COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP671 **Cir. Ct. No. 2015CV600**

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

DEAN MCCONLEY,

PLAINTIFF-APPELLANT,

V.

T. C. VISIONS, INC. AND THOMAS G. REICHENBERGER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Dean McConley[1] appeals the circuit court's judgment dismissing his claims against his former employer, T.C. Visions, Inc., and Visions' owner, Thomas G. Reichenberger. The claims arise out of 2008 and 2011 contracts that McConley entered into with Visions and Reichenberger. McConley argues that the circuit court erred in dismissing his claims on summary judgment because (1) the contracts, read together, are ambiguous and, therefore, require a trial involving disputed extrinsic evidence as to the parties' contractual intent; (2) the circuit court's interpretation of the contracts is not reasonable because it renders the 2011 contract illusory; and (3) summary judgment was improper under ***Phillips v. U.S. Bank, N.A.***, 2010 WI App 35, 324 Wis. 2d 151, 781 N.W.2d 540, *aff'd by an equally divided court*, 2010 WI 131, ¶¶1-2, 329 Wis. 2d 639, 791 N.W.2d 190. We affirm.

Background

¶2 McConley was a long-time Visions employee and manager. Under the parties' 2008 contract, Visions and Reichenberger agreed that, if there was a specified change in ownership of Visions—an event that we will refer to here as a "sale"—McConley would receive a bonus equal to 25% of the net sale proceeds, if certain other conditions were met. These other conditions, as pertinent to this appeal, were in Sections 6 and 7 of the contract. Section 6 provided that McConley is entitled to the bonus:

> If McConley is a full-time employee … upon the occurrence of a [sale] .... In addition, McConley shall also

[1] McConley's attorney informs us that McConley died after the entry of judgment and that the parties stipulated to the substitution of McConley's estate as a party. We see no reason to distinguish between McConley and his estate for purposes of this appeal and, therefore, in this opinion refer only to McConley as an individual.

> be entitled to this same bonus if his employment … was terminated … without Cause within six (6) months of the execution ... of legal documents that would result in [such sale] ….

Section 7 provided that McConley would forfeit his right to such a bonus if McConley's employment ended for any reason other than termination without cause. Section 7 stated:

> If McConley's employment … is terminated … for Cause, or if McConley terminates his employment … for any reason, he shall forfeit all rights to the bonus compensation provided for under Section 6, above ….

¶3 Under the 2011 contract, for a sum of $25,000 and in addition to McConley's bonus rights under the 2008 contract, McConley purchased the right to 5% of the proceeds from a sale of Visions, subject generally to the same "conditions … and limitations" that were in the 2008 contract. The 2011 contract also specifically provided that McConley's right to the additional 5% was subject to Sections 6 and 7 of the 2008 contract and that, under those sections, "McConley may lose his rights to the 5% interest."

¶4 In 2014, Reichenberger terminated McConley's employment with Visions. McConley subsequently sued Visions and Reichenberger, claiming that he was terminated without cause and that Reichenberger's intent in terminating McConley was to deprive McConley of the benefit of his bargain under the 2008 and 2011 contracts. In 2016, the circuit court dismissed McConley's claims on summary judgment, noting that McConley never offered any evidence that Visions had been sold, which was one of the contract conditions.

Discussion

¶5 The parties dispute whether the circuit court properly granted summary judgment. We discuss McConley's more specific arguments below but, as already noted, perceive McConley to be making three main arguments: (1) the contracts, read together, are ambiguous and, therefore, require a trial involving disputed extrinsic evidence as to the parties' contractual intent; (2) the circuit court's interpretation of the contracts is not reasonable because it renders the 2011 contract illusory; and (3) summary judgment was improper under ***Phillips***, 324 Wis. 2d 151.

¶6 We reject McConley's arguments. We agree with the circuit court that this case is properly resolved against McConley as a matter of law by applying unambiguous contract language to undisputed facts.

A. Whether The Contract Language Is Ambiguous

¶7 McConley's primary argument, as we understand it, boils down to an assertion that there is contractual ambiguity here. We disagree.

¶8 The interpretation of unambiguous contract language is a question of law for de novo review. ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476. The question of *whether* contract language is ambiguous is also a question of law for de novo review. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶8, 266 Wis. 2d 124, 667 N.W.2d 751.

¶9 We first explain why we agree with Visions and Reichenberger that the pertinent contract terms are unambiguous. We then explain why we reject McConley's ambiguity argument.

¶10 As noted, the 2008 contract granted McConley a right to a bonus equal to 25% of the sale proceeds "[i]f McConley is a full-time employee" at the time of the sale or if McConley "was terminated … without Cause within six (6) months" of the sale. In other words, under the 2008 contract and as pertinent here, McConley is not entitled to the bonus if he was terminated with or without cause more than six months prior to the sale. There is no ambiguity here.

¶11 The above limitation was incorporated into the 2011 contract. McConley's right to an additional 5% of sale proceeds under the 2011 contract was expressly subject to the "conditions … and limitations" in the 2008 contract. Indeed, the 2011 contract separately and redundantly provided that McConley's right to the additional 5% was subject to Sections 6 and 7 of the 2008 contract, explaining with excessive caution that McConley "may lose his rights to the 5% interest in the Net Sale Proceeds."

¶12 In sum, the contracts plainly specified that McConley was not entitled to a bonus or any sale proceeds relating to a sale if he had been terminated with or without cause more than six months prior to any sale. We comment that any reasonable person reading the pertinent contract provisions above would understand that McConley's protection against losing out on any sale proceeds was limited to McConley being terminated without cause within six months of a sale. Because McConley does not assert that there had been a sale within six months of his termination, it is beyond dispute that he was not entitled to relief under the contracts.

¶13 Turning to McConley's ambiguity argument to the contrary, McConley argues that the 2011 contract injected ambiguity into the otherwise clear contractual 2008 language and that this ambiguity can only be resolved at a

trial by resort to extrinsic evidence of the parties' intent. *See* ***Town Bank***, 330 Wis. 2d 340, ¶32 ("[W]hen a contract is ambiguous and consequently is properly construed by use of extrinsic evidence, the contract's interpretation presents a question of fact for the jury.").

¶14 The only contract provision that McConley points to that even *arguably* creates ambiguity states that McConley's purchase of the additional 5% of sale proceeds "does not require McConley to remain an employee." The provision states, in full:

> 12. **No Guarantied Employment:** The purchase of 5% of the Net Sale Proceeds pursuant to this Agreement is not an employment contract. It does not give McConley the right to remain an employee of the Company nor does it interfere with the Company's right to discharge McConley as an employee. It also does not require McConley to remain an employee nor interfere with McConley's right to terminate employment at any time.

¶15 McConley apparently interprets this provision as contradictory to the contract conditions we have already discussed because it states that his purchase of the additional 5% of sale proceeds does not require him to "remain an employee." We disagree that the provision introduces ambiguity or in any way undercuts the plain meaning of the conditions set forth in the 2008 contract. The only reasonable way to interpret this 2011 language is that it clarifies that McConley continued to be an employee at will, consistent with other contract terms on that topic. That is, the provision makes clear that McConley's purchase of a conditional right to 5% of sale proceeds was not meant to impair McConley's *separate* right to voluntarily leave employment with Visions at any time or *Visions' separate right* to terminate McConley for any reason without further penalty.

¶16 As part of his ambiguity argument, McConley appears to take the position that, under the 2011 contract, his right to 5% of the proceeds from a sale exists in perpetuity, at least if he was terminated without cause. As should by now be clear, we reject that interpretation of the 2011 contract. We instead agree with Visions and Reichenberger that McConley "seemingly misses … that this right to participate in the proceeds is not forever, it only exists for six months after separation of employment, and then only if [McConley] was not terminated for cause." Stated another way, McConley's right to a share of any proceeds from a sale of Visions plainly expired under the contracts no later than six months after McConley's termination without regard to the reason for the termination.[2]

B. Whether The 2011 Contract Is Illusory

¶17 McConley appears to argue that the contract interpretation advanced by Visions and Reichenberger and adopted by the circuit court, and now this court, is absurd and renders the 2011 contract illusory. That is, we understand McConley to be arguing that, under this interpretation of the contract, he paid $25,000 for nothing. We disagree. As we have discussed, McConley's $25,000 purchased a right to an additional 5% of the proceeds from a sale of Visions if certain conditions were met. While it is possible one might think that McConley overpaid for this *conditional* right given the relatively short six-month window of protection, it remains true that the contract *could* have led to a payday for McConley if Reichenberger accepted an attractive offer to purchase while McConley remained employed or within six months of McConley's termination.

[2] McConley often argues in terms of whether the 2011 contract gave him a "vested" right, but we fail to see how this adds to McConley's argument. We note that McConley does not point to any contract language referring to "vesting" or similar terms.

*C. Whether **Phillips** Controls*

¶18 McConley argues that his case is "exactly like" ***Phillips***, 324 Wis. 2d 151, a case in which we concluded that summary judgment was improper. For the reasons that we explain in the remainder of this opinion, we, like the circuit court, reject McConley's reliance on ***Phillips***.

¶19 In ***Phillips***, we held that "an at-will employee does not forfeit benefits that have accrued during his or her employment even though the agreement governing those benefits conditions their receipt on the employee's continued employment *if* the employer fires the employee solely to prevent the employee from getting the accrued benefits." ***Id.***, ¶1; *see also* ***id.***, ¶¶7-8. Applying this holding, we reversed a summary judgment in favor of an employer when there was evidence that the sole reason for the employee's termination was to avoid paying the employee's accrued benefits. *See* ***id.***, ¶¶1, 7-8.

¶20 McConley argues that, as in ***Phillips***, this case should survive summary judgment so that McConley has an opportunity to prove that Reichenberger terminated McConley solely to prevent McConley from sharing in proceeds from a sale of Visions. We are not persuaded that this case is like ***Phillips*** or that Reichenberger's motive matters.

¶21 To begin, McConley never satisfactorily explains why his contractual rights here are comparable to the "accrued" benefits in ***Phillips***. Although the facts in ***Phillips*** are sparse, the benefits at issue there appear to have been a form of compensation based on past performance. *See* ***id.***, ¶¶2, 4, 7 & n.2. There was no dispute that the benefits had "accrued" by the time the employee was terminated; those benefits simply had not been paid. ***Id.***, ¶¶1-2, 8. Further, it was undisputed in ***Phillips*** that the *only* unmet condition for payment was the

condition that the employee still be employed by the employer. *See* ***id.***, ¶8. In that situation, we concluded that the employee could prevail if she proved that the employer's sole motivation in terminating her was to avoid paying her what she had already earned. Here, in contrast, there is another unmet condition apart from McConley's employment status, namely, a sale of Visions within six months of McConley's termination. Another distinguishing fact is that here the contract specifically addressed McConley's rights with respect to termination without cause and limited that right to a six-month window.

¶22 More broadly, McConley's discussion of ***Phillips*** sometimes seems to presume that Reichenberger's motive matters because contract language grants McConley rights in perpetuity. The exact opposite is true. The contract language specifically contemplates that McConley's rights will fully expire six months after termination. No reasonable person reading the contract would fail to understand that the six-month clause is both a shield and a sword, giving McConley rights during the six-month window and terminating those rights thereafter. That is, the clause plainly prevents McConley from sharing in the proceeds from any sale of Visions occurring more than six months after McConley's termination.

Conclusion

¶23 For the reasons above, we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (2015-16).