FILED
United States Court of Appeals
Tenth Circuit

October 6, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ORDERLY HEALTH, INC.,

Plaintiff - Appellant,

v.

NEWWAVE TELECOM AND TECHNOLOGIES, INC.,

Defendant - Appellee.

No. 20-1441
(D.C. No. 1:19-CV-00847-TMT)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Appellant Orderly Health, Inc. contends that Appellee NewWave Telecom and Technologies, Inc. owes it $250,000 under a Letter of Intent (LOI) signed by both parties. The district court granted summary judgment to NewWave. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Background

Orderly is a Delaware corporation with its principal place of business in Colorado. It develops and markets software for healthcare companies. NewWave is incorporated in Maryland and has its principal place of business there. It specializes in information technology. Orderly was trying to raise funds for its business operations when NewWave asked a third party, Affiniti VC, to identify investment or acquisition opportunities. Affiniti put the two companies in touch. NewWave investigated and considered making an offer to acquire Orderly.

On November 27, 2018, Orderly and NewWave signed the LOI, confirming their "mutual intentions to engage in exclusive negotiations" for NewWave's purchase of Orderly's stock. Suppl. App. at 1. The LOI states that it creates no legally binding obligations except in two parts: Section 3 ("Confidentiality; Public Announcements") and Section 4 ("Exclusivity/No Shop"). *Id.* at 4. This appeal centers on the last paragraph of Section 4, which states:

> At the expiration of the 60-day no shop period with each Party negotiating utilizing commercial best efforts, the Purchaser agrees to pay the Company a non-refundable earnest money deposit of $250,000 (hereinafter "Earnest Money") if the Closing is [sic] has not occurred at such time. For the avoidance of doubt, upon payment of Earnest Money payment the Exclusivity Period shall be extended for 30 days and the Closing Payment balance due will be reduced by $250,000.

Id.

In early January 2019, NewWave decided not to acquire Orderly because of the price, and Affiniti conveyed to Orderly that NewWave was no longer interested. On January 15, Orderly's CEO sent an email to NewWave executives, in which he

acknowledged NewWave's decision not to acquire Orderly, sought to learn how the negotiations broke down "for my own edification" and "how to run a better process in the future," and advised that Orderly was receiving and processing overtures from other investors. Aplt. App. vol. I at 245. He emphasized that he was "[i]n no way . . . trying to talk [NewWave] and [its] team into re-considering [its] stance on acquiring Orderly." *Id.* The exclusivity period expired on January 25.

On January 29, Orderly demanded a $250,000 earnest-money payment under Section 4 of the LOI. NewWave refused to pay, reasoning that it did not owe Orderly because the parties stopped negotiating before the exclusivity period ended.

Orderly sued for breach of contract in state court, and NewWave removed the action to federal court based on diversity of citizenship. The parties filed cross-motions for summary judgment. They agreed that no genuine issues of material fact existed and that the only legal issue for the court to resolve was whether the LOI required NewWave to pay $250,000 to Orderly. The district court found payment was not required, so it denied Orderly's summary-judgment motion and granted NewWave's summary-judgment motion. Orderly filed this timely appeal.

Analysis

We review the grant of summary judgment to NewWave de novo, applying the same standard the district court is to apply. *See Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). Summary judgment must be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Stated otherwise, "[t]he moving party is

entitled to summary judgment where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *19 Solid Waste Dep't Mechs. v. City of Albuquerque*, 156 F.3d 1068, 1071 (10th Cir. 1998) (original brackets and internal quotation marks omitted). "When applying this standard, we examine the record and reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Id.*

"We also review the district court's interpretation of state contract law de novo." *MTI, Inc. v. Emps. Ins. Co. of Wausau*, 913 F.3d 1245, 1248 (10th Cir. 2019). Section 8(a) of the LOI provides that it "shall be governed by the substantive laws of the State of Delaware without regard to conflict of law principles." Suppl. App. at 5. Therefore, Delaware law applies here. *See Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 427-28 (10th Cir. 2006) (absent special circumstances, courts honor the parties' choice-of-law provision).

The construction of a contract is a question of law. *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins.*, 616 A.2d 1192, 1195 (Del. 1992). "Contracts must be construed as a whole, to give effect to the intentions of the parties." *Nw. Nat'l Ins. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996); *see also Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("[W]e will give each provision and term effect, so as not to render any part of the contract mere surplusage." (internal quotation marks omitted)). "We interpret clear and unambiguous terms according to their ordinary meaning." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 335 (Del. 2012) (internal quotation marks omitted). "A contract is not rendered

ambiguous simply because the parties do not agree upon its proper construction." *Rhone-Poulenc*, 616 A.2d at 1196. Ambiguity exists only if "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id.*

Orderly argues that the last paragraph of Section 4 of the LOI plainly and unambiguously obligated NewWave to pay $250,000 to Orderly at the expiration of the exclusivity period, regardless of whether NewWave still intended to pursue the acquisition. In district court it repeatedly characterized the $250,000 as a break-up fee in the event the closing did not occur. NewWave sees it differently. It interprets the paragraph to mean that if the acquisition had not closed by the expiration of the exclusivity period *and* the parties were still negotiating, then NewWave would pay $250,000 to Orderly as earnest money, the exclusivity period would extend for 30 days, and NewWave would receive a corresponding deduction in the purchase price at closing. But, it says, the parties ceased negotiating weeks before the exclusivity period expired, so no payment was due.

For the reader's convenience we repeat the last paragraph of the LOI:

> At the expiration of the 60-day no shop period *with each Party negotiating utilizing commercial best efforts*, the Purchaser agrees to pay the Company a non-refundable earnest money deposit of $250,000 (hereinafter "Earnest Money") if the Closing is [sic] has not occurred at such time. For the avoidance of doubt, upon payment of Earnest Money payment the Exclusivity Period shall be extended for 30 days and the Closing Payment balance due will be reduced by $250,000.

Suppl. App. at 4 (emphasis added). The parties offer two contrary interpretations of the phrase, "with each Party negotiating utilizing commercial best efforts."

NewWave reads the phrase as a condition precedent; it says that the possibility of a $250,000 payment arises only when the parties are still "negotiating utilizing commercial best efforts" at the end of the 60-day period. Orderly, in contrast, describes the language as only a promise or covenant (to use best efforts in negotiations), not a condition precedent.

Contract language must be read in context. *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006). And read in context, we think that NewWave's interpretation is the only reasonable one. Or put another way, no reasonable person would have written Section 4 of the LOI the way it was if the intent was to require NewWave to pay $250,000 for the 60-day exclusivity period regardless of the result of its due diligence.

This becomes apparent when we look at all of Section 4, which states:

> The Company [Orderly] agrees that it shall not negotiate with any parties other than Purchaser [NewWave] and/or affiliates thereof with respect to a purchase of a majority of its common stock for a period of sixty (60) days from and after the execution of this LOI (hereinafter the "Exclusivity Period") by the Company and the Purchaser.
>
> The Exclusivity Period shall end if the Purchaser requests a reduction in the Initial Purchase Price (or the timing of such payment) of the Company.
>
> At the expiration of the 60-day no shop period with each Party negotiating utilizing commercial best efforts, the Purchaser agrees to pay the Company a non-refundable earnest money deposit of $250,000 (hereinafter "Earnest Money") if the Closing is [sic] has not occurred at such time. For the avoidance of doubt, upon payment of Earnest Money payment the Exclusivity Period shall be extended for 30 days and the Closing Payment balance due will be reduced by $250,000.

Id.

To begin with, if the intent were to require a payment of $250,000 for the exclusivity period, the obvious place to put such a requirement would have been in the first paragraph of the section, where Orderly grants exclusivity. Indeed, one would expect it to be the first thing stated, as in: "**In return for payment by Purchaser of $250,000**, the Company agrees that it shall not negotiate with any parties other than Purchaser and/or affiliates thereof with respect to a purchase of a majority of its common stock for a period of sixty (60) days . . . ."

It would be even more peculiar not to mention the $250,000 requirement in the self-contained second paragraph, which states that the exclusivity period ends if NewWave requests a concession with respect to price or timing of payment for purchase of Orderly stock. The sole expressed consequence of a request for a concession on price or timing is that the exclusivity period immediately ends. There is no mention of requiring a $250,000 payment at that time.

The use of the term *earnest money* in the third paragraph to describe the $250,000 payment is also inconsistent with the notion that the payment would come at the end of the exclusivity period. Earnest money is an upfront payment to demonstrate good faith. The term *earnest money* does fit, however, as a description of money paid at the end of the exclusivity period for the purpose of (and in advance of) extending that period another 30 days.

And most telling is that the sole mention of the $250,000 payment is in a paragraph whose only subject matter is an extension of the exclusivity period when closing has not occurred within the original 60-day period but negotiations are

continuing. That paragraph says nothing about what happens if closing occurs within the 60-day period or if negotiations end before the expiration of that time. In particular, it gives NewWave credit toward the purchase price for the $250,000 payment only if the exclusivity period is extended for 30 days. (If, as Orderly argues, that sum is always due, why not give at least as much credit to NewWave if it closes the deal during the exclusivity period?) We also think it peculiar that, under Orderly's interpretation of the LOI, NewWave would have to pay $250,000 for the initial 60-day exclusivity period but would not have to pay an additional sum to extend exclusivity for a further 30 days so long as negotiations were continuing.

The natural and, in our view, only reasonable interpretation of Section 4 is that there is no $250,000 charge for the initial 60-day exclusivity period but that NewWave can extend the exclusivity period an additional 30 days by paying that sum, which would be credited to the purchase price if the deal went through.

Orderly contends that this interpretation of the LOI is untenable because allowing NewWave to have the exclusivity right provided by the LOI without paying for it is "unusual, unfair, [and] improbable." Aplt. Br. at 19. But that ignores commercial realities. Orderly was looking for a buyer. But the potential buyer was unwilling to devote the resources and time necessary for due diligence unless it was given exclusive rights for 60 days to negotiate a deal. It hardly seems out of the question that a company eagerly seeking a buyer would be willing not to charge for the exclusivity privilege.

Orderly's additional arguments to the contrary are likewise not persuasive. It contends that the phrase "with each Party negotiating utilizing commercial best efforts" cannot be a condition precedent because it does not use terms such as *conditioned upon*, *if*, or *unless* in connection with the phrase. But the first sentence of the third paragraph of Section 4 can easily be read as stating that the $250,000 payment is due *when* three *conditions* have been satisfied: "(1) the sixty-day no shop period expired, (2) the parties were still negotiating utilizing commercial best efforts, and (3) the closing had not yet occurred." Aplt. App. vol. II at 203 (district court order).

Orderly also invokes the proposition that conditions precedent are not favored in contract interpretation because they tend to work a forfeiture. But that proposition cannot override plain and unambiguous language. *See AES P.R., L.P. v. Alstom Power, Inc.*, 429 F. Supp. 2d 713, 717 (D. Del. 2006).

Third, Orderly argues that the interpretation we adopt renders the $250,000 provision illusory because "even if NewWave wanted to purchase Orderly after the expiration of the sixty-day no shop period but did not want to pay the $250,000, . . . the LOI [would] permit[] NewWave to do so by terminating negotiations the day before the expiration of the no shop period and resuming negotiations the day following the expiration of the no shop period." Aplt. Br. at 18. We disagree. After expiration of the no shop period, Orderly would have the right to negotiate with other potential purchasers and to refuse to provide further financial information to NewWave; Orderly could demand payment by NewWave if NewWave wanted an

extension of the terms of the LOI. What the third paragraph of Section 4 does is express the parties' agreement regarding what that payment would be.

Fourth, Orderly contends that the interpretation of the LOI we adopt would allow NewWave to terminate the LOI unilaterally, in contravention of the termination provision in Section 8.g of the LOI. But Section 8.g does not purport to state the only ways in which the contract can be terminated. All it does is state three circumstances that *automatically* terminate the LOI.[1] In any event, the LOI did not make that provision enforceable.

Finally, Orderly, citing *Williams v. Bank of United States*, 27 U.S. 96, 102 (1829), argues that even if the phrase "with each Party negotiating utilizing commercial best efforts" in Section 4 is a condition precedent, NewWave should not be permitted to benefit by preventing compliance with the condition (by refusing to continue to negotiate). But this proposition applies only if NewWave acted in bad faith or wrongly, as by breaching a contractual duty. *See W & G Seaford Assocs., L.P. v. E. Shore Mkts., Inc.*, 714 F. Supp. 1336, 1341 (D. Del. 1989) (Under the prevention doctrine, "a party who wrongfully prevents a thing from being done cannot avail itself of the nonperformance it has occasioned."). We reject Orderly's argument because, as we construe the LOI, NewWave had no duty to negotiate with Orderly throughout the 60-day exclusivity period.

[1] Section 8.g. provides that the LOI "will automatically terminate and be of no further force and effect upon the earlier of": (i) execution of the purchase agreement; (ii) expiration of the exclusivity period in Section 4; or (iii) mutual agreement of Orderly and NewWave. Suppl. App. at 5.

Conclusion

We affirm the judgment of the district court. We grant Orderly's motion to file under seal Volume III of the Appendix, which contains an unredacted version of the LOI. *See United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985). A redacted version of the LOI is accessible in the Supplemental Appendix.

Entered for the Court

Harris L Hartz
Circuit Judge