[Cite as *Fleming v. Kent State Univ.*, 2015-Ohio-5626.]

Court of Claims of Ohio

The Ohio Judicial Center
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JAMES M. FLEMING

Plaintiff

v.

KENT STATE UNIVERSITY

Defendant

Case No. 2011-09365

Judge Patrick M. McGrath

DECISION

{¶1} Plaintiff brings this action against defendant for breach of contract. The issues of liability and damages were bifurcated for trial. Following a trial on the issue of liability, the court found that defendant breached the parties' contract by reassigning plaintiff from a coaching position with the football team to a non-coaching position in defendant's Athletic Department. Following a trial on the issue of damages, the court determined that the contract contained an unenforceable penalty clause and that plaintiff failed to prove that he was damaged by defendant's breach of contract. On appeal, the court of appeals reversed the decision, in part, finding that defendant breached the contract on February 14, 2011, the effective date of plaintiff's reassignment, and that at the time of contracting, damages were uncertain as to amount and difficult of proof, thus satisfying the first part of a three-part test to determine whether the contract provision is an enforceable stipulated damages clause. *Fleming v. Kent State Univ.*, 10th Dist. Franklin No. 13AP-942, 2014-Ohio-3471, ¶ 31. Accordingly, the case was remanded for a determination as to "whether the stipulated damages clause satisfies the other two parts of the test and to award damages consistent with its determination." *Id*. at ¶ 34.

{¶2} Upon remand, the court conducted a status conference with the parties, wherein it was agreed that the parties would file briefs on the issue of damages. The parties were also permitted to file reply briefs, if desired, whereupon the case was submitted for a decision.

{¶3} Plaintiff's employment contract provides in relevant part:

{¶4} "WHEREAS, Kent State University agrees that [plaintiff] shall be employed by Kent State University as its Football, Defensive Coordinator; and

{¶5} "WHEREAS, the parties to this Contract desire to establish terms of employment not contained in the standard university employment Contract;

{¶6} "NOW, THEREFORE, in consideration of the above, the parties agree as follows:

{¶7} "1. The term of this Contract shall be for an initial period of **twenty-eight (28) months**, to terminate on June 30, 2012.

{¶8} "2. The initial salary beginning **March __, 2010** will be **$71,500**. * * *.

{¶9} " * * *

{¶10} "6. Subject to [plaintiff's] continuing compliance with NCAA and University rules and regulations, if this party terminates this Agreement prior to **June 30, 2012** except for cause as defined in Rule 3342-09(D)(2) of the Administrative Code as contained in the University Policy Register, the initiating party shall pay to the other the agreed upon early termination cost. If [defendant] is the initiator, it shall pay the balance of the then in effect base salary due for the remaining term."

{¶11} It is well established that parties are free to enter into contracts that contain provisions which apportion damages in the event of default. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27 (1984). Contracting parties may specify in advance those damages that are to be paid in the event of a breach "as long as the provision does not disregard the principle of compensation." *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376 (1993), citing 3 Restatement of the Law 2d, Contracts (1981), 157, Section 356, Comment a. Such damages are typically referred to as liquidated damages. In certain circumstances, however, freedom of contract may be limited for public policy reasons where stipulated damages constitute a penalty. *Id*.

{¶12} "Determining whether stipulated damages are punitive or liquidated is not always easy: '[I]t is necessary to look to the whole instrument, its subject-matter, the ease or difficulty of measuring the breach in damages, and the amount of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach, and also to the intent of the parties ascertained from the instrument itself in the light of the particular facts surrounding the making and execution of the contract.'" *Lake Ridge Academy* at 381-82, quoting *Jones v. Stevens*, 112 Ohio St. 43 (1925), paragraph one of the syllabus. "[W]hen a stipulated damages provision is challenged, the court must step back and examine it in light of what the parties knew at the time the contract was formed and in light of an estimate of the actual damages caused by the breach. If the provision was reasonable at the time of formation and it bears a reasonable (not necessarily exact) relation to actual damages, the provision will be enforced." *Id*. at 382, citing 3 Restatement of the Law 2d, Contracts, Section 356(1), at 157 (1981).

{¶13} The test developed in Ohio to judge a stipulated damages provision was set forth in *Samson Sales* as follows: "Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." *Id*. at paragraph one of the syllabus, citing *Jones*, paragraph two of the syllabus. Whether a stipulated damages provision constitutes enforceable liquidated damages or an unenforceable penalty is a question of law for the court. *Lake Ridge Academy* at 380.

{¶14} Plaintiff has satisfied part one of the test outlined in *Samson Sales*. *Fleming* at ¶ 31. Turning to the remaining two parts of the test, "'[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' * * * A contract is unconscionable if it did not result 'from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion.'" *Lake Ridge Academy* at 383. (Citations omitted.)

{¶15} The contract as a whole is not unconscionable. Defendant's former Director of Intercollegiate Athletics, Laing Kennedy, negotiated the terms of the contract with plaintiff. Plaintiff testified that upon being offered a position as a football coach, he was aware of the possibility that former head football coach, Doug Martin, might not continue as the head coach for more than one year. As a result, plaintiff negotiated a 28-month term for the contract. Additionally, the contract is a standard contract drafted by counsel for defendant and is a typical contract used for defendant's athletic coaches. However, negotiations between the parties resulted in several changes to the original contract form. Defendant's extensive experience with this type of transaction is not disputed.

{¶16} The contract as a whole is not unreasonable. At the time of contracting or even at the time of the breach, "the parties could not know what future bonuses or business opportunities [plaintiff] was missing out on due to the early termination." *Fleming* at ¶ 31, fn. 3. As a result, the parties agreed to an amount of damages as expressed in the parties' contract should either party terminate the contract except for cause. Such contract terms do not unreasonably favor either party given that the parties could not have known actual damages at the time of contracting in the event of a subsequent breach. It is reasonable for the parties to agree upon plaintiff's base salary due for the remaining term of the contract as the measure of damages in the event of a breach by defendant. *O'Brien v. Ohio State Univ.*, 139 Ohio Misc. 2d 36, 2006-Ohio-4346, ¶ 34-36 (finding the stipulated damages clause, which included the sum of the remaining base salary, benefits, and value of the use of a vehicle, to be reasonable and not disproportionate to former head basketball coach's actual damages as a result of defendant's termination of his employment).

{¶17} Defendant argues that enforcement of the stipulated damages provision will result in a "windfall" that is "manifestly disproportionate to the possible damage that reasonably could be foreseen" from defendant's breach. Defendant's brief, pg. 2. Interestingly, defendant took the opposite position in a case involving a breach of contract by defendant's former head basketball coach. *Kent State University v. Ford*, 11th Dist. Portage No. 2013-P-0091, 2015-Ohio-41. In affirming an award of $1.2 million to the defendant for the plaintiff's breach in taking a job as a head coach at a different university, the court held that the party seeking liquidated damages need not prove that actual damages resulted from the breach. *Id*. at ¶ 37. *See Kurtz v. Western Prop., L.L.C.*, 10th Dist. Franklin No. 10AP-1099, 2011-Ohio-6726, ¶ 41 (upholding an award of liquidated damages even though the court could not calculate the actual damages). Nevertheless, the court in *Kent State* noted that the defendant actually suffered some damage as a result of the breach. *Kent State* at ¶ 38. Similarly in the case before the court, plaintiff's employment was terminated on February 14, 2011. It is not disputed that plaintiff did not obtain employment as a football coach until December 16, 2011 when he accepted a position at the University of Central Florida. Regardless of whether plaintiff eventually obtained employment elsewhere at a higher rate of pay, plaintiff was unemployed and without income from defendant during much of the time period originally contemplated in the parties' contract. Therefore, considering the contract as a whole, the court finds that stipulated damages in the amount of plaintiff's base salary due for the remaining term is not so "manifestly disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties." *Kurtz* at ¶ 41.

{¶18} Finally, the court finds that the contract was the product of real bargaining between the parties wherein the parties expressed their intent that the damages listed in the contract should follow a breach thereof. Therefore, the court finds that an award of liquidated damages will not result in windfall to plaintiff. Accordingly, the court finds that the parties' contract contains a valid liquidated damages clause.

{¶19} Turning to the calculation of liquidated damages, the contract provides in relevant part as follows:

{¶20} "1. The term of this Contract shall be for an initial period of **twenty-eight (28) months**, to terminate on June 30, 2012.

{¶21} "2. The initial salary beginning **March __, 2010** will be **$71,500**. * * *.

{¶22} " * * *

{¶23} "6. * * * if this party terminates this Agreement prior to **June 30, 2012** * * * the initiating party shall pay to the other the agreed upon early termination cost. If [defendant] is the initiator, it shall pay the balance of the then in effect base salary due for the remaining term."

{¶24} The court of appeals determined that defendant breached the parties' contract on February 14, 2011. *Fleming* at ¶ 23. The contract provides that defendant "shall pay the balance of the then in effect base salary due for the remaining term." Plaintiff's base salary was $71,500 per year or $5,958.33 per month ($71,500/12 months = $5,958.33). At the time of the breach, the contract had a remaining term of 16.5 months (February 14, 2011 through June 30, 2012). Therefore, pursuant to the parties' liquidated damages provision, defendant as the initiator must pay plaintiff $98,312.45 ($5,958.33 X 16.5 months).

{¶25} Plaintiff also claims prejudgment interest. The Ohio Supreme Court has stated that "in a case involving a breach of contract where liability is determined and damages are awarded against the state, the aggrieved party is entitled to prejudgment interest on the amount of damages found due by the Court of Claims. The award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court." *Royal Elec. Const. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 117 (1995).

{¶26} The award of prejudgment interest is controlled by R.C.1343.03(A) which provides, in pertinent part, as follows: "[W]hen money becomes due and payable upon any * * * instrument of writing * * * the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract." Once a favorable judgment has been awarded, that party has a right to prejudgment interest. *Tharo Sys. v. cab Produkttechnik GmbH & Co. KG*, 196 Fed.Appx. 366, 377 (6th Cir.2006). "[M]oney damages become due and payable on a contract at the time of the breach." *Id*. at 378. The court of appeals determined that defendant breached the parties' contract on February 14, 2011. *Fleming* at ¶ 23. Therefore, the court awards plaintiff prejudgment interest as follows:

a. 320 days (02/14/2011 to 12/31/2011) @ 4% of $ 98,312.45 = $ 3,447.67
b. 366 days[1](01/01/2012 to 12/31/2012) @ 3% of $ 98,312.45 = $ 2,957.45
c. 365 days (01/01/2013 to 12/31/2013) @ 3% of $ 98,312.45 = $ 2,949.37
d. 365 days (01/01/2014 to 12/31/2014) @ 3% of $ 98,312.45 = $ 2,949.37
e. 113 days (01/01/2015 to 04/24/2015) @ 3% of $ 98,312.45 = $ 913.09
f. Total Prejudgment Interest = $13,216.95

{¶27} Based upon the foregoing, judgment shall be rendered in favor of plaintiff in the amount of $111,554.40 ($98,312.45 + $13,216.95 + $25 filing fee).

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[1] 2012 was a leap year.

PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶28} The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $111,554.40. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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