[Cite as *McClure v. Northwest Ohio Cardiology Consultants, Inc.*, 2012-Ohio-1106.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jeffrey B. McClure	Court of Appeals No. L-11-1074
Appellant	Trial Court No. CI 200808887
v.	
Northwest Ohio Cardiology Consultants, Inc.	**DECISION AND JUDGMENT**
Appellee	Decided: March 16, 2012

* * * * *

Gerardo R. Rollinson and Michael A. Gonzalez, for appellant.

Fritz Byers, for appellee.

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YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of defendant-appellee Northwest Ohio Cardiology Consultants, Inc. ("NWOCC"). For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} The underlying facts are not in dispute. Plaintiff-appellant Dr. Jeffrey McClure entered into a shareholder employment contract with NWOCC on July 1, 2001. On January 25, 2006, NWOCC terminated appellant without cause pursuant to section 10(B) of that contract. In effectuating the termination, the parties reached an impasse regarding their rights relative to paying the cost of appellant's "tail insurance."[1]

{¶ 3} The employment contract contains two provisions pertinent to the resolution of this dispute. The first is section 4(B), under the heading "NWOCC's Obligations." It provides,

> **Professional-liability Insurance.** NWOCC must maintain and pay for professional-liability insurance covering Employee's actions and omissions while in the normal course of employment. Employee must be named as an insured under the policy. NWOCC may determine the limits and form of such insurance, provided it is reasonable in scope and amount. If NWOCC terminates this agreement without cause, NWOCC must provide and pay for tail insurance, in an amount equal to the insurance in

[1] As stated by NWOCC, "'Tail insurance' provides medical-malpractice coverage, in the context of claims-made policies, for claims that are made after a particular policy period concludes." Here, the claims-made policy concluded when NWOCC terminated appellant's employment. Thus, tail insurance was needed to cover appellant for those claims brought after he was terminated, but that were based on his pre-termination acts and omissions.

place at the conclusion of Employee's employment, covering Employee's period of employment by NWOCC.

{¶ 4} The second provision is section 12(A), under the heading "Rights of Terminated Employee." It states,

> **Right to Accounts Receivable.** If NWOCC terminates this Agreement under section 10(B) [termination without cause], or if Employee terminates this Agreement under section 11(A) or in accordance with the notice provisions of section 11(B), or if the Agreement is terminated by Employee's disability, NWOCC must pay Employee, as additional compensation, an amount based on Employee's percentage of NWOCC Accounts Receivable, as set forth below. * * *
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> * * *
>
> The Employee's percentage of Accounts Receivable payable under this section is the product of NWOCC Accounts Receivable, multiplied by Employee's percentage of NWOCC stock ownership at the end of the month immediately before the date of termination. The amount due Employee may be reduced by the cost of professional-liability tail insurance provided in accordance with this Agreement, and by Employee's pro rata share of accrued and unpaid charges for plans and benefits and other expenses incurred for Employee's sole benefit.

{¶ 5} The parties do not dispute that NWOCC paid the cost of appellant's tail insurance, and then deducted that amount from appellant's accounts receivable payment.

{¶ 6} Appellant filed a complaint against NWOCC on December 22, 2008, seeking a declaratory judgment that "NWOCC is required to provide tail insurance coverage for [appellant] for the period described in the Agreement without any deduction." Appellant also sought judgment in his favor for the cost of the insurance.

{¶ 7} The parties filed cross-motions for summary judgment. On March 9, 2011, the trial court granted NWOCC's motion for summary judgment, and denied appellant's motion.

B. Assignment of Error

{¶ 8} Appellant now raises as his sole assignment of error:

> NWOCC breached the shareholder employment agreement by deducting the cost of medical malpractice tail insurance from Dr. McClure's accounts receivable payment after it terminated his employment without cause. The trial court erred in concluding otherwise and awarding NWOCC summary judgment.

II. Analysis

{¶ 9} An appellate court reviews summary judgment rulings de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying Civ.R. 56(C), summary judgment is

appropriate where (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 10} The principal question in this case is whether the parties' employment contract allows NWOCC to deduct the cost of tail insurance from appellant's accounts receivable payment.

{¶ 11} "In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130, 132, 509 N.E.2d 411 (1987). Thus, "[i]t is well-settled law that courts will not construe contract language that is clear and unambiguous on its face." *Logsdon v. Fifth Third Bank of Toledo*, 100 Ohio App.3d 333, 339, 654 N.E.2d 115 (6th Dist.1994), citing *Kelly v. Med. Life Ins. Co.* at 132.

{¶ 12} In support of his assignment of error, appellant first argues that the terms of the agreement clearly and unambiguously *prohibit* NWOCC from deducting the cost of tail insurance from the accounts receivable payment of an employee terminated without cause. Alternatively, appellant argues that the contract is ambiguous on this issue, and that the parties intended that the cost of the tail insurance is not deductible as

demonstrated by NWOCC's course of conduct and the deposition testimony of its executive director. We disagree, and hold that the shareholder employment agreement clearly and unambiguously allows NWOCC to deduct this cost from appellant's accounts receivable payment.

{¶ 13} The first sentence of section 4(B) provides that NWOCC must "maintain and pay for professional-liability insurance covering Employee's actions and omissions while in the normal course of employment." The fourth sentence of section 4(B) requires that, "[i]f NWOCC terminates this agreement without cause, NWOCC must provide and pay for tail insurance * * *." Finally, section 12(A) states that "the amount due Employee [for the accounts receivable payment] may be reduced by the cost of professional-liability tail insurance provided in accordance with this Agreement * * *."

{¶ 14} In order to reach his conclusion that this language clearly and unambiguously prohibits NWOCC from deducting the cost of tail insurance from his accounts receivable payment, or at the least creates an ambiguity regarding the parties' rights, appellant embarks on a multi-step analysis.

{¶ 15} First, appellant argues that the obligation to provide tail insurance for employees terminated without cause emanates from the first sentence of section 4(B), not the fourth. Appellant's argument is based on the fact that claims-based insurance covers only claims that are brought while the policy is in effect, and the policy is in effect only while an employee is employed. Thus, to satisfy the first sentence's requirement that NWOCC maintain and pay for professional-liability insurance covering *an employee's*

actions while in the normal course of employment, NWOCC must provide tail insurance to the terminated employee. As additional support for this interpretation, appellant repeatedly argues that NWOCC's executive director testified that NWOCC is obligated to provide tail insurance under sentence one of section 4(B).[2]

{¶ 16} Next, appellant contends that because the first sentence of section 4(B) obligates NWOCC to pay for the tail insurance, the fourth sentence cannot be relied on as creating the initial obligation to purchase tail insurance for an employee terminated without cause. Further, since courts are to avoid interpretations that render portions of a contract meaningless, sentence four of section 4(B) must have some other meaning.

{¶ 17} Finally, appellant claims the only interpretation that gives meaning to sentence four of section 4(B) is that the sentence operates to create an "employees terminated without cause" exception from the provision in section 12(A) that allows NWOCC to deduct the cost of tail insurance from an employee's accounts receivable payment. Therefore, appellant concludes that pursuant to sentence four of section 4(B),

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[2] The portion of the deposition appellant cites to states,

> Q Then in order to vote not to deduct [the cost of the tail insurance], there has to be an obligation to pay it. And [in relation to a specific, different employee], is sentence one of 4 B the obligation to pay the tail insurance, and section 12 A the ability to vote to deduct it?
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> * * *
>
> A It would appear so. * * *

and despite the clear language of section 12(A), NWOCC is prohibited from deducting the cost of tail insurance from any accounts receivable payments made to appellant.

{¶ 18} In interpreting a contract, "the most critical rule is that which stops this court from rewriting the contract when the intent of the parties is evident, i.e., if the language of the [contract's] provisions is clear and unambiguous, this court may not 'resort to construction of that language.'" *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992).

{¶ 19} Here, the language of the contract is clear and unambiguous. Section 4(B) requires NWOCC to provide and pay for appellant's tail insurance. Section 12(A) goes on to state without qualification that its cost may be deducted from appellant's accounts receivable payment. These two provisions are neither in conflict nor ambiguous. As NWOCC points out, it is common for a party to a contract to be required to pay for something, but then have the opportunity to seek reimbursement for the payment. Instead, an ambiguity is created only when appellant applies the rules of construction to a purportedly redundant sentence, thereby altering its meaning from an obligation to provide and pay for tail insurance to an exclusion from NWOCC's ability to deduct the cost of the tail insurance. Appellant's argument is, therefore, without merit. We hold that pursuant to the clear and unambiguous language of the agreement NWOCC may deduct the cost of appellant's tail insurance from the accounts receivable payment.

{¶ 20} Finally, appellant argues that even if the contract allows for the deduction, NWOCC breached its implied duty of good faith and fair dealing by exercising the option

to deduct the cost from his accounts receivable payment when it had not done so with other physicians who departed under similar circumstances.

{¶ 21} It is well-established that every contract "has an implied covenant of good faith and fair dealing that requires not only honesty but also reasonableness in the enforcement of the contract." *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶ 27 (1st Dist.); *see also State ex rel. Cordray v. Estate of Roberts*, 188 Ohio App.3d 306, 2010-Ohio-2003, 935 N.E.2d 450, ¶ 38 (6th Dist.).

> As stated by the Restatement Second of Contracts, "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." * * * [B]ad faith may consist of inaction, or may be the "abuse of power to specify terms, [or] interference with or failure to cooperate in the other party's performance." *Littlejohn* at ¶ 26.

{¶ 22} "'Good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could have not been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 443-444, 662 N.E.2d 1074 (1996), quoting *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir.1990).

{¶ 23} Appellant presents two reasons why NWOCC's exercise of its discretion to deduct the cost of tail insurance was arbitrary and unreasonable. First, NWOCC could

not articulate any factors on which it based its decision. Second, prior to appellant's departure NWOCC had not deducted the cost from any other physician's accounts receivable payment, even though some of those physicians may have engaged in improper and potentially damaging behavior. The gravamen of appellant's argument is lack of parity: since NWOCC did not deduct the cost of tail insurance from other terminated physicians who engaged in bad acts, it should not be allowed to deduct the cost of tail insurance from him when both parties agree he did nothing wrong.

{¶ 24} As support for his argument, appellant relies on *Littlejohn*. In 1991, the Littlejohns executed a mortgage note with the Parrishes, whereby the Littlejohns were obligated to repay "a principal amount of $92,000, plus nine percent interest, in 180 equal monthly installments." *Littlejohn*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, at ¶ 3. The note provided, "There shall be no prepayment penalty of any nature against the maker for early payment of principal and simple interest shall only apply to the unpaid balance." *Id.* Prior to the execution of the note, the Parrishes demanded a clause be inserted that stated, "Any prepayment shall be subject to approval of holder(s) hereof." *Id.* On several occasions over the next 12 years, the Parrishes allowed the Littlejohns to substitute new real property as collateral, so that the Littlejohns could sell the property currently securing the note. During that period, the Littlejohns requested to pay off the mortgage note in full four times. The Parrishes refused each time. The Littlejohns made one final request, offering additional compensation to be allowed to pay off the mortgage. The Parrishes again refused. In 2003, the Littlejohns defaulted on the

note. The Littlejohns subsequently sued for a declaratory judgment to verify their right to prepay the note. The trial court, in granting summary judgment for the Parrishes, found that the note clearly and unambiguously allowed the Parrishes to withhold their approval of any prepayment. *Id.* at ¶ 9.

{¶ 25} On appeal, the Littlejohns claimed the Parrishes' refusal to allow them to pay off the note was unreasonable, in violation of the implied duty of good faith and fair dealing, and amounted to a restraint on alienation because they could not sell the property securing the note without an unencumbered title. In finding that summary judgment was inappropriate because an unresolved issue of fact existed, the First District stated,

> We are somewhat mystified that the case has proceeded to our court. Surely, the Parrishes were entitled to the benefit of their bargain—they had a high interest rate of nine percent, negotiated when prevailing rates were higher. To allow the Littlejohns to pay off the loan early would deprive them of that rate of return.
>
> But anything involving only money can be reduced to present value. That is, a nine percent interest rate on the remaining balance payable over the remaining period can be valued and used to pay off the loan reasonably. If this was offered and refused, then the Parrishes were not dealing fairly, and their refusal to release the loan would have been an unreasonable restraint on alienation. If the Littlejohns simply insisted on paying off the loan without accounting for the now generous interest rate, then their

actions were unreasonable. The trier of fact should be able to figure this out.

If the finder of fact determines that the Parrishes withheld consent arbitrarily and unreasonably, then the Parrishes breached the contract. *Id.* at ¶ 29-31.

{¶ 26} Appellant argues that the present situation is analogous to *Littlejohn* because both involve a party exercising discretion under the agreement. Thus, appellant concludes that if it is a breach of contract for the Parrishes to "[withhold] consent arbitrarily and unreasonably," then NWOCC's disparate treatment of the other physicians and appellant, without reason, "is exactly what the duty of good faith and fair dealing is meant to prevent." However, appellant's argument is based only on the last sentence of the quoted passage, and ignores the two paragraphs preceding it. Those paragraphs put the last sentence into context, and ultimately undermine appellant's conclusion.

{¶ 27} As the First District identified, the Parrishes are entitled to the benefit of their bargain, the high interest rate. The court then presented a scenario where the Littlejohns offered to pay the full present value of the benefit. In that context, the arbitrary and unreasonable withholding of consent refers to rejecting the full value of the benefit and perpetuating a restraint on the alienation of land. In contrast, here there has not been any allegation that NWOCC was offered the full cost of the tail insurance but refused, instead demanding that it be deducted from appellant's accounts receivable payment. Rather, NWOCC is merely realizing the benefit of its bargain, the deduction of

the cost of the tail insurance. Such action, regardless of its dealings with the other physicians, does not constitute "bad faith." *See Ed Schory & Sons*, 75 Ohio St.3d at 443, 662 N.E.2d 1074 ("Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of 'good faith.' * * * ['Good faith'] is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document").

{¶ 28} Indeed, we find appellant's position to be more similar to the scenario where the Littlejohns insist on paying off the loan without accounting for the higher interest rate, in that both seek to deprive the other party of the benefit clearly provided for in the agreement. The First District stated this action would be unreasonable, and we agree. Therefore, we hold that NWOCC did not breach its implied duty of good faith and fair dealing when it elected to deduct the cost of the tail insurance, as it was allowed to do under the clear and unambiguous language of the shareholder employment contract.

{¶ 29} Accordingly, appellant's assignment of error is not well-taken.

III. Conclusion

{¶ 30} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE