COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP922 **Cir. Ct. No. 2011CV1080**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BRIAN L. DOHERTY,

PLAINTIFF-APPELLANT,

V.

IVAN GANDRUD CHEVROLET, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Brian Doherty appeals a summary judgment dismissing his contract action. Doherty argues that the circuit court misinterpreted the contract or, alternatively, that the contract was ambiguous. We conclude the

contract was ambiguous, and therefore reverse and remand for further proceedings.

BACKGROUND

¶2 Ivan Gandrud Chevrolet, Inc., hired Doherty in February 2007 as its General Sales Manager. When Doherty was hired, Gandrud's owner, Dan Mangless presented Doherty with a payroll form describing his compensation plan. The "RATE" box was checked, and the form indicated "$8000.^00 p/month salary[.]" Immediately below, a box with no title was checked, and the form indicated "+ comm. plan outlined below[.]" Near the bottom of the form, it provided:[1]

> Variable Gross page 2 Line 2 monthly
>
> above 300,000 comm. is 2000^00
>
> 3 month C.S.I. Chev 92 or better Nissan 95 or better 500.^00 each
>
> year end bonus payable Jan. 31 Feb 15th payroll
>
> 15% of Variable net page 2 Line 58 minus YTD earnings
>
> exclusive of C.S.I. comm.

¶3 Mangless explained the commission plan in his deposition. Under the first portion of the commission plan, Doherty would receive a $2000 commission if monthly gross profit exceeded $300,000. The second portion of the plan referred to customer satisfaction indexes, allowing one or two additional $500

[1] Additionally, in the margin next to the commission plan set forth at the bottom of the page, the form stated: "Includes SFE Monthly + YTD," followed by further language that was scribbled out. Mangless testified at deposition that another employee, the controller, likely added that text. Neither party addresses it on appeal.

monthly payments to Doherty if the minimum satisfaction scores were achieved. The third portion of the commission plan provided that Doherty could receive a payment consisting of fifteen percent of the profit from the sales department, minus Doherty's regular pay and any monthly gross-profit commissions. Finally, Mangless explained that the term "variable" on the contract was General Motors terminology referring to the sales department, while fixed would refer to the service and parts departments.[2]

¶4 During the course of his employment, Doherty occasionally requested reports from Gandrud to determine the current value of his year-end bonus. The reports, titled Gandrud General Sales Manager Annual Incentive Plan, contained various figures, including profit calculations, Doherty's year-to-date salary and commissions, and the bonus amount. The reports also stated, "Payment will be on January 30 [of the following year]. To be eligible to receive this incentive you must be an active full time employee as of January 30 [of the following year]." Doherty's most recent report, dated September 30, 2010, indicated the bonus amount for the "period of January 1, 2010 through December 31, 2010" was $62,448.75.

¶5 Gandrud terminated Doherty on November 1, 2010, due to corporate restructuring. Doherty requested payment for his year-to-date share of the year-end bonus. Gandrud refused, and Doherty commenced this action.

¶6 The circuit court granted summary judgment to Gandrud. The court determined that the payroll form was a contract. However, the court concluded

[2] Mangless further explained that the sales department was comprised of the new car, used car, and financing divisions.

the contract unambiguously required Doherty to be employed as of January 31, 2011 in order to receive the bonus. Doherty appeals.

DISCUSSION

¶7 Doherty contends the circuit court erroneously granted summary judgment to Gandrud. We review summary judgment decisions de novo. ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12). The interpretation of a contract presents a question of law, also subject to de novo review. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). The ultimate aim in contract interpretation is to give effect to the parties' intentions, which we ascertain by looking to the language of the contract itself. ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 351, 241 N.W.2d 158 (1976). If, however, the language of the contract is ambiguous, then the court is not restricted to the face of the instrument in ascertaining intent, but may consider extrinsic evidence. ***Id.*** Words and phrases in a contract are ambiguous if they are fairly susceptible of more than one construction. ***Id.*** at 351-52.

¶8 On appeal, the parties do not dispute that the payroll form was, in fact, a valid contract. However, each party argues the contract is unambiguous, in their respective favor. Alternatively, Doherty contends the contract was ambiguous, and asks us to either construe it in his favor or remand for additional fact finding.

¶9 The pertinent question is whether the contract required Doherty to be employed beyond November 1—until either year end or January 31—in order to

be entitled to his commission plan year-end bonus. The contract is silent on the matter. Each party therefore asks us to draw inferences from various language used in the contract. Gandrud asserts the key language is the term "year-end," and argues the only logical interpretation is that the bonus did not accrue until the end of the year. Doherty, meanwhile, citing the term "payable," argues the contract merely states when the bonus is paid out. Further, he contends the reference to year-to-date earnings is inconsistent with a requirement of full-year employment.

¶10 We conclude the parties' competing inferences are both reasonable; therefore, the contract is ambiguous. The contract does not set forth any eligibility requirements for the year-end bonus or state the bonus is earned only for a full year's work. We agree that year-to-date implies something other than year's end, and that payable on a certain date is not the unambiguous equivalent of being employed on that date. We see no reason why Gandrud could not hold back the bonus and then pay it to Doherty on the specified later date. At the very least, if Gandrud intended bonus eligibility to require employment through the end of the year, the logical term to utilize would have been *annual* earnings. Further, "year-end" is inconsistent with a January 31 eligibility date, and Gandrud itself does not settle upon which date applies. Indeed, if January 31 was the employment eligibility date, then year-to-date earnings would include only the month of January. In that scenario, each year's year-end bonus calculation would be based upon a single month's earnings. On the other hand, we agree that the term "year-end bonus" could reasonably be interpreted to require that a person be employed through December 31.[3]

[3] Gandrud suggests ***Compton v. Shopko Stores, Inc.***, 93 Wis. 2d 613, 287 N.W.2d 720 (1980), is relevant to our inquiry. That case, however, did not involve contract interpretation.

¶11 We turn next to the incentive plan reports, which, in stark contrast to the compensation contract, unambiguously provided that to be eligible for the bonus, Doherty "must be an active full time employee as of January 30 …." At the outset, we observe the incentive reports' January 30 eligibility requirement is inconsistent with the contract's references to year-end and January 31.

¶12 Doherty argues the incentive reports could not alter the original contract because they were not presented to him as an offer for a new or modified contract and, in any event, he never accepted the terms set forth in the reports and no consideration was exchanged. Doherty further emphasizes that the reports would never have been generated in the first place if he had not requested occasional status updates. Gandrud does not directly respond to this argument. Instead, it argues only that the reports were consistent with the compensation contract because the contract unambiguously required that Doherty be employed through the end of the year.[4] This argument, however, fails because we have already determined the contract was ambiguous. Gandrud therefore concedes that the incentive reports constituted neither a new contract nor a modification of the original contract. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶13 Because the contract is ambiguous, extrinsic sources may be considered to determine the parties' intent. The record contains affidavits and

[4] Gandrud does include a single assertion regarding consideration, supported by citation to a federal court ruling. However, Gandrud fails to address offer or acceptance and cites no binding authority. Gandrud's assertion, therefore, fails to adequately refute Doherty's argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may disregard issues that are inadequately briefed).

deposition testimony by Doherty and Mangless concerning their competing views as to what their compensation agreement consisted of. Doherty concedes there are disputed issues of material fact. Therefore, it would be inappropriate to grant him relief as a matter of law. "Where the evidence permits more than one reasonable inference concerning the parties' intent, the trial court, not the appellate court, must make the factual determination and resolve the ambiguity." ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987); *see also* ***Welter v. Singer***, 126 Wis. 2d 242, 248, 376 N.W.2d 84 (Ct. App. 1985) (construction of an ambiguous contract, with reference to extrinsic evidence, is normally a question of fact).

¶14 Finally, we address the circuit court's concern, that it was unwilling to read a pro rata requirement into the contract when none existed. That, however, concerns the potential remedy, not whether Gandrud was obligated to pay Doherty a bonus in the first instance. Calculation of the bonus amount only becomes necessary if Doherty establishes he was entitled to it. In that event, it appears Doherty has agreed to accept a bonus based only upon the profit minus Doherty's earnings as of his termination, as opposed to including those profits accrued after he left. We see no harm to Gandrud in this conciliatory approach.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).