IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KENNETH J. GARY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 3537-VCS
	)	
BEAZER HOMES USA, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: April 16, 2008
Date Decided: June 11, 2008

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STRINE, Vice Chancellor.

I. Introduction

Defendant Beazer Homes USA, Inc. ("Beazer" or the "Company") hired Plaintiff Kenneth J. Gary as its Executive Vice President, General Counsel, and Corporate Secretary in 2005. At that time, Beazer and Gary signed an employment agreement that detailed, among other things, Beazer's obligations to Gary should it decide to fire him. Those obligations varied materially depending on whether Gary was fired for cause or other than for cause. In fact, a for cause termination terminated the employment agreement and limited Beazer's obligations to Gary to paying his previously accrued compensation. Beazer exercised its ability to fire Gary for cause in early 2007. Gary believes that Beazer did not have a proper reason to fire him for cause and brought suit in this court to vindicate that belief as well as collect the benefits that would have been payable to him under the employment agreement had he been fired other than for cause.

Through the summary judgment motion before the court, Gary seeks an order compelling Beazer to advance funds for his suit under an attorneys' fees clause in the employment agreement. The parties dispute whether the attorneys' fees clause grants Gary the right to advancement as opposed to the right to indemnification. Candidly, the attorneys' fees clause is a good example of the unclear contractual language that can be created by starting with murky form language (a.k.a., "bad boilerplate") and making ill-chosen modifications that further muck up the already unclear form language. Here, I avoid the resulting interpretive quagmire because the plain language of the employment agreement indicates that the entire employment agreement, including the attorneys' fees clause, was terminated by the for cause dismissal of Gary. Stated differently, the

employment agreement was drafted so that Beazer had the discretion to end all but its obligation to pay certain accrued benefits by terminating Gary's employment for cause. Beazer is entitled to the benefit of the bargain it struck with Gary, including the ability to foreclose his arguable right to advancement by terminating him for cause.

II. Factual Background

A. Gary's Employment At Beazer

Beazer, a Delaware corporation whose principal business is building new homes, hired Gary on March 14, 2005 to serve as its Executive Vice President, General Counsel, and Corporate Secretary. The terms of Gary's employment and compensation were memorialized in an "Employment Agreement."[1] Under the Employment Agreement, Gary was paid a base salary and, among other things, was eligible to receive annual bonuses and participate in the Company's stock incentive plans. During the course of his employment at Beazer, Gary was in fact granted certain benefits under Beazer's stock incentive plans. The terms of those stock incentive awards were memorialized in several "Award Agreements."[2]

But Gary's time at Beazer was not long-lived. On January 8, 2007, a few months shy of two years after Gary began working for Beazer, Beazer asked Gary to take a leave of absence. Several weeks later, on February 12, 2007, Beazer sent Gary a notice of termination that terminated his employment for cause. Beazer's decision to terminate Gary for cause was consequential because the benefits Gary was entitled to receive under

[1] Compl. Ex. A ("Employment Agreement").
[2] Compl. Exs. B-F ("Award Agreements").

the Employment Agreement varied materially based on whether Gary was fired for cause or other than for cause. The Award Agreements also contained provisions that indicated Gary forfeited his benefits under those Agreements if he was terminated for cause. Both the Employment Agreement and the Award Agreements defined the term "cause" by listing actions that would support a for cause termination.

The Employment Agreement limits Beazer's obligations to Gary in the instance of a for cause termination as follows:

> (d) Cause. If the Executive's employment shall be terminated for Cause, *this Agreement shall terminate* without further obligations to the Executive other than the obligation to pay to the Executive (x) his Annual Base Salary through the Date of Termination, (y) the amount of any compensation previously deferred by the Executive, and (z) Other Benefits, in each case to the extent theretofore unpaid.[3]

In other words, a for cause termination terminates the Employment Agreement and results in Gary receiving only certain compensation and benefits that had accrued through the termination date.[4] The termination of the Employment Agreement, however, does not entirely terminate the Agreement because a separate survival provision states that § 7 of the Agreement, which contains covenants not to compete and not to use or disclose

[3] Employment Agreement § 6(d) (emphasis added). "Other Benefits" are "any other amounts or benefits required to be paid or provided or which the Executive is eligible to receive under any plan, program, policy or practice or contract or agreement of the Company and its affiliated companies." *Id.* § 6(a)(iv). The parties do not claim that the provision for the payment of Other Benefits is material to this resolution of this dispute.

[4] If Gary's employment was terminated by death, disability, or voluntary resignation by Gary, the Employment Agreement also terminated and Gary would also only receive certain compensation and benefits that had accrued through the termination date. *Id.* § 6(b), (c), (d). In those cases, however, the accrued compensation included any unpaid annual bonuses for prior years and a pro-rata annual bonus for the current year. *Id.*

confidential information, survives the termination of the Agreement absent an explicit written agreement that specifically refers to and terminates § 7.[5]

In contrast, an other than for cause termination does not terminate the Employment Agreement. Instead, compensation and benefits accrued through the termination date are paid within 30 days and future payments to Gary, including salary, annual bonus, and welfare benefits, are continued at the same time the payments would have otherwise been made for a period of two years from the termination date so long as Gary complies with § 7.[6] Therefore, under an other than for cause termination, Beazer must pay Gary various forward-looking benefits for a period of two years after he is terminated.

One section of the Employment Agreement is particularly relevant in an other than for cause termination because, among other things, it states that Gary need not seek to mitigate any amounts payable under the Agreement by, for example, seeking other employment. That section, § 8, also states that the Company is obligated to pay Gary's attorneys' fees in certain situations (the "Attorneys' Fees Clause"). In its entirety, § 8 states reads as follows:

> 8. No Mitigation. In no event shall the Executive be obligated to seek other employment or take any other action by way of mitigation of the amounts payable to the Executive under any of the provisions of this Agreement and such amounts shall not be reduced whether or not the Executive obtains other employment. The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses which the Executive may reasonably incur as a result of any contest by (i)

[5] *Id.* § 7(e).
[6] *Id.* § 6(a); *see also id.* § 7 (covenants not to compete and not to use or disclose confidential information).

> the Company, provided that the Executive prevails in at least one material issue, (ii) the Executive or (iii) others, of the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof (including, without limitation, as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement), plus in each case interest on any delayed payment at the applicable Federal rate provided for in Section 7872(f) (2) (A) of the Internal Revenue Code of 1986, as amended (the "Code").

B. Gary Sues Beazer

Gary believes that the reasons given by Beazer for his termination for cause were pretextual. Consistent with that belief, he filed suit in this court on February 11, 2008. Gary's complaint contains four counts. Count I alleges that Beazer breached the Employment Agreement by terminating Gary's employment for cause when there was no cause, as defined in the Agreement, to do so. Gary seeks damages for that breach, including the payment of the benefits he would have received under an other than for cause termination. Count II alleges a similar breach of the Award Agreements. Count III alleges, in the alternative to Count I, that Beazer breached the covenant of good faith and fair dealing that is implicit in the Employment Agreement. Count IV seeks specific performance of the Attorneys' Fees Clause in the Employment Agreement in the form of an order compelling Beazer to advance Gary's attorneys' fees and costs related to his lawsuit against it.

Beazer responded to Gary's complaint with two counterclaims. The first counterclaim alleges that Gary breached the Employment Agreement by engaging in the conduct that it contends supports his for cause termination. The second counterclaim asserts that the same conduct was a breach of fiduciary duty.

III. Procedural Framework

The subject of this opinion is Gary's motion for summary judgment on Count IV, Gary's claim for advancement of attorneys' fees. Gary's motion for partial summary judgment is governed by Court of Chancery Rule 56. Under that familiar standard, a "motion for summary judgment will be granted only when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law."[7] The moving party bears the burden of establishing that there are no issues of material fact, and the court must review all evidence in the light most favorable to the non-moving party.[8]

Both parties argue that this dispute turns on the interpretation of the Employment Agreement and neither party suggests that extrinsic evidence would assist in interpreting that Agreement. Therefore, "[a]s in most advancement disputes, summary judgment practice is an efficient and appropriate method to decide this case, as the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought."[9]

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[7] *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992).
[8] *Id.* at 10-11.
[9] *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, at *2 (Del. Ch. Aug. 8, 2003); *see also DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *6 (Del. Ch. Jan. 23, 2006) (noting that interpreting an advancement provision without resorting to parol evidence is not problematic as it "tend[s] to reinforce the legal policy of this State, which strongly emphasizes contractual text as the overridingly important guide to contractual interpretation") (citations omitted). This dispute is different from that traditional advancement dispute because the relevant provision is in an employment agreement rather than a certificate of incorporation or bylaw. Although that might suggest that there would be extrinsic evidence relevant to the interpretation of the disputed contractual language, the parties have not suggested that there is any relevant extrinsic evidence and all indications are that were no negotiations over the relevant contractual language. *See* Gary Op. Br. at 8 ("This contractual language . . . was drafted by

IV. Legal Analysis

Gary requests that I interpret the Attorneys' Fees Clause, or § 8 of the Employment Agreement, as granting him an advancement right. To that end, he and Beazer have traded arguments about the less than clearly drafted Attorneys' Fees Clause in the Employment Agreement. That Clause, adapted from a form appearing in hundreds of employment contracts filed with the SEC, is an example of taking unclear form language and further muddling it.[10] The parties have each advanced plausible arguments why the Attorneys' Fees Clause should be read their way, having each eschewed the notion that there was any parol evidence shedding light on what the parties intended.[11]

Beazer in its standard form of employment agreement used for all of its executive officers . . . .").

[10] The language in the Attorneys' Fees Clause compares with the standard form language, as exemplified by the language analyzed in *Miller v. U.S. Foodservice, Inc.*, as follows (deletions stricken and additions underlined):

> The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses which the Executive may reasonably incur as a result of any contest ~~regardless of the outcome thereof~~ by (i) the Company, provided that the Executive prevails in at least one material issue, (ii) the Executive, or (iii) others, of the validity or enforceability of, or liability under, any provision~~s~~ of this Agreement~~,~~ or any guarantee of performance thereof (including, without limitation, as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement), plus in each case interest on any delayed payment at the applicable Federal rate provided for in Section 7872(f)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code").

Employment Agreement § 8; *Miller*, 405 F. Supp. 2d 607, 614 (D. Md. 2005) (interpreting this language in its original form as creating a right to advancement); *see also* SIMON M. LORNE & JOY MARLENE BRYAN, 11A ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS App. D7 (2008) (providing a sample "Severance Plan and Amended Golden Parachute Employment Agreement" that contains the same language except that it ends the provision after "thereof").

[11] Without subjecting the reader to painstaking detail, the essence of Gary's argument is that the "as incurred" in the Attorneys' Fees Clause creates an advancement right. In contrast, Beazer argues that the Attorneys' Fees Clause, read as a whole with particular reference to the parties' modifications to the standard form language, is a backward-looking provision that only contemplates indemnification.

The problem for Gary, however, is that Beazer has demonstrated that the Employment Agreement does not provide him with rights in this circumstance. Under § 6(d) of the Employment Agreement, once Gary was terminated for cause, the entire Employment Agreement was terminated and Beazer's only obligation to Gary was to pay certain accrued compensation and benefits.[12] As a result, by operation of the clear terms of § 6(d), the Attorneys' Fees Clause was not available to Gary once Beazer terminated him for cause.

That result is the bargain struck by the parties. Section 6(d) explicitly states that "[i]f the Executive's employment shall be terminated for Cause, this Agreement shall terminate without further obligations to the Executive other than [certain accrued compensation and benefits]."[13] The plain language of § 6(d) indicates that the Attorneys' Fees Clause would be unavailable to Gary after a for cause termination both by explicitly terminating the Employment Agreement (and thus the Attorneys' Fees Clause)[14] and by limiting Beazer's obligations to Gary to certain accrued compensation and benefits that

[12] As discussed above, there was an exception for § 7, which contains covenants not to compete and not to use or disclose confidential information.
[13] Employment Agreement § 6(d).
[14] Gary argues against the plain language of § 6(d) by contending that the terms of § 8 do not make sense if the entire Agreement is terminated by a for cause termination. Specifically, Gary argues that the no mitigation provision only makes sense once Gary has been terminated because, among other things, it states that the amount payable under the Agreement is not reduced if Gary obtains other employment. That is true. The critical issue here, though, is that the no mitigation provision is only relevant in an other than for cause termination because that is the only situation in which the Company would owe Gary forward-looking, as opposed to accrued, payments. The Employment Agreement is not terminated by an other than for cause termination, and thus there is no collision between §§ 6(d) and 8 that would suggest that § 6(d) should be interpreted in a manner inconsistent with its plain language.

Gary does not argue includes attorneys' fees.[15] The bargain struck by the parties is a reasonable one whereby Beazer granted Gary material benefits, but retained the right to terminate those benefits by firing Gary for cause. In other words, Beazer anticipated that it would not want to continue making payments to Gary after it fired him for cause and demanded that that protection be in his Employment Agreement. Gary now argues that the bargain he struck with Beazer strips him of his right to attorneys' fees in the situation where he most ardently desires to use that right to litigate against the Company. But that is very clearly one of the purposes of § 6(d) and was readily apparent to both parties at the time they negotiated and signed the Agreement.

There is nothing unusually harsh about this contractual outcome. It only means that Gary, just like every other party subject to the default American Rule, must pay his own fees in this lawsuit seeking to vindicate his contractual rights. If Gary can establish that his termination was without cause, then compensating him for the loss of his right to attorneys' fees under the Attorneys' Fees Clause might well be part of what is necessary to give him the benefit of his bargain.[16] But that is an issue for another day, if ever. For

[15] Gary also advances the argument that a for cause termination cannot be intended to terminate the Entire Agreement because § 7, the section that contains the covenants not to compete or use or disclose confidential information, survives the termination. According to Gary, it would make no sense for that section to survive while terminating numerous other provisions, such as the notices provision and the choice of law and choice of forum clause. There is a plausible argument that those particular provisions might survive solely in relation to § 7, but that argument does not support the conclusion that the parties intended for the Attorneys' Fees Clause to survive. As discussed above, the language of the for cause termination provision indicates that the parties did not intend for Beazer to pay forward-looking obligations, such as advancement, after a for cause termination.

[16] *See* Tr. of Oral Arg. (Apr. 16, 2008) at 38 (Counsel for Beazer: "[Gary] has been terminated for cause subject to his litigation right to challenge that, and the fee provision protects him. It's not that he has no fee protection. At the end of the case, if he's successful in showing [Beazer]

now, what is clear is that Gary is not entitled to advancement under the Attorneys' Fees Clause.

V. Conclusion

For the foregoing reasons, the Gary's motion of partial summary judgment is denied and Count IV of the complaint is dismissed. Consistent with that ruling, Gary is not entitled to fees on fees for his motion.[17]

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acted wrongfully, the Court can award him reasonable attorneys' fees pursuant to [the Attorneys' Fees Clause].").

[17] *Kaung v. Cole Nat'l Corp.*, 2005 WL 3462250, at *4 (Del. Ch. Dec. 13, 2005) ("'Fees on fees,' in sum, are inappropriate in this case because Kaung has thus far been entirely unsuccessful in his advancement claims.").