[Cite as *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis,* 2009-Ohio-5671.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Drs. Kristal & Forche, D.D.S., Inc.,	:	
Plaintiffs-Appellees,	:	No. 09AP-06 (C.P.C. No. 05CVH08-8289)
v.	:	(REGULAR CALENDAR)
Ronald S. Erkis, D.D.S.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 27, 2009

Gordon P. Shuler, for appellees.

Hollern & Associates, and *Edwin J. Hollern*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Ronald S. Erkis, D.D.S. ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas granting partial summary judgment in favor of appellees, Drs. Kristal & Forche, D.D.S., Inc. ("the corporation"), and overruling appellant's cross-motion for partial summary judgment as to the declaratory judgment claims related to the professional services agreement ("PSA") executed between appellant and the corporation. For the following reasons, we affirm the judgment of the trial court.

{¶2} The corporation was first formed in 1977 by appellant, who was the sole shareholder. At that time, the name of the corporation was Ronald S. Erkis, D.D.S., Inc. The corporation is an orthodontics practice located on the east side of Columbus, Ohio. Its patients are generally drawn from the suburbs of Whitehall, Reynoldsburg, Pickerington, and Bexley, as well as east Columbus.

{¶3} The corporation hired David M. Kristal, D.D.S. in 1978. In 1981, Dr. Kristal became a shareholder of the corporation and its name was changed to Drs. Erkis & Kristal, D.D.S., Inc.

{¶4} On August 29, 1994, the corporation entered into the PSA with appellant which set forth the terms of his employment, and which also included a provision for deferred compensation benefits upon retirement.

{¶5} In 1994, the corporation hired Robert J. Forche, D.D.S. In 1997, Dr. Forche became a shareholder in the corporation and its name was changed to Drs. Erkis, Kristal & Forche, D.D.S., Inc. Drs. Kristal and Forche also executed professional service agreements with the corporation.

{¶6} In January 2003, appellant became extremely ill after contracting a life-threatening infection and was hospitalized for a lengthy period of time. During his recovery, which spanned many months, appellant was unable to perform his duties under the PSA. In accordance with paragraph 11 of the PSA, appellant received disability payments.

{¶7} Effective May 1, 2003, appellant retired from the corporation in accordance with paragraph 12 of the PSA. The documents effectuating appellant's retirement, which

included the second amendment to the PSA, were executed on August 1, 2003.[1] On that same date, the corporation purchased appellant's stock in the corporation and changed the name of the corporation to its current name, Drs. Kristal & Forche, D.D.S., Inc.

{¶8} Following the execution of the second amendment to the PSA, the corporation made an initial retirement payment of $26,000 to appellant, and thereafter made seven payments to appellant, each in the amount of $40,000, between November 1, 2003 and May 1, 2005, for a total of $306,000.

{¶9} Despite the amputation of his left foot and the toes on his right foot, appellant made a remarkable recovery from his illness and wished to return to the practice of orthodontics. On October 1, 2004, appellant opened a competing practice near the corporation and began to solicit employees, patients, and referral sources from the corporation.

{¶10} The corporation ceased making payments to appellant in August 2005, arguing appellant had breached the PSA. The corporation claimed its gross revenues dropped significantly as a result of appellant's competing practice and, because the retirement payments to appellant were unfunded, meaning they came from revenues generated by the ongoing operation of the corporation's business, it was no longer feasible to make the retirement payments.

{¶11} On August 2, 2005, the corporation filed a complaint in the common pleas court, requesting, inter alia, a declaratory judgment to determine the rights of the parties

[1] The PSA and the second amendment to the PSA shall be referred to collectively as "the PSA" unless otherwise noted and referenced individually.

with respect to the PSA. Appellant filed an answer and counterclaim and third party complaint and also requested a declaratory judgment interpreting the PSA.[2]

{¶12} On August 1, 2006, the corporation filed its motion for partial summary judgment, requesting a declaratory judgment finding that appellant had breached his obligations under the PSA because he was not retired, which therefore impaired the corporation's ability to pay appellant, and in turn excused the corporation from making any future payments. Appellant filed a cross-motion requesting the trial court to find that the term "retirement" as set forth in the PSA should be interpreted to mean retirement from the corporation, rather than retirement from the profession, and therefore, he is not prohibited from maintaining a professional practice and is entitled to the deferred compensation payments.

{¶13} On October 4, 2006, the trial court granted the corporation's motion for partial summary judgment and denied appellant's cross-motion for partial summary judgment. The trial court determined that the words "retire" and "retirement" should be interpreted to mean "[leaving] one's profession entirely and not continue to pursue another car[eer] in the same field." (R. 117-19 at 8.) The trial court found this interpretation created an implied non-compete agreement between appellant and the

[2] In addition to the request for declaratory judgment, the corporation's complaint alleges causes of action for breach of contract, breach of fiduciary duty, and unjust enrichment. Appellant's counterclaim alleges its own multitude of claims, including breach of contract, unjust enrichment, intentional infliction of emotional distress, civil conspiracy, and declaratory judgment. Additionally, appellant filed a third-party complaint against the corporation, the individual dentists and one of their wives, as well as Barry H. Wolinetz, Esq. and the law firm of Baker & Hostetler, LLP. The third-party complaint includes claims for breach of fiduciary duty, civil conspiracy, fraud, and legal malpractice, among others. However, the vast majority of all of these claims have been settled and/or dismissed and the only issue on appeal for this court's review involves the declaratory judgment claims argued in the cross-motions for partial summary judgment.

corporation. The trial court further found that to interpret the contract in the manner advanced by appellant would produce an unreasonable and unjust result. As a result of appellant's competing practice, the trial court determined that appellant breached the PSA and converted his involuntary termination into a voluntary termination. Consequently, the trial court determined appellant was no longer entitled to retirement payments from the corporation.

{¶14} Appellant filed this timely appeal and asserts the following assignment of error for our review:

> THE TRIAL COURT ERRED BY GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF-APPELLEE AND BY OVERRULING DEFENDANT-APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

{¶15} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶16} Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could 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 most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id.

{¶17} In his sole assignment of error, appellant argues the trial court erred in granting partial summary judgment in favor of the corporation and against him. Appellant contends the language used in the PSA references retirement from the corporation and not retirement from the practice of orthodontics. Appellant disputes the trial court's determination that the PSA contains an implied non-compete provision, arguing that the trial court failed to provide any legal support for this determination and that such an interpretation is an impairment of his contract rights. He argues that the PSA does not require him to permanently leave the practice of orthodontics in order to receive his deferred compensation benefits, nor does it preclude him from opening another practice or otherwise compel him to forfeit those benefits if he begins practicing again. Appellant seeks to receive the deferred compensation benefits to which he claims he is entitled.

{¶18} In a declaratory judgment action, R.C. 2721.03 and 2721.04 provide that a party to a written contract is entitled to have the construction and validity of that contract determined by a court and the party may obtain a declaration of rights, status, or other legal relations under it.

{¶19} The construction of a written contract is a matter of law. *Alexander v. Buckeye Pipe Line Co*. (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. Common words in a contact must be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly intended, based upon the face or overall contents of the document. Id. at paragraph two of the syllabus.

{¶20} The purpose of contract construction is to realize and give effect to the intent of the parties. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 1996-Ohio-393. The intent of the parties is evidenced by the contractual language. *Skivolocki v. East Ohio Gas Co*. (1974), 38 Ohio St.2d 244, 247. See also *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9 (it is presumed that the intent of the parties to the contract lies within the language used in the contract); *Kelly v. Med. Life Ins. Co*. (1987), 31 Ohio St.3d 130, 132 (the intent of the parties is presumed to reside in the language they chose to use in the agreement).

{¶21} When parties to a contract dispute the meaning of the contract language, courts must first look to the four corners of the document to determine whether or not an ambiguity exists. *Buckeye Corrugated, Inc. v. DeRycke*, 9th Dist. No. 21459, 2003-Ohio-6321. "[I]f the contract terms are clear and precise, the contract is not ambiguous and the trial court is not permitted to refer to any evidence outside of the contract itself." *Ryan v. Ryan* (Oct. 27, 1999), 9th Dist. No. 19347.

{¶22} When the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement give the plain language special meaning, extrinsic evidence can be used to ascertain the intent of the parties. *Shifrin v. Forest City Ent., Inc*. (1992), 64 Ohio St.3d 635, 638. Contract language is ambiguous if its meaning

cannot be determined from the four corners of the contract or if the contract language is susceptible to two or more conflicting, yet reasonable, interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶18.

{¶23} In determining the intent of the parties, the court must read the contract as a whole and give effect to every part of the contract, if possible. *Clark v. Humes*, 10th Dist. No. 06AP-1202, 2008-Ohio-640; *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth*., 78 Ohio St.3d 353, 361-62, 1997-Ohio-202. The intent of each party is to be gathered from a consideration of the contract as a whole. Id.; *Harden v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. No. 04AP-154, 2004-Ohio-5548, ¶21.

{¶24} " 'Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred' * * * ." *Skivolocki* at 250, quoting *Stewart v. Chernicky* (1970), 439 Pa. 43, 49-50 (emphasis omitted). See also *Drydock Coal Company* at 316 (where the language of the contract is subject to two constructions, the interpretation that makes it a reasonable and probable agreement is preferred); *Doctors Hosp. W. v. Family Med. Group, Inc*. (Feb. 8, 1977), 10th Dist. No. 76AP-702 (where the language of the contract is susceptible to two constructions, one of which makes it fair and customary, while the other makes it inequitable, unusual, or unlikely, the fair and rational interpretation should be applied); *Foster Wheeler Enviresponse, Inc.* at 362 (in contract construction, the court should give effect to every provision within the contract, if possible, and if one

construction of a doubtful condition would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, the latter construction must prevail).

{¶25} The issue on appeal relates to the meaning of the words "retire" and "retirement" as used within the PSA in dispute.

{¶26} Following the execution of the second amendment to the PSA, paragraph 12 of the PSA, as amended, reads as follows:

> RETIREMENT. Employee may retire at any time upon reasonable notice to the Corporation. Upon retirement the Employee shall be entitled to deferred compensation in an amount specified on Schedule B, attached hereto and made a part hereof. Such deferred compensation shall be payable, without interest, by the Corporation as follows: (a) $26,000 shall be paid by the Corporation, less applicable tax and other withholdings, on August 1, 2003; and (b) the balance of the deferred compensation (i.e., $1,120,000) shall be paid by the corporation in 28 equal consecutive quarterly installments of $40,000 each, less applicable tax and other withholdings, commencing on November 1, 2003. It is understood that Ronald S. Erkis shall always have the right to elect to retire prior to the retirement of all other shareholder employees of the Corporation.

{¶27} The words "retire" and "retirement" are not defined in either the PSA or the second amendment to the PSA. The parties dispute the meaning of these words. Appellant urges us to define retire as "to terminate employment or service upon reaching retirement age," as set forth in Black's Law Dictionary (5th ed.1979) (Appellant's Reply Brief, at 1). Appellant contends the PSA refers to his retirement from the corporation, not from the practice of orthodontic dentistry. The corporation, on the other hand, argues there is no case law in Ohio which defines retire or retirement and cites to one definition set forth in the Oxford Dictionary as being applicable: "[to] leave one's job and cease to

work, especially because one has reached a particular age." (Appellee's Brief, at 20.) The corporation asserts that retire, as used in the context of these documents, means leaving the profession of orthodontic dentistry.

{¶28} The issue before us is whether or not appellant "retired" within the meaning of the PSA. We begin our analysis by looking at the four corners of the document to determine whether or not an ambiguity exists. As set forth above, we are required to give the words used in the PSA their common and ordinary meaning and to impose the meaning that fulfills the intent of the parties to the PSA, which shall be determined by considering the PSA as a whole.

{¶29} The PSA contains multiple provisions covering a variety of topics, such as exclusive service, malpractice insurance, disability, retirement, and death benefits, among many others. The provisions which appear most relevant to our review and determination are paragraphs 11 (Disability; Salary Continuation), 12 (Retirement), 13 (Deferred Compensation: Death Benefits), 14 (Involuntary Termination), and 15 (Voluntary Termination by Employee).

{¶30} Paragraph 11 provides for compensation while an employee is off work due to a disability. Under the PSA, he is entitled to 100 percent of his salary for up to three months and then 50 percent for up to an additional nine months. In the event the employee's disability continues for 12 consecutive months, he shall be deemed permanently and totally disabled and the PSA shall be terminated. The employee is then entitled to benefits in accordance with paragraph 13.

{¶31} Paragraph 13 provides that in the event of the employee's death, a surviving spouse or other designated beneficiary receives the same benefits the employee would have received upon retirement as set forth under paragraph 12.

{¶32} Paragraph 14 sets forth an assortment of events which constitute "involuntary termination" of the PSA. Subsections b, c, d, and e, are terminations caused by wrongdoing on the part of the employee. These include a substantial failure to perform, the loss of the employee's dentistry license, conviction of a felony offense, and conviction of an offense of moral turpitude or immoral conduct. The significance of terminating the PSA under these subsections is that it terminates the rights and obligations of the parties under the PSA. Thus, termination of the PSA under these subsections means the employee is not entitled to any type of disability, death, or retirement benefits.

{¶33} Significantly, termination of the PSA under subsections a, f, and g, of paragraph 14 still entitles the employee to any disability, death, or retirement benefits. These subsections govern termination in the event of the death of the employee, disability for more than 12 consecutive months, and retirement. Each of these subsections contains a provision which states that termination under these provisions does not relieve the corporation of its obligations, with respect to the payment of death, disability, or retirement benefits.

{¶34} Paragraph 15 of the PSA governs voluntary termination by the employee, meaning it gives the employee the right to terminate the PSA at his own choosing by providing 90 days written notice. The employee is then free to do as he likes, meaning he could work elsewhere and/or compete with the corporation if he chose to do so.

However, under this type of termination, the employee is not entitled to disability, death, or retirement benefits.

{¶35} The provision in paragraph 15 applies not only to appellant, but also to the other two employee shareholders who signed professional services agreements. This means that they too could choose to terminate their agreements with the proper notice, establish a new practice, and compete with one another or against the corporation. However, they would not be entitled to deferred compensation benefits either.

{¶36} We find it is also important to emphasize that the deferred compensation benefit payments set forth pursuant to paragraph 13 are unfunded. Thus, the payments are meant to come from the revenue generated by the ongoing operation of the corporation's business. In addition to making the retirement payments to appellant for seven years, the shareholders in the corporation must use that same revenue to pay the overhead expenses of the practice, including all employees, as well as themselves. Notably, paragraph 13 contains a provision which allows appellant the right to elect to retire prior to all other shareholder employees. Under this provision, appellant has the option to retire first and, as a result, he would not have to continue working to support any shareholder employees who are planning to retire and collect their own deferred compensation benefits, if he chose to exercise that option.

{¶37} If we interpret "retire" to simply mean retirement from the corporation, as appellant urges, the end result is that appellant is permitted to continue to practice orthodontics while earning his own revenue and competing with the corporation, thereby

resulting in an enormous decrease in the corporation's gross revenues.[3] Under this interpretation, appellant would also continue to collect $160,000 a year in deferred retirement compensation, while the corporation must continue to operate and compete with him in order to make the retirement payments and stay in business.

{¶38} Such an interpretation of "retire" is illogical, unreasonable, and improbable in this context when the PSA is considered as a whole. It is not reasonable or logical for the corporation to sign a contract that would permit an orthodontist to retire from the corporation and receive $160,000 annually in deferred compensation retirement payments, yet still allow him to compete against the corporation for the very same client base. No rational, prudent individual, or corporation would enter into such a contract, as it would make it extremely difficult, if not impossible, for the corporation to remain profitable under this interpretation, with appellant taking away the very revenue needed to fund the disability, death, or retirement benefits that were being paid to appellant. The corporation shareholders would be forced to work harder than before in order to earn enough revenue to not only compensate the retired employee, but to continue operating. See generally *Drydock Coal Co*. and *Skivolocki*, supra.

{¶39} Furthermore, such an interpretation of "retire" would render meaningless the provisions differentiating between voluntary termination and involuntary termination.

{¶40} The PSA, in paragraph 13, provides that an employee may retire at any time, upon providing reasonable notice to the corporation. Retirement falls under the "involuntary termination" provision set forth in paragraph 14, as do terminations occurring

[3] Dr. Kristal, one of the employee shareholders of the corporation, avers in his affidavit, dated July 20, 2006, that the gross revenues of the corporation dropped by $912,523 as a result of appellant's competing practice.

as a result of death or disability. Upon retirement, a retired employee is treated similarly to an employee who has died or become disabled, meaning that, unlike an employee who has simply chosen to end the employment relationship, employees who are retired, disabled, or deceased are still entitled to deferred compensation benefits. It is reasonable and logical to infer and to expect that these types of employees will not be competing with the corporation for clients and revenue and that they would not open a competing practice within the same locality as the existing corporation. It is apparent that the parties intended for all three circumstances to be treated in a similar fashion, in that, under all three circumstances, the employee would no longer be working in the field of orthodontic dentistry and would not be competing against the corporation for clients or referrals. As a result of this status, the employee is awarded deferred compensation benefits for his years of loyalty, service and hard work, based upon the corporation's gross revenue.

{¶41} This is differentiated from a voluntary termination situation where the employee leaves the corporation but is free to compete if he chooses, and the corporation is under no obligation to provide any death, disability, or retirement benefits to the employee under these circumstances. The death, disability, and retirement benefits are clearly intended to provide compensation as a benefit for past services rendered where the employee is no longer working in the profession and is not competing with the corporation for the same stream of revenue.

{¶42} Although some individuals may re-enter the work force after "retirement" and continue to pursue their long-time profession, such an interpretation of retire was not intended here. That interpretation of "retirement," which includes a subsequent return to the profession, is akin to simply exercising a voluntary termination of the PSA, which

would then allow the employee to compete, but which would not entitle him to any deferred compensation benefits. The PSA specifically excludes deferred compensation for an employee who has voluntarily left the corporation and who may be competing against the corporation. The fact that the PSA does not contemplate a situation where an employee "retires" and then re-enters the work force in the same profession lends itself to the inference that it did not consider such a scenario to constitute "retirement" as it was intended under the terms of the PSA.

{¶43} Although "retire" may be susceptible to two or more conflicting interpretations in some situations, both interpretations are not reasonable in this context. The only reasonable interpretation here is the interpretation that reads "retire" to mean retiring from the practice of orthodontics and not re-entering the profession at some later date. Here, the PSA must be interpreted to mean that appellant must stay retired in order to be entitled to deferred compensation benefits. This interpretation affords meaning and purpose to all parts of the contract and exemplifies the parties' intent to provide deferred compensation benefits only to persons who left the employ of the corporation upon their death or disability or upon reaching the end of their career.

{¶44} We find the context of the PSA offers sufficient aid in construing the meaning of "retire" in the contract at issue, and thus, there is no ambiguity. See generally *The Charles Behlen Sons' Co. v. Ricketts* (1928), 30 Ohio App. 167, 174. Therefore, because the meaning of the term "retire" has been determined from the four corners of the document, no extrinsic evidence is required or admissible here. After properly applying the rules of construction to the legal meaning of the contract, we find that the words "retire" and "retirement," as used in the context of this contract, were intended to

mean retirement from the practice of orthodontics without a re-entering of the profession at some later date. The trial court's finding of an implied non-compete provision is irrelevant, as such a finding is not necessary to determine that appellant breached the PSA and did not retire as that word is used in the PSA. We further find that when appellant returned to work in the same profession, his "retirement" became a voluntary termination of the PSA. Under this interpretation, appellant is not entitled to the deferred compensation benefits.

{¶45} Based upon the foregoing, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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