[Cite as *Lill v. Ohio State Univ.*, 2016-Ohio-5502.]

NANCY L. LILL, Ph.D. Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2015-00387 Judge Dale A. Crawford INTERIM DECISION

{¶1} This matter comes to be heard on Plaintiff's Complaint seeking damages, along with declaratory and equitable relief, for breach of contract and conversion. The matter was heard by the Court on June 20-22, 2016. After the evidence was taken and arguments completed, the Court issued an oral decision granting, in part, and denying, in part, Plaintiff's request for relief. This interim[1] decision constitutes the Court's findings of fact and conclusions of law.

Background

{¶2} Plaintiff, Nancy L. Lill, Ph.D., was hired by Defendant in 2008 as an Associate Professor in Defendant's Department of Pathology in the College of Medicine – her position was a tenure-track position. Since Plaintiff had eight years as an Assistant Professor at the University of Iowa College of Medicine, she was placed on a four year tenure-track. Defendant's tenure review process is governed by the University Faculty Rules and the Department of Pathology's Appointment Promotion and Tenure Document (AP&T) which the Parties have stipulated are incorporated in Plaintiff's employment contract entered into by the parties on August 14, 2008. (Plaintiff's Ex. 20).

{¶3} Pursuant to that contract, it was expected "that within three years, [Plaintiff would] generate sufficient funds through extramural funding to fund at least 50% of [her]

[1]While the Court has titled this decision an "interim" decision it considers the decision and order a final order, pursuant to R.C. 2505.02(B)(1), because it "* * * affects a substantial right in an action that in effect determined the action and prevent a judgment. * * *"

salary and benefits." (Plaintiff's Ex. 20, pg. 2). While employed by the University of Iowa, Dr. Lill obtained an R01 grant from the National Institutes of Health/National Cancer Institute (NIH R01). This is considered the gold standard of grant funding for cancer research. This was Plaintiff's only source of extramural funding while she was employed by Defendant and with a total grant value of $1,843,750.00 it covered 35% of her salary and benefits. (Defendant's Ex. A, B). This particular grant was set to expire on July 31, 2012. (Defendant's Ex. R; *See also* Defendant's Ex. O, Bates No. OSU_003146). While employed by Defendant, Plaintiff obtained a $100,000 grant through Pelotonia. (Defendant's Ex. B and Ex. O, Bates No. OSU_003146). However, as an internal funding source, this grant is not considered extramural funding.

{¶4} Plaintiff began the tenure review process in the summer of 2011. The rules applicable to the tenure review process provide that the faculty must first prepare a dossier; then obtain external and internal letters regarding their qualifications; and, submit the information to their department for recommendation. After review by the department, the information is sent to her college dean for further recommendation. The prepared packet and recommendations then go to the Provost for his or her determination of whether he or she believes that tenure should be granted or denied. Once the Provost has decided, the finding goes to the President and ultimately to the Board of Trustees for approval. As a practical matter, tenure decisions are made by the Provost pursuant to the rules applicable to the tenure process in effect at such time as the tenure process proceeds. In Dr. Lill's case, the process proceeded with her department chair and college dean recommending against tenure. (Defendant's Ex. E-G). The Provost's decision was also against tenure. (Plaintiff's Ex. 28). The University President and the Board of Trustees found against tenure. Plaintiff appealed her denial of tenure to the Committee on Academic Freedom and Responsibility (CAFR), alleging numerous violations of her tenure review process. University Faculty Rule 3335-5-05(B) (Plaintiff's Ex. 7) states, in part:

a. "* * * Complaints alleging improper evaluation shall be presented in writing to the faculty members of the committee on academic freedom and responsibility (hereinafter "committee") and to the executive vice president and provost within thirty days * * * the committee shall have sixty days to review the complaint, and evidence relating to it (including evidence on behalf of the academic unit) to determine whether reasonable or adequate ground exist for asserting improper evaluation."

{¶5} After consideration, CAFR found reasonable adequate grounds existed for asserting that Dr. Lill's tenure evaluation was improper and thereby referred Dr. Lill's appeal to the University Faculty Hearing Committee. (Plaintiff's Ex. 13/ Defendant's Ex. J). Pursuant to Faculty Rule 3335-5-05(C)(6), after an evaluation and a hearing, if the committee finds an improper evaluation has been made it shall:

b. "* * * submit its findings to the dean of the college in which the complainant is a member and to the executive vice president and provost. The executive vice president and provost, in consultation with the hearing panel and the chair of the faculty hearing committee, shall take such steps as may be deemed necessary to assure a new, fair, and impartial evaluation.* * *" (Emphasis added.)

{¶6} After an evaluation of the appeal, the Committee issued the following findings to the provost:

c. "* * * We found that the TIU [Tenure Initiating Unit] did, in fact, make use of the department's unapproved 2011 AP&T document, although the CAFR determined that the 2006 OAA approved AP&T document should have been used. We **did** find that this complaint could be reasonably upheld. * * * We found that the TIU did not obtain the minimum number of letters required (5) by the approved AP&T document (2006). We **did** find that this complaint could be reasonably upheld. * * * We found that the timeline which the TIU solicited evaluation letters was not in accordance with either the department's AP&T document or in accordance with the guidelines

> suggested by OAA. We **did** find that this complaint could be reasonably upheld. * * * "

(Plaintiff's Ex. 14/ Defendant's Ex. K) (Emphasis in Original).

{¶7} These findings were reported to the University's then-Executive Vice President of Academic Affairs and Provost, Dr. Joseph Alluto, as well as the University's then-President Dr. E. Gordon Gee along with the following recommendations:

> d. "* * * The TIU should be required to obtain two (2) additional letters of evaluation of Dr. Lill's file, review her tenure dossier in accordance with the 2006 AP&T document, provide a revised summary letter that takes this information into consideration, and hold a *new* vote at the departmental and college levels. * * * The Panel also recommends that the TIU be certain that all faculty whose votes are counted be present for the entirety of the deliberation of Dr. Lill's case, and that their votes be tabulated during the meeting. Moreover, we encourage that in the future the TIU solicit evaluation letters early enough to ensure the acquisition of five letters. * * *"

Id. (Emphasis in Original).

{¶8} The then-Provost, Dr. Joseph Alutto, received the Committee's findings and determined that he disagreed with the Committee's Findings of error and proceeded with what the defense believes was a new, fair and impartial evaluation, ultimately confirming his original finding that Dr. Lill's tenure should be denied, effectively resulting in Plaintiff's termination. (Defendant's Ex. L). It is the steps, or lack thereof, taken by Dr. Alutto after the Committee issued its findings and recommendations that gave rise to Plaintiff's claim for breach of contract, and as a direct result of said breach, to her related claim for conversion. The nature of these steps and the Court's findings related to whether his actions constituted a breach of contract are discussed in detail below.

1) <u>Breach of Contract</u>

{¶9} The concept of tenure is a backbone of the national higher education system. Dr. Alutto testified that it creates a 35-to-40-year relationship with faculty granted tenure, and that relationship is not only important to the faculty but important to the operation of the University. This is why it's so important for those persons involved in the tenure process to follow the rule applicable thereto.

{¶10} Contract interpretation is a matter of law for the court. *City of St. Marys v. Auglaize County Bd. of Comm'rs*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561. When interpreting a contract, the court's main objective is always to give effect to the intent of the parties as expressed in the written contract itself. *Hamilton Ins. Servs. v. Nationwide Ins. Cos*., 86 Ohio St.3d 270, 1999-Ohio-162, 714 N.E.2d 898. The intent of the parties is always presumed to reside in the precise language and terms they employed and set forth in the agreement. *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987). And, in determining the intent of the parties, a court must read the contract as a whole and attempt to give effect to every part and term of the contract. *Foster Wheeler Enviresponse v. Franklin Cnty Conv. Facilities Auth*., 78 Ohio St.3d 353, 1997-Ohio-202, 678 N.E.2d 519.

{¶11} Most important for the court is the admonition from the Ohio Supreme Court that "[i]t is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result. *Id*. at 362. A contract "does not become ambiguous by reason of the fact that in its operation it will work a hardship upon one of the parties thereto." *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 172, 143 N.E. 388 (1924).

{¶12} "[W]here the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978).

{¶13} "[W]hen a contract has an express provision governing a dispute, that provision will be applied; the court will not rewrite the contract to achieve a more equitable result." *Dugan & Meyers Constr. Co. v. Ohio Dept. of Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶ 39.

{¶14} Also important to the court's review is the long accepted tenet in contract interpretation that, if there are ambiguities in a contract, the document will be strictly construed against the party who drafted it or selected its language. *Graham v. Drydock Coal Co*., 76 Ohio St.3d 311, 1996-Ohio-393, 667 N.E.2d 949; *Central Realty Co. v. Clutter*, 62 Ohio St.2d 411, 406 N.E.2d 515 (1980). Defendant drafted the contract in dispute in this matter. With this well-settled law in mind, the Court turns to the written contract between the parties.

{¶15} The Parties have stipulated that Plaintiff's employment contract consists of her offer letter (Plaintiff's Ex. 20) and the incorporated rules, including but not limited to Faculty Rule 3335-5-05 (Defendant's Ex. I/ Plaintiff's Ex. 7), Faculty Rule 3335-5-05 (Plaintiff's Ex. 18), and the 2006 Department of Pathology AP&T Document (Plaintiff's Ex. 3). Therefore, if the Court finds that Defendant breached one or more of the clauses in these rules/standards, it may find that it breached its contract with Dr. Lill.

{¶16} The Court does not wish to rewrite the rules, nor interpret the rules in such a way as to violate the intent of the Parties. The Court finds, pursuant to Rule 3335-5-05, the findings of the Committee set forth in Plaintiff's Ex. 14 is a determination of the Committee that Plaintiff received an "improper evaluation."[2] Pursuant to Rule 3335-5-05(6)(b), upon receiving the Committee's findings, the Provost was required to "take such steps as may be deemed necessary to assure a new, fair, and impartial evaluation." (Defendant Ex. I, Bates No. OSU_005434). As stipulated by the defense,

[2]Pursuant to Rule 3335-5-05(C)(6) the Committee had two choices, "* * * dismiss the complaint if it determines there has been no improper evaluation. [or] * * * When it is found that an improper evaluation has been made, submit its findings to the dean of the college in which the complainant is a member and to the executive vice president and provost. * * *." (Defendant's Ex. I). Thus, the findings set forth in Plaintiffs Ex. 14 must be a finding of an improper evaluation.

the rules do not grant the Provost authority to disregard the Committee's findings and not grant a new, fair and impartial evaluation. While "new, fair and impartial" are not defined, there is no evidence that the definition of these three terms are anything different from their common meaning. As the terms are not clear and unambiguous, the Court relied, in part, on the legislative history of the rules in question to ascertain their meaning. (Plaintiff's Ex. 8-10). While there is some argument that "new" means de novo, the Court does not agree. New is dependent upon the circumstances on a case-by-case basis. Fair and impartial have substantially the same meaning – unbiased, neutral, nonpartisan.

{¶17} The rule requires the Provost to take the steps and provide the procedures that he or she deems necessary to facilitate the new, fair and impartial evaluation. The Court will not substitute its judgment for that of the Provost, nor will it determine what that process should be. However, the Court will state, clearly the rules intend the new process to include a correction of the errors found by the Committee. If an error is found in the Provost's review, there is no need to go back to the college level to conduct a review. However, if the error took place at the college level, it would appear the steps taken by the Provost should correct the error starting at the college level.

{¶18} In the case at bar, Dr. Lill was denied tenure by the Provost after receiving negative recommendations from the department and college level. Dr. Lill appealed that decision to the University Committee which found an improper evaluation citing three errors: One, the tenure standards used in the evaluation process were not in effect at the time the evaluation took place (*See* Plaintiff's Ex. 1-3); two, the reviews did not obtain the minimum number of evaluation letters required; and, three, the timeline for soliciting external review letters was not in accordance with the rules. The then-Provost, Dr. Joseph Alutto, received the Committee's findings of error and proceeded with what the defense characterizes as a new, fair, and impartial decision.

Conclusion

{¶19} The Court finds that Defendant's failure to provide Plaintiff with her contractual right to a new, fair and impartial evaluation constitutes a breach of Plaintiff's employment contract. This breach has caused Plaintiff significant damages, as yet to be determined.

{¶20} It is clear to the Court that Dr. Alutto did not conduct a new hearing, nor was the review fair and impartial considering it did not incorporate the findings of the committee. Another commonly accepted definition of "fair" is: "being in accordance with the rules, logic, or ethics." *Fair*, *Webster's II New College Dictionary*, (1999). Therefore, it can hardly be said that conducting a tenure review inconsistent with the rules is a fair evaluation.

{¶21} Dr. Alutto did not take such steps to assure the re-review was done with the applicable 2006 standards, nor did he obtain or seek to obtain the appropriate number of evaluation letters required by the rules. He advised the Committee it was simply not necessary; new letters, regardless of how good they were would not change his mind. (Plaintiff's Ex. 16).

{¶22} Having found the Provost failed to take such steps to assure a new, fair and impartial evaluation and that such failure constituted a breach of contract, the Court will make the further finding set forth in *Galiatsatos v. Univ. of Akron*, 10th Dist. Franklin No. 00AP-1307, 2001 Ohio App. LEXIS 4051 (Sep. 13, 2001) that the errors found by the Committee substantially prejudiced Dr. Lill's tenure application process. While *Galiatsatos* is probably not applicable, because there was no requirement in the Akron rules for a new, fair and impartial evaluation, the Court has made this finding to avoid a possible conflict with the holding of that case.

{¶23} Defendant asserts there should be a finding for Defendant since Plaintiff cannot prove at this point her damages by a reasonable certainty. The Court agrees that because of the unusual nature of this case, the damages, at this point, cannot be proved by a reasonable certainty. The damages cannot be determined until such time

as a new, fair and impartial evaluation is held. Once the promised evaluation is held, the Court will then have an opportunity to determine an appropriate damage amount. If the new, fair and impartial evaluation is held and her tenure is denied, it is possible that the Court may award no damages. If tenure is granted after a new evaluation, it is possible damages could be awarded. There's also an issue regarding whether a decision granting tenure will be made prospective or retrospective by the University. Initially, this is a determination that should be made by the University.

2) Conversion

{¶24} After Plaintiff rested, Defendant made a motion to dismiss both of Plaintiff's claims, pursuant to Civ.R. 41(B)(2). The Court held the motion in abeyance until after the Defendant presented the entirety of its case-in-chief. At the close of all of the evidence, and after careful consideration, the Court granted Defendant's motion as to Plaintiff's conversion claim. In response to a request by Defendant, and pursuant to Civ.R. 52, the following constitutes the Court's findings of fact and conclusions of law regarding its decision to grant Defendant's motion to dismiss as to Plaintiff's conversion claim.

{¶25} Plaintiff claims that when her employment with the University ended, it failed to return to her equipment she possessed and used in her research. To establish the tort of conversion, a plaintiff must show that (1) she has ownership or the right of possession of the property in question at the time of the alleged conversion, (2) defendant converted the property through a wrongful act, and (3) damages resulted from the defendant's act. *RAE Assocs., Inc. v. Nexus Communications, Inc.*, 2015-Ohio-2166, 36 N.E.3d 757 (10th Dist.).

{¶26} The plaintiff must also show that she demanded the return of the property after the alleged conversion, and defendant refused. *Cent. Funding, Inc. v. Compuserve Interactive Servs., Inc.*, 10th Dist. Franklin No. 02AP-972, 2003-Ohio-5037.

{¶27} Dr. Lill testified that she requested the return of the property. The evidence the Court has before it is that the property she claims she had the right to possess had not been adequately identified before this case was filed. Plaintiff compiled a summary of equipment located in the lab in which she conducted her research. (Plaintiff's Ex. 31). She completed this list after the filing of this lawsuit, at a time well-after she was no longer employed by the University. The summary was compiled primarily from memory, with the assistance of documents obtained from Defendant during the discovery process in this matter. (Plaintiff's Ex. 32). While Plaintiff's summary includes information regarding which items she recalls were purchased with funds from her NIH R01 there is nothing in the record to corroborate Plaintiff's recollection, i.e. documentation from the National Institute of Health confirming which equipment was purchased with NIH grant funds. This is an important distinction. Defendant's policy is such that (in the event that a faculty member's employment with Defendant is terminated) it will transfer grant-funded equipment to a new institution if the faculty member (or the grant sponsor, i.e. NIH) requests that the equipment be transferred and the receiving institution agrees to accept the equipment. This policy does not apply to any equipment purchased by Defendant for use in the faculty member's laboratory.

{¶28} The Court finds that the property in question was either owned by the sponsor or Defendant, not by the Plaintiff. The only way Plaintiff could have a right to possess, above that of the title sponsor and/or Defendant, is to have the sponsor and/or Defendant give her permission to take control of the property. Plaintiff took no steps to obtain their approval.

{¶29} Prior to her termination, Dr. Lill was a principal investigator who had the right to use the property for the purposes of her grants but she did not have the right to possess the property outside the auspices of her grants, i.e. she had no right to take the property and store it as she proposed. This is because, as indicated by Defendant's Ex. R, the NIH R01 grant was awarded to the University of Iowa, not directly to Dr. Lill.

Consistent with NIH policies, the grant was transferred to Defendant (not Plaintiff) when Dr. Lill was hired in 2008.

Conclusion

{¶30} Based on the testimony of Plaintiff and George Scher, Defendant's Asset Manager, the Court believes that Dr. Lill called Mr. Scher in May 2013 and inquired about who was the appropriate person to help her with the property issue. She was advised by Mr. Scher that he was the person she should talk with. The Court finds that Dr. Lill made this one phone call and never made a demand to Mr. Scher for identified equipment, either orally or in writing, nor did she make a demand on any other person or persons at the University or to the grant sponsors. The Court finds that the Plaintiff did not own or have a right to possess the equipment; she never identified to the University the specific equipment she was seeking to obtain. In addition, the Court further finds she never made a demand for the return of the property; the University never wrongfully refused to return the equipment.

DALE A. CRAWFORD
Judge

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NANCY L. LILL, Ph.D. Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2015-00387 Judge Dale A. Crawford JUDGMENT ENTRY

{¶31} Pursuant to Civ.R. 41(B)(2), the Court finds that upon the facts and the law Plaintiff has shown no right to relief regarding her claim of conversion and therefore Defendant's motion to dismiss is GRANTED as to that claim. As the Court considered all of the evidence prior to rendering the decision, pursuant to Civ.R. 41(B)(3), this dismissal operates as an adjudication upon the merits.

{¶32} As to the breach of contract claim, judgment is rendered in favor of Plaintiff. The Court believes that the failure on the part of the University to provide the promise for reevaluation has caused her significant damage as yet to be determined. Thus, the Court makes a finding, sending the matter back to Defendant (the Provost) to take such steps as he or she deems necessary to assure a new, fair and impartial evaluation is conducted considering the findings of the Committee as set forth in Plaintiff's Ex. 14. The Court will maintain jurisdiction while this process proceeds. Upon completion of the process, the Court will reconvene and proceed with whatever further hearings, if any, are necessary.

{¶33} In accordance with Civ.R. 54(B), the Court makes the express determination that there is no just reasons for delay.

DALE A. CRAWFORD
Judge

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