[Cite as *You v. N.E. Ohio Med. Univ.*, 2019-Ohio-5476.]

MIN YOU, PhD Plaintiff v. NORTHEAST OHIO MEDICAL UNIVERSITY Defendant	Case No. 2015-00747JD Judge Patrick M. McGrath Magistrate Anderson M. Renick DECISION

{¶1} On August 16, 2019, plaintiff, Min You, and defendant, Northeast Ohio Medical University (NEOMU), filed competing motions for summary judgment, pursuant to Civ.R. 56(B). On August 30, 2019, plaintiff filed a memorandum contra NEOMU's motion for summary judgment. On September 13, 2019, NEOMU filed a memorandum contra plaintiff's motion for summary judgment. With leave of court, NEOMU filed a reply memorandum in support of its motion for summary judgment on September 16, 2019, and plaintiff filed a reply memorandum in support of her motion for summary judgment on September 27, 2019. The competing motions for summary judgment are now before the court for a non-oral hearing pursuant to L.C.C.R. 4. For the reasons set forth below, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of

> law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶3} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶4} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Factual Background

{¶5} NEOMU is a public medical university with two colleges—a college of medicine and a college of pharmacy. In November 2013, NEOMU hired plaintiff as chair of the department of pharmaceutical sciences and associate dean for research in the college of pharmacy. (You Depo, Ex. A.) Plaintiff was also appointed as a full

professor in the department of pharmaceutical sciences. (You Depo., Ex. A.) Charles Taylor, then dean of the college of pharmacy, was primarily responsible for the decision to hire plaintiff. (Taylor Depo. at 6.)

{¶6} Before plaintiff was hired, she and Taylor negotiated the terms of her appointment in a series of telephone calls and email exchanges. (First Taylor Aff. at ¶ 2.) One of the terms discussed was the creation of an endowed chair or professorship to be held by plaintiff. (First Taylor Aff. at ¶ 5; Second You Aff. at ¶ 5.) On October 17, 2013, Taylor sent plaintiff an email summarizing their "discussions pertaining to the principles and resources important for us to consider with the department chair position." (First You Aff., Ex. 3-C.) The email included discussions about establishing an endowed chair or professorship for plaintiff. (First You Aff., Ex. 3-C at 4.) Taylor and plaintiff exchanged additional emails before reaching final terms. (First You Aff., Ex. 3-C at 1-2; Second Taylor Aff. Ex. V at 3.)

{¶7} Taylor memorialized the final terms in an offer letter he sent plaintiff on November 4, 2013. (You Depo., Ex. A.) The letter set forth the following terms concerning the creation of an endowed position:

> As part of our 40th year Anniversary, the College of Pharmacy, in conjunction with [NEOMU's] Division of Advancement, will create a process to name and fully endow a distinguished chair/professorship within the College of Pharmacy to which you will be assigned. The process will begin immediately upon your acceptance of this offer with the final name of the position determined by March 31, 2014. We will contribute annual disbursements for up to a five year period to help establish the corpus. You will be expected to engage in a philanthropic initiative with the Division of Advancement to fully fund this endowment within the five year time period, at which time the name may be modified

> based on donor instructions. Any earnings and various restrictions will be in accordance with university policies for endowments.

(You Depo., Ex. A at 2.) Plaintiff signed a formal written acceptance of the terms of the offer letter on November 11, 2013. (You Depo., Ex. A at 4.) After NEOMU's president and board of trustees approved plaintiff's appointment, plaintiff started working at NEOMU in early 2014. (You Depo. at 14; Taylor Depo. at 11.) In her capacities as department chair and associate dean, plaintiff reported to Taylor. (You Depo. at 61-62, 151.)

{¶8} In late 2014, plaintiff began behaving in a manner that Taylor found insubordinate. (Taylor Depo. at 22.) On multiple occasions, plaintiff sent emails about departmental and college business to NEOMU's president, Jay Gershen. (Taylor Depo. at 19; You Depo. Ex. G-K.) On one occasion, Gershen's assistant requested plaintiff remove Gershen from such emails due to the "exorbitant amount of emails" Gershen received on a daily basis. (You Depo., Ex. D.) Taylor also spoke to plaintiff multiple times about the chain of command and instructed plaintiff to stop sending Gershen emails about departmental business. (Taylor Depo. at 19.) Eventually, Gershen and Taylor met with plaintiff to discuss their expectations concerning the chain of command and plaintiff's email practices. (Taylor Depo. at 19; Gershen Depo. at 13; You Depo. at 151-160.) After the meeting, Taylor sent plaintiff a formal written warning, instructing her to cease communicating directly with Gershen "on the department or collegiate operational matters." (You Depo., Ex. L.) When plaintiff rejected this warning letter, Taylor sent a second warning, which plaintiff also rejected. (You Depo., Ex. M-O.)

{¶9} Following plaintiff's rejection of his second warning letter, Taylor decided to remove plaintiff from her administrative positions as department chair and associate dean for research. (You Depo., Ex. P.) Taylor sent plaintiff a formal removal letter notifying her of his decision. Concerning the creation of an endowed position for plaintiff, Taylor wrote, "Furthermore, you are hereby released from your obligation to

engage with the Division of Advancement to fund an endowed chair/professorship within the College of Pharmacy, and you are hereby notified that the College will not assign that position to you should one be developed." (You Depo., Ex. P.) Plaintiff retained her position as a tenured professor. (You Depo., Ex. P.)

Procedural Background

{¶10} Plaintiff filed this action following her removal from her positions as chair and associate dean. She brought claims for breach of contract, violation of due process rights, retaliation, and discrimination on the basis of race, gender, and national origin. NEOMU moved for summary judgment on all claims, and the court granted NEOMU's motion. Plaintiff appealed the decision to the Tenth District Court of Appeals, which affirmed the grant of summary judgment as to plaintiff's due process claim, retaliation claim, and discrimination claims. *You v. N.E. Ohio Med. Univ.*, 10th Dist. Franklin No. 17AP-426, 2018-Ohio-4838. Furthermore, the appellate court partially affirmed the grant of summary judgment as to the breach of contract claim. Specifically, the appellate court affirmed this court's finding that plaintiff "could not as a matter of law establish a breach of contract claim for the termination of her appointments as department chair and associate dean for research." *Id*. at ¶ 26. The appellate court concluded that the NEOMU faculty bylaws, which were incorporated into plaintiff's offer letter, gave Taylor the authority to remove plaintiff from her positions as department chair and associate dean for research at will. *Id*. However, the appellate court found that plaintiff had also raised a breach of contract claim for the cancellation of her endowed position. *Id*. at ¶ 28. The appellate court determined that this court did not address that claim in its decision and that NEOMU failed to carry its burden of demonstrating that there was no genuine issue of material fact as to that claim. *Id*. at ¶ 28-29. The court of appeals remanded this case back to this court for "further proceedings on that limited claim only." *Id*. at ¶ 74.

Law and Analysis

{¶11} To prevail on a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages or loss to the plaintiff. *Jarupan v. Hannah*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 18 (10th Dist.).[1] The existence of a contract is a question of law. *Motorists Mut. Ins. Co. v. Columbus Fin., Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090, ¶ 7 (10th Dist.). "A valid contract consists of an offer, acceptance, and consideration." *Id*., citing *Tersigni v. Gen. Tire, Inc.*, 91 Ohio App.3d 757, 760 (9th Dist.1993). For a party to be bound by a contract, there must be a "meeting of the minds." *Aftermath, Inc. v. Buffingon*, 10th Dist. Franklin No. 09AP-410, 2010-Ohio-19, ¶ 4. "'[T]he signing of an agreement and acquiescence in its effect generally demonstrates the existence of a meeting of the minds.'" *Id*., quoting *Dalicandrao v. Morrison Rd. Dev. Co.*, 10th Dist. Franklin No. 00AP-619, 2001 Ohio App. LEXIS 1765 (Apr. 17, 2001).

{¶12} Plaintiff's acceptance of NEOMU's offer letter created a contractual relationship. Undisputed evidence in the record establishes that Taylor, acting on behalf of NEOMU, offered plaintiff employment on the terms set forth in the offer letter and that plaintiff formally accepted that offer in writing. Neither party contests the existence of a contractual relationship between them. However, the parties disagree as to whether plaintiff and NEOMU contracted to create an endowed position for plaintiff independent from her administrative positions as department chair and associate dean. Plaintiff contends that that the endowed position described in plaintiff's offer letter is an academic rank completely separate from the role of department chair or associate dean. (Plaintiff's Motion for Summary Judgment at 5.) NEOMU, on the other hand, contends that the endowed position was a tool for plaintiff to use in her administrative positions,

[1]In its motion for summary judgment, NEOMU argues that plaintiff failed to attach a copy of her alleged contract with NEOMU to her complaint, as required by Civ.R. 10(D). To the extent NEOMU argues that plaintiff's breach of contract claim must fail because of plaintiff's failure to comply with Civ.R. 10(D), NEOMU has waived this argument because it did not file a motion for a more definite statement pursuant to Civ.R. 12(E). *See Ohio Receivables, LLC v. Dallriva*, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, ¶ 36.

from which she was lawfully removed. (Defendant's Motion for Summary Judgment at 7.)

{¶13} The interpretation of a written contract is a question of law. *CosmetiCredit, LLC v. World Fin. Network Natl. Bank*, 10th Dist. Franklin No. 14AP-32, 2014-Ohio-5301, ¶ 13. "'The intent of the parties is presumed to reside in the language they chose to employ in the agreement.'" *Id*., quoting *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, paragraph one of the syllabus (1987). Thus, if the language of a contract is not ambiguous, it must be enforced as written. *CosmetiCredit* at ¶ 14. Contract language is ambiguous if its meaning cannot be determined from the four corners of the contract or if it is susceptible to more than one reasonable interpretation. *Bluemile, Inc. v. Atlas Indus. Contrs., Ltd.*, 10th Dist. Franklin No. 16AP-789 and 16AP-791, 2017-Ohio-9196, ¶ 15. When contract language is ambiguous, a court must then look at parol evidence to determine the parties' intent. *Cent. Funding, Inc. v. CompuServe Interactive Servs., Inc.*, 10th Dist. No. 02AP-972, 2003-Ohio-5037, ¶ 44. Parol evidence is evidence of antecedent understandings and negotiations between the parties. *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433, 440 (1996).

{¶14} The language in plaintiff's offer letter unambiguously establishes that the creation of an endowed position for plaintiff was a benefit attendant to plaintiff's administrative positions as department chair and associate dean for research. Plaintiff's offer letter explicitly offers plaintiff an appointment to two specific positions: "appointment at [NEOMU] College of Pharmacy as department chair at the rank of Professor" and "a non-paid appointment as Associate Dean for Research within the College of Pharmacy." (You Depo., Ex. A at 1.) By contrast, the letter does not offer plaintiff a position as an endowed chair or endowed professor. Rather, the letter discusses the establishment of a process to create and name an endowed position for plaintiff. This language appears in the middle of a lengthy description of the benefits and responsibilities attendant to plaintiff's administrative positions. The endowment

language appears after language describing the location of plaintiff's office and the requirement that plaintiff design a faculty hiring plan and before the language describing the supplemental payment that NEOMU agreed to provide plaintiff for moving expenses. Based on the four corners of plaintiff's offer letter, the proposed endowment was a potential benefit and resource offered to plaintiff as part and parcel of her administrative roles.

{¶15} Plaintiff contends that the NEOMU faculty bylaws, which are incorporated into the offer letter by reference, establish that the proposed endowed position is a faculty position, unrelated to administrative roles and not subject to the administrative authority of the dean. (Plaintiff's Motion for Summary Judgment at 6.) Section M of the bylaws provide for the title of "Distinguished University Professor." (You Depo., Ex. B, at 19-20). The title is a "non-salaried designation that may be conferred by [NEOMU] from time to time, on individuals who have demonstrated extraordinary achievement as [NEOMU] faculty members" and "represents the highest honor that the University can confer on a faculty member." (You Depo., Ex. B. at 19-20.) Plaintiff argues that NEOMU's commitment to "create a process to name and fully endow a distinguished chair/professorship within the College of Pharmacy to which you will be assigned" gave plaintiff a distinguished university professorship under Section M of the faculty bylaws. (Plaintiff's Motion for Summary Judgment at 6.)

{¶16} Plaintiff's position is not consistent with the language of either the faculty bylaws or her offer letter. Section M of the bylaws does not discuss an endowed position, and the offer letter does not mention the title of Distinguished University Professor. Furthermore, under the terms of the faculty bylaws, Taylor had no authority to offer plaintiff the title of Distinguished University Professor. Section M(4) of the bylaws clearly and unambiguously establishes the process by which a NEOMU faculty member earns the designation of Distinguished University Professor: A department chair, college dean, or the NEOMU president must nominate a faculty member for the

title, and the nomination must be approved by NEOMU's council of deans, the NEOMU president, and NEOMU's board of trustees. (You Depo., Ex. B at 20.) There is no evidence, or even an allegation, that plaintiff was nominated and approved through such a process. There is no evidence in either the faculty bylaws or the terms of plaintiff's offer letter that this process could or would be circumvented in order to give plaintiff the title of Distinguished University Professor.

{¶17} Ultimately, neither the language in the four corners of the offer letter nor the language of the faculty bylaws incorporated therein promised plaintiff an endowed position independent of plaintiff's administrative positions. Furthermore, even if the language in plaintiff's offer letter was ambiguous, the parol evidence before the court under Civ.R. 56, construed in the light most favorable to plaintiff, also establishes that the endowment was a benefit of plaintiff's administrative roles.

{¶18} Both parties submitted emails exchanged between Taylor and plaintiff during the negotiations over the terms of plaintiff's appointment. In an email to plaintiff summarizing the negotiations, Taylor described the negotiated terms, which included the "Named/Endowed Chair" as "principles and resources important for us to consider *with the department chair position*." (Emphasis added.) (First You Affidavit, Ex. 3-C, at 2). In her reply email, plaintiff did not dispute Taylor's categorization of the terms as related to the department chair position or otherwise indicate that she expected the endowment to be separate from her administrative roles. (First You Affidavit, Ex. 3-C at 1.) Thus, the emails indicate that the endowment was contemplated as part of plaintiff's roles as department chair and associate dean, not as a standalone position. This evidence supports Taylor's affidavit testimony that NEOMU never intended to assign plaintiff an endowed chair or professorship should she no longer serve in her administrative roles. (First Taylor Aff. at ¶ 6.)

{¶19} Plaintiff submitted additional evidence with her motion for summary judgment and her memorandum contra NEOMU's motion for summary judgment. None

of the evidence creates a genuine issue of material fact as to whether plaintiff and NEOMU contracted to give plaintiff an endowed position distinct from her administrative positions. Plaintiff submitted copies of organizational charts from NEOMU's College of Medicine, showing that at least two departments in that college have endowed professors or endowed chairs who are not the administrative chairs of their respective departments. (First You Affidavit, Ex. 3-A, 3-B.) However, plaintiff offered no evidence that these arrangements were referenced or otherwise contemplated during her negotiations with Taylor and NEOMU.[2] Absent such evidence, there is no basis to read the terms of NEOMU's arrangements with other professors in the college of medicine into the terms of NEOMU's agreement with plaintiff concerning her position in the college of pharmacy.

{¶20} The only other evidence plaintiff offers to support her assertion that her endowment was an academic rank rather than a position incident to her administrative roles is her own testimony in affidavits and depositions. (You Depo. at 35; First You Aff. at ¶ 5; Second You Affidavit at ¶ 3.) Plaintiff did not support this self-serving testimony with any specific facts. Therefore, it is insufficient to create a genuine issue of material fact. *See White v. Sears*, 10th Dist. Franklin No. 10AP-294, 2011-Ohio-204, ¶ 9 (self-serving affidavit and deposition testimony is insufficient to demonstrate a material issue of fact on summary judgment). Aside from the self-serving testimony, all the parol evidence before the court on summary judgment, when construed in the light most favorable to the plaintiff, either supports that plaintiff's endowed position was attendant to her administrative roles or is altogether silent on the issue. Therefore, there is no genuine issue of material fact concerning whether plaintiff and NEOMU contracted for plaintiff to hold an endowed position independent of her positions as department chair

[2]It is not clear that these arrangements even existed at the time plaintiff accepted the offer to come to NEOMU in late 2013, as the organizational charts plaintiff provided are dated May 8, 2019.

and associate dean. The endowment was a benefit of and a resource to be utilized for plaintiff's administrative positions.

{¶21} Construing all evidence in the light most favorable to the plaintiff, the court concludes that the parties did not enter into a contract for the creation of an endowed position for plaintiff. Rather, the parties entered into a contract for plaintiff to serve as chair of NEOMU's department of pharmaceutical sciences and associate dean for research, and the creation of an endowed position for plaintiff to hold was an attendant benefit of those administrative positions. The Tenth District Court of Appeals has already determined that plaintiff's removal from those positions did not constitute a breach of contract. *You*, 2018-Ohio-4838, at ¶ 26. Therefore, plaintiff cannot prevail on a breach of contract claim for the loss of benefits attendant to those positions, including the benefit of an endowment. As a matter of law, plaintiff's sole remaining breach of contract claim must fail.

Conclusion

{¶22} Based upon the foregoing, the court finds there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law. Accordingly, plaintiff's motion for summary judgment shall be denied, defendant's motion for summary judgment shall be granted, and judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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MIN YOU, PhD Plaintiff v. NORTHEAST OHIO MEDICAL UNIVERSITY Defendant	Case No. 2015-00747JD Judge Patrick M. McGrath Magistrate Anderson M. Renick JUDGMENT ENTRY

{¶23} A non-oral hearing was conducted in this case upon plaintiff's and defendant's competing motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, plaintiff's motion for summary judgment is DENIED and defendant's motion for summary judgment is GRANTED. Judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

Filed October 16, 2019
Sent to S.C. Reporter 2/11/20