in Wheels' employ but refused to adhere to Frank's directives to create her own duties thereby providing the framework for her termination for cause under the SBA. On August 12, 2015, O'Dwyer filed a timely notice of appeal seeking review of the July 20, 2015 order.

¶ 29 Analysis

¶ 30 O'Dwyer presents two issues for our review: (i) whether the circuit court erred when it granted the defendants' motion for summary judgment based on its finding that O'Dwyer was terminated for cause; and (ii) whether the circuit court erred when it granted the defendants' motion for summary judgment based on its finding that O'Dwyer voluntarily resigned.

¶ 31 Standard of Review

¶ 32 A trial court may grant a motion for summary judgment only if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). We review a trial court's order that grants a motion for summary judgment *de novo*. *Thompson*, 241 Ill. 2d at 438. Here, we must also determine whether O'Dwyer is entitled to severance payments under the terms of the SBA, an employment contract. The construction, interpretation and legal effect

of the contractual terms in the SBA presents a question of law which is subject to *de novo* review. *Avery v. State Farm Mutual Auto Insurance Company*, 216 Ill. 2d 100, 129 (2005). Finally, when parties file cross-motions for summary judgment, they agree that only a question of law is involved and they invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28; *Allen v. Meyer*, 14 Ill. 2d 284, 292 (1958). However, we are mindful that the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Id.*

¶ 33 Illinois case law has established that when interpreting an employment contract, like the SBA, the court's aim should be to "ascertain and give effect to the intent of the parties." *Elsener v. Brown*, 2013 IL (2nd) 120209, ¶ 71, quoting *Allianz Insurance Co. v. Guidant Corp.*, 387 Ill. App. 3d 1008, 1027 (2008). The court further noted that the best indication of the parties' intent is the language of the contract itself. *Id.* Thus, when analyzing whether or not O'Dwyer was terminated for cause, we must examine the language in the SBA.

¶ 34 Termination For Cause

¶ 35 The SBA's language provides that termination for cause is based upon a "willful and continued failure by [O'Dwyer] to substantially perform [her] duties after a written demand for performance is delivered to [O'Dwyer] from the Chief Executive Officer of Wheels, and a reasonable opportunity afforded to [O'Dwyer] to properly perform [her] duties." Illinois case law makes it clear that an agent has a duty to respond to the desires of her principal. *Milwaukee Mutual Ins. Co. v. Joseph Wessels, Wessels Plumbing Sales & Serv. Co., Clemons, Shepherd & Eckols, Inc. and John Bova*, 114 Ill. App. 3d 746, 749 (1983); *Slates v. Int'l House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 724 (1980). We must determine whether

the defendants provided O'Dwyer with written directives and provided her with a reasonable opportunity to perform, in order to determine if she was terminated for cause under the SBA.

¶ 36 The facts establish that in 2011, Frank and O'Dwyer discussed a plan and decided that when O'Dwyer retired, her position as CFO would be transferred to Crandus, her subordinate. In July 2012, O'Dwyer was diagnosed with an immunodeficiency disorder. In December 2012, she met with Frank and told him that she wanted to execute their plan to transfer her CFO duties to Crandus and to reduce her duties at Wheels to accommodate her health issues. In June 2013, Crandus was promoted to CFO of Wheels and in November 2013, O'Dwyer assisted Wilson in her transition as the new COO of Wheels. Both O'Dwyer and the defendants concede that all of O'Dwyer's responsibilities had been transferred to Crandus and Wilson by November 18, 2013, leaving O'Dwyer with no substantive duties.

¶ 37 On November 19, 2013, Frank sent O'Dwyer the Transition Document, which named her new position at FCE, delineated her primary responsibilities, and included a compensation plan. On December 10, 2013, O'Dwyer sent Frank a letter stating that she rejected the FCE offer, and would provide Frank with a counterproposal, but she failed to provide Frank with a counterproposal. When Frank did not receive a counterproposal, he sent O'Dwyer a letter on March 3, 2014, and an email on March 26, 2014, requesting that she delineate her desired duties, and noted that she was not performing any substantive duties, but she was still receiving the same salary she received when she held the positions of COO and CFO of Wheels. Instead of complying with Frank's directives, O'Dwyer responded to his correspondence with an email on April 1, 2014, acknowledging her failure to comply and stating that it was not her responsibility to propose new duties because the creation of duties belonged to her employer.

¶ 38 We note that O'Dwyer was paid the same salary she had always received at Wheels although she had reduced responsibilities in 2013 and performed no work in 2014. We also note that O'Dwyer had health problems and was diagnosed with an immunodeficiency disorder. Finally, we note that Frank attempted to make accommodations for O'Dwyer's health issues by providing O'Dwyer with a new position, CFO of FCE, and a new salary in the Transition document.

¶ 39 We find that O'Dwyer's refusal to comply with Frank's, the Chief Executive Officer, March 3, and March 26, 2014 written directives to delineate a position, substantive job duties, and a compensation plan constituted a breach of her duty as an agent to respond to the desires of her principal. *Slates*, 90 Ill. App. 3d at 724; *Milwaukee Mutual Ins.*, 114 Ill. App. 3d at 749. We also find that O'Dwyer was given a reasonable amount of time, from November 19, 2013, the date of the Transition Document, until April 5, 2014, the day she was terminated, to delineate a position, job duties, and a compensation plan. Therefore, we find that, after being given a reasonable time to comply with the Chief Executive Officer's directives, O'Dwyer's refusal to comply with Frank's March 3 and March 26, 2014, written directives constituted a willful failure to perform her duties.

¶ 40 Accordingly, we find that O'Dwyer's nonfeasance justified her termination for cause under the SBA. Therefore, we hold that the circuit court did not err when it granted the defendants' motion for summary judgment based on its finding that O'Dwyer was terminated for cause as defined by the SBA.

¶ 41

Other Issues

¶ 42

In light of the fact we find that the circuit court properly granted the defendants' motion for summary judgment based on its finding that O'Dwyer was terminated for cause, we need not consider whether she voluntarily resigned. We also find that O'Dwyer's claim under the IWPCA, a different theory of recovery, was also predicated on the SBA, but has no merit because we found O'Dwyer was terminated for cause. *Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 480, 490-91 (1993) (Although a single group of operative facts may give rise to the assertion of more than one theory of recovery, assertions of different theories of relief arising out of a single group of operative facts constitute a single cause of action); also see *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310-11 (1998). Finally, with respect to the Phantom Stock Agreement, O'Dwyer admits in her brief that the payments were made, and therefore, we consider the issue moot.

¶ 43

Affirmed.