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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CATHY WOLVERTON,) No. 1 CA-CV 11-0365
)
Plaintiff/Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
INNEXUS BIOTECHNOLOGY, INC., a) Not for Publication
Canadian corporation,) (Rule 28, Arizona Rules
) of Civil Appellate Procedure
Defendant/Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-032619

The Honorable Karen A. Potts, Judge

VACATED AND REMANDED

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G E M M I L L, Judge

¶1 InNexus Biotechnology, Inc. ("InNexus") appeals from
the trial court's grant of summary judgment in favor of the

corporation's former employee, Cathy Wolverton. For the reasons that follow, we vacate the judgment and remand to The Honorable Karen A. Potts, Superior Court Judge, for additional findings and conclusions as described herein.

FACTS AND PROCEDURAL HISTORY

¶2 Wolverton and InNexus entered into an employment agreement ("Agreement") on April 15, 2008. The Agreement covered a period of twelve months, with an option for an extension, and provided for compensation of \$118,800 per year.

¶3 The Agreement indicated:

The Employee is an "at will" employee, as that term is defined under Arizona law. The Employee or the Employer may effect termination with or without reason or cause, and without notice or payment of any compensation in lieu of notice.

Upon Termination, for cause or otherwise, the Employer shall pay to the Employee all salary and other remuneration accrued to the date of Termination, plus severance of one year annual salary, subject to standard payroll deductions and tax withholdings.

Termination was defined as "the termination of the Employee's employment with the Employer pursuant to the terms and conditions of [the] Agreement."

¶4 Wolverton resigned on April 12, 2009. She asserts that, following her resignation, she made a demand upon InNexus for the severance pay but did not receive it. Wolverton then filed a complaint against InNexus in October 2009, alleging that

InNexus failed and refused to pay her the severance package, consisting of one year's salary pursuant to the Agreement, upon her resignation. Wolverton alleged two theories: count one, a contract claim, and count two, a statutory claim, based on Arizona Revised Statutes ("A.R.S.") section 23-355 (2012)¹, for failure to pay wages. She sought treble damages on the statutory claim. InNexus answered and denied that it owed Wolverton any payment.

¶15 In February 2010, InNexus moved to dismiss for failure to state a claim, arguing that Wolverton voluntarily quit her job and "tried to exhort \$118,000 in severance pay for 'termination.'" Wolverton responded and cross-moved for summary judgment. InNexus replied and argued that Wolverton erroneously cross-moved for summary judgment because InNexus filed a motion to dismiss, not a motion for summary judgment.

¶16 In April 2010, the court held oral argument on InNexus' motion to dismiss and Wolverton's cross-motion for summary judgment. The court then denied the motion to dismiss as to the contract claim, taking the statutory claim under advisement. InNexus filed a response to Wolverton's cross-motion for summary judgment and attached an affidavit of Wade Brooksby, the chief financial officer of InNexus at the time of

¹ We cite the current versions of statutes when no material revisions have occurred since the events in question.

Wolverton's employment. Brooksby's affidavit asserted that InNexus and Wolverton "never discussed (nor did [Wolverton] ever suggest) that [Wolverton] would be entitled to a 'severance' if she quit her employment prior to the end of the full year." Brooksby further asserted that Wolverton "knew that no severance was due, and she never made another demand until she hired counsel and filed [the] lawsuit."

¶7 The court held oral argument on Wolverton's cross-motion for summary judgment in July 2010. The court considered the parol evidence being proffered by InNexus in light of *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134 (1993) and set the matter for an evidentiary hearing, explaining as follows:

the Court is missing the factual context surrounding the making of the agreement. [InNexus] has made what this court has deemed an offer of proof, through an unverified affidavit, regarding the factual context of this agreement.

. . .

The Court finds that the four corners of the agreement is contrary to the interpretation advanced by [InNexus]. However, without having before it evidence of the factual context surrounding this agreement, the Court cannot conclude as a matter of law that the quoted contract language is not reasonably susceptible to the interpretation advance[d] by [InNexus].

¶8 Following the evidentiary hearing in December 2010, the court found that the Agreement entitled Wolverton to an

additional one-year annual salary upon termination from InNexus, whether the termination was by InNexus or by Wolverton. The court permitted additional legal memoranda to be filed in regard to the summary judgment motion in light of the court's December 20, 2010 ruling. In March 2011, the court considered Wolverton's cross-motion for summary judgment, InNexus' response thereto, and the parties' supplemental filings. The court found that Wolverton was entitled to judgment on count one, for breach of contract, in the amount of \$118,800. The court denied Wolverton's claim for an award of treble damages.

¶9 InNexus timely appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101 (Supp. 2011). Wolverton did not cross-appeal the court's denial of her request for treble damages.

DISCUSSION

¶10 InNexus argues that the court erred by granting summary judgment in favor of Wolverton. Specifically, InNexus asserts that the court erred in: 1) ruling that the Agreement entitled Wolverton to an additional one-year annual salary upon termination of the contract, whether termination was by InNexus or Wolverton; 2) ignoring the parties' intention to include a severance provision in the Agreement and not sending the issues to a jury for resolution; and, 3) ignoring that no consideration was given for the severance provision.

¶11 Summary judgment may be granted when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). Summary judgment is appropriate only "if the facts produced in support of the [other party's] claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. We review *de novo* a grant of summary judgment. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002).

¶12 An evidentiary hearing may precede a summary judgment ruling when one party proposes the consideration of parol evidence to help interpret a contractual provision. Extrinsic evidence may be admitted to interpret a contract if the contract language is "reasonably susceptible to more than one meaning." *ELM Retirement Ctr., LP v. Callaway*, 226 Ariz. 287, 291, ¶ 15, 246 P.3d 938, 942 (App. 2010). The trial court appropriately held an evidentiary hearing to determine whether InNexus's proffered parol evidence would be admissible under the analysis approved by our supreme court in *Taylor*. In *Taylor*, our supreme court found a court may admit evidence to determine the parties'

intentions if "the judge ... finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent." *Taylor*, 175 Ariz. at 154, 854 P.2d at 1140; see also *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 384, ¶ 12, 132 P.3d 825, 828 (2006).

¶13 After the evidentiary hearing, it appears that the trial court proceeded to resolve the facts in favor of Wolverton and against InNexus. We are unable to discern from the court's findings and conclusions whether the court decided that the parol evidence was admissible or inadmissible. This initial determination should be made by the trial court, followed by a determination of whether any genuine issues of material fact exist that would preclude summary judgment. Because the court did not make these specific determinations – or, if made, did not explain the findings – we believe the best course of action is a limited remand to Judge Potts for additional or clarifying findings and conclusions. The court should explain specifically whether the proffered parol evidence is admissible under *Taylor*, and then further address whether Wolverton is entitled to summary judgment.

CONCLUSION

¶14 The trial court erred by not completing the *Taylor* analysis and, potentially, by resolving contested fact questions that should be submitted to the jury. For these reasons, we

vacate the judgment in favor of Wolverton and remand for additional findings and conclusions regarding the admissibility of InNexus's proffered parol evidence and whether Wolverton is entitled to summary judgment. This is a limited remand specifically to Judge Potts. We express no opinion on what rulings should be made by the trial court on remand.

¶15 InNexus is entitled to an award of taxable costs upon its compliance with Arizona Rule of Civil Appellate Procedure 21. We deny both parties' requests for awards of attorneys' fees.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge