RENDERED: OCTOBER 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000781-MR

CHRISTOPHER SCHEIB, M.D. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-04193

COMMONWEALTH ANESTHESIA, P.S.C.; HARRY H. TAYLOR III, M.D.; KENDALL F. BELL, M.D.; GEORGE W. GINTER, M.D.; WILLIAM C. ALLEN, M.D.; JOHN DEMAIO, M.D. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** ** ** **

BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,[1] SENIOR JUDGE.

KELLER, JUDGE: Christopher Scheib, M.D. (Dr. Scheib) appeals from an opinion and order of the Fayette Circuit Court granting summary judgment in favor

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of the Appellees, Commonwealth Anesthesia, P.S.C. (Commonwealth Anesthesia), Harry H. Taylor, III, M.D. (Dr. Taylor), Kendall F. Bell, M.D. (Dr. Bell), George W. Ginter, M.D. (Dr. Ginter), William C. Allen, M.D. (Dr. Allen), and John DeMaio, M.D. (Dr. DeMaio). For the following reasons, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

FACTUAL BACKGROUND

Commonwealth Anesthesia provides services at hospitals located in central and eastern Kentucky. Dr. Scheib is an anesthesiologist and was hired by Commonwealth Anesthesia on January 1, 2005. On January 1, 2006, Dr. Scheib entered into an employment agreement with Commonwealth Anesthesia, which provided that he was to be paid a fixed annual salary plus quarterly bonuses. The employment agreement also set forth the terms by which Commonwealth Anesthesia could terminate Dr. Scheib with or without cause.

In addition to the employment agreement, Dr. Scheib executed a Stock Purchase Agreement (SPA)[2] on January 1, 2006, wherein he purchased 100 shares of stock in Commonwealth Anesthesia for $500. Additionally, Dr. Scheib paid "buy-ins" totaling approximately $117,360.00, which Commonwealth Anesthesia deducted from his bonuses.

[2] The January 1, 2006, document Dr. Scheib executed was an Addendum to Commonwealth Anesthesia, P.S.C. Stock Purchase Agreement (the Addendum). In the Addendum, Dr. Scheib agreed to be bound by all the terms and conditions of the Commonwealth Anesthesia, P.S.C. Stock Purchase Agreement dated July 16, 1991, which was attached to and incorporated by reference in the Addendum. We refer to the Stock Purchase Agreement and the Addendum collectively as the SPA.

Sometime thereafter, Commonwealth Anesthesia allegedly began receiving complaints from staff at the hospitals it serviced regarding Dr. Scheib's job performance. These complaints consisted of the following. In Maysville, Dr. Scheib was falling asleep. In Mt. Sterling, Dr. Scheib had been asleep and a nurse had to wake him up in the operating room. Dr. Scheib was also watching the clock and had a lazy attitude. In Winchester, another doctor was not happy with Dr. Scheib because he would not cancel a case even if it needed to be cancelled. Additionally, an orthopedic surgeon from Winchester complained that Dr. Scheib was not doing blocks for his cases.

In June 2007, Drs. Ginter, Taylor, Allen, Bell, and DeMaio, who were all shareholders of Commonwealth Anesthesia, met to discuss these complaints and Dr. Scheib's performance. Dr. Scheib was not given notice of this meeting, and was the only shareholder not present at the meeting. The doctors present at the meeting concluded that they wanted to revoke Dr. Scheib's shareholder status.

On August 28, 2007, Dr. Scheib received notice that a special meeting of the board of directors was going to be held on September 6, 2007 at 7:00 p.m., where the termination of his employment agreement and shareholder status would be discussed. Dr. Scheib was present at the September 6, 2007, meeting and was given the opportunity to speak. The board of directors voted to terminate Dr. Scheib's employment agreement and shareholder status.

A special meeting of the shareholders was held on September 19, 2007, and the shareholders ratified the board of directors' decision. Although Dr.

Scheib did not attend this meeting, he voted by proxy. Dr. Scheib received notice of the shareholders' decision by letter dated September 28, 2007. The letter stated that his termination would become effective January 18, 2008.

On September 6, 2007, and prior to the 7:00 p.m. special meeting of the board of directors, Dr. Scheib filed a complaint in the Fayette Circuit Court. He subsequently filed an amended complaint on November 10, 2008. In his complaint and amended complaint (hereinafter collectively referred to as the Complaint), Dr. Scheib alleged breach of the SPA, breach of the employment agreement, ultra vires corporate action, and denial of inspection and production of corporate documents against Commonwealth Anesthesia. He also alleged breach of the implied covenant of good faith and fair dealing against the Appellees, and tortious interference with an existing contractual relationship against Dr. Taylor.

On September 30, 2009, the Appellees filed a motion for summary judgment, and the trial court held a hearing on January 4, 2010. On April 7, 2010, the trial court entered an order granting summary judgment and dismissing all of Dr. Scheib's claims against the Appellees. This appeal followed.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment is properly granted "where the movant

shows that the adverse party cannot prevail under any circumstances." *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476, 479 (Ky. 1991). When considering a motion for summary judgment, the trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Id.* at 480. Because summary judgment involves only questions of law and not the resolution of disputed material facts, "an appellate court need not defer to the trial court's decision . . . and will review the issue *de novo* . . . ." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

ANALYSIS

On appeal, Dr. Scheib argues that the trial court incorrectly granted summary judgment in favor of the Appellees as to his claims of (1) breach of the employment agreement; (2) breach of the SPA; (3) breach of the implied covenant of good faith and fair dealing; (4) and tortious interference with an existing contractual relationship. We address each issue in turn.

1. Breach of the Employment Agreement

On appeal, Dr. Scheib first contends that the trial court erred in granting summary judgment in favor of Commonwealth Anesthesia as to his claim of breach of the employment agreement. Dr. Scheib makes two arguments as to this issue. First, he argues that the trial court erred in concluding that he was terminated "for cause" pursuant to Section 3(b)(1) of the employment agreement. Second, he argues that because he was terminated without cause under Section 3(a)

of the employment agreement, Commonwealth Anesthesia breached the employment agreement by failing to provide him with 120 days' notice of his termination. We agree with Dr. Scheib.

Section 3 of the employment agreement provides the following:

> a. The term of this Agreement shall begin as of the date hereof and continue until the Employee or the Employer's Board of Directors terminates this Agreement by giving not less than one hundred twenty (120) days' written notice to the other specifying the date of the termination.
>
> b. Further, this Agreement shall automatically terminate upon the happening of any of the following events:
>
> (1) Seventy-five percent (75%) of the Employer's shareholders, upon recommendation of the Employer's Board of Directors, vote to dismiss the Employee for cause. "Cause" shall be defined as continued inattention to, or neglect of, any duties to be performed by the Employee, which inattention or neglect is not the result of illness or accident;
>
> . . . .
>
> All actions of the Board of Directors under this Section requires two thirds (66.66%) vote of said directors, and, unless otherwise indicated, must be ratified by a supermajority vote of two-thirds (66%) of the Employer's shareholders.

As correctly noted by Dr. Scheib, the minutes from the special meeting of the board of directors held on September 6, 2007, clearly state that Dr. Scheib was being terminated pursuant to Section 3(a). Additionally, the September 28, 2007, letter notifying Dr. Scheib of his termination states that, "Pursuant to Section 3(a) of the Agreement, your employment with Commonwealth shall

continue until January 18, 2008 unless earlier terminated pursuant to the terms of the Agreement." Furthermore, at the January 4, 2010, hearing on the Appellees' motion for summary judgment, counsel for the Appellees stated that Commonwealth Anesthesia chose to terminate Dr. Scheib "without cause" by providing him with 120 days' notice. Based on the preceding, we conclude that the trial court erred when it concluded that Dr. Scheib was terminated for cause under Section 3(b)(1).

Although the trial court concluded that Dr. Scheib was terminated for cause under Section 3(b)(1), it also concluded that, even if Dr. Scheib was terminated pursuant to Section 3(a), he received the required 120 days' notice of termination. Dr. Scheib contends that he did not receive 120 days' notice and therefore Commonwealth Anesthesia breached the employment agreement.

As noted above, Section 3(a) states that Dr. Scheib shall be given 120 days' "written notice." (Emphasis added). Because Dr. Scheib did not receive the letter notifying him of his termination date of January 18, 2008 until September 28, 2007, Commonwealth Anesthesia did not provide Dr. Scheib with the notice required under the employment agreement.

Commonwealth Anesthesia argues that despite this provision in the employment agreement, they were not required to give Dr. Scheib written notice because he had actual notice of his termination more than 120 days' before his termination date. In support of their argument that actual notice was sufficient, the Appellees cite to *Gorman v. TPA Corp.*, 419 S.W.2d 722 (Ky. 1967). In *Gorman*,

the plaintiff filed suit against an adjoining property owner for negligently demolishing a building that shared a wall with the plaintiff's building. The issue on appeal was whether the defendant gave proper notice of the demolition to the plaintiff, which, under the law, would absolve the defendant of liability for the resulting damages. The former Kentucky Court of Appeals concluded that the plaintiff's actual knowledge of the demolition superseded any requirement by the defendant to give him express or formal notice. *Id*. at 723-24.

We believe *Gorman* is distinguishable from the instant case. Although the Court in *Gorman* addressed whether actual notice was sufficient, that case did not involve a contract and a specific provision within a contract requiring that the notice be given in writing. Because "a written instrument will be strictly enforced according to its terms[,]" *Yeager v. McLellan*, 177 S.W.3d 807, 809 (Ky. 2005), Commonwealth Anesthesia was required to give Dr. Scheib 120 days' written notice of his termination date. Thus, Commonwealth Anesthesia breached the employment agreement. Accordingly, the trial court erred in granting summary judgment in favor of Commonwealth Anesthesia as to this claim.

2. Breach of the SPA

Next, Dr. Scheib contends that the trial court erred in granting summary judgment in favor of Commonwealth Anesthesia as to his claim of breach of the SPA. Specifically, Dr. Scheib argues the trial court incorrectly concluded that, pursuant to the SPA, Commonwealth Anesthesia was only required to pay him $500 for his shares instead of the fair market value. According to Dr.

Scheib, the fair market value of his shares includes his $117,360.00 "buy-in." We disagree.

> The SPA provides as follows:
>
> 3. Events Necessitating Sale. The Corporation shall purchase and the affected Shareholder, or his estate, shall sell and transfer to the Corporation all of the shares of stock in the Corporation held by such Shareholder for the price set forth in Paragraph 3 hereof, upon the occurrence of any of the following events:
>
> > . . . .
> >
> > c. The Shareholder's employment with the Corporation shall be terminated for any reason.
>
> 4. Purchase Price and Date for Purchase of Shares. The total purchase price for all shares of any one affected Shareholder shall be Five Hundred Dollars ($500.00). The purchase price shall be paid by the Corporation in cash within six (6) months from the date of the occurrence of the event which precipitated the purchase.

Dr. Scheib notes that pursuant to paragraph 3 of the SPA, he is required to sell his shares to Commonwealth Anesthesia "for the price set forth in Paragraph 3." Dr. Scheib contends that because there is no price set forth in paragraph 3, the SPA is ambiguous or silent as to the price Commonwealth Anesthesia was required to pay him for his shares. Thus, he argues that summary judgment was inappropriate because there is a genuine issue of material fact as to whether Commonwealth Anesthesia was required to pay him fair market value for his shares instead of $500.

As noted in *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657, 659 (Ky. App. 2007), an unambiguous written contract must be strictly enforced according to the plain meaning of its express terms and without resort to extrinsic evidence. Only "[w]here a contract is ambiguous or silent on a vital matter, [may a court] consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. " *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). "An ambiguous contract is one capable of more than one different, reasonable interpretation." *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981).

Although there is not a price set forth in paragraph 3, paragraph 4 of the SPA clearly states that the purchase price is $500. Therefore, contrary to Dr. Scheib's assertion, the SPA is not silent or ambiguous as to the price Commonwealth Anesthesia was required to pay Dr. Scheib for his shares. Because the parties do not dispute that Dr. Scheib received $500 from Commonwealth Anesthesia for his shares, the trial court correctly concluded that Commonwealth Anesthesia did not breach the SPA. Accordingly, the trial court correctly granted summary judgment in favor of Commonwealth Anesthesia as to this issue.

We note that Dr. Scheib may have a viable claim for his $117,360.00 "buy-in." However, as set forth above, such a claim does not arise from his interest in the shares that were purchased pursuant to the SPA.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

Next, Dr. Scheib argues that the trial court erred in granting summary judgment because there is a genuine issue of material fact as to whether the Appellees breached the implied covenant of good faith and fair dealing. Dr. Scheib contends that the Appellees breached that implied covenant by holding a "secret" shareholders' meeting, and by failing to discuss with him the accusations made against him at that meeting. Before we address Dr. Scheib's argument, we must first set forth the procedural history with respect to this issue.

In Count II of his Complaint, Dr. Scheib alleged that the Appellees breached the implied covenant of good faith and fair dealing inherent in his employment agreement by scheduling the September 6, 2007, special meeting of the board of directors. Dr. Scheib did not make any allegations regarding any other meetings until he filed his response to the Appellees' motion for summary judgment. In his response, Dr. Scheib, for the first time, argued that the shareholders held a "secret" meeting. According to Dr. Scheib, at that meeting, the shareholders discussed the complaints they allegedly received about him and discussed terminating his shareholder status. Dr. Scheib argues that these actions by the shareholders violated the implied covenant of good faith and fair dealing inherent in his employment agreement. In its order granting the Appellees' motion for summary judgment, the trial court addressed these new arguments raised by Dr. Scheib. Although these arguments were not raised in Dr. Scheib's Complaint, because they were raised and addressed by both parties in the trial court and to this Court, we discuss them below.

As noted in *Farmers Bank & Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005), "[w]ithin every contract, there is an implied covenant of good faith and fair dealing, and contracts impose on the parties thereto a duty to do everything necessary to carry them out." However, the "implied covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights." *Id*.

Under the employment agreement, Commonwealth Anesthesia could terminate Dr. Scheib without cause. To take such an action, there had to be a vote by two-thirds of the board of directors, which had to be ratified by two-thirds of the shareholders. Although the shareholders met to discuss Dr. Scheib's job performance in June 2007, this was not a formal meeting of the shareholders, no minutes were taken, and no action by Commonwealth Anesthesia was taken as a result of this meeting. Furthermore, as required by the employment agreement, there was a board of directors meeting followed by a shareholders meeting. Dr. Scheib had notice of both of these meetings and had the opportunity to respond to the complaints about his job performance at both of these meetings.

Because the Appellees were exercising their contractual rights under the employment agreement, their actions did not result in a breach of the implied covenant of good faith and fair dealing. *See id*. To the extent that Dr. Scheib argues that the complaints of his job performance were false, we note that such an argument is irrelevant because he was terminated without cause. Therefore, the

trial court correctly granted summary judgment in favor of the Appellees as to this issue.

4. Intentional Interference

Finally, Dr. Scheib argues that the trial court erred by dismissing his claim against Dr. Taylor of intentional interference with his employment agreement. Specifically, Dr. Scheib contends that, Dr. Taylor made false accusations regarding Dr. Scheib's job performance at the "secret" shareholders meeting, which resulted in his termination. We disagree.

Kentucky follows the Restatement (Second) of Torts § 766, which provides the legal requirements of a claim of intentional interference with the performance of a contract by a third person as follows:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

See Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC, 182 S.W.3d 529, 533-34 (Ky. App. 2005). Thus, to prove his claim of tortious interference, Dr. Scheib must show: "(1) the existence of a contract; (2) Defendant's knowledge of this contract; (3) Defendant intended to cause its breach; (4) Defendant's conduct caused the breach; (5) this breach resulted in damages to Plaintiff; and (6) Defendant had no privilege or justification to excuse its conduct." *Dennison v. Murray State Univ.*, 465 F. Supp. 2d 733, 755 (W.D. Ky. 2006).

As noted above, Dr. Scheib was terminated without cause pursuant to Section 3(a) of his employment agreement. Thus, any complaints raised by Dr. Taylor regarding Dr. Scheib's job performance, whether false or not, are irrelevant to Dr. Scheib's termination. Therefore, Dr. Scheib cannot prove that the complaints raised by Dr. Taylor caused Commonwealth Anesthesia to breach the employment agreement. Furthermore, except for providing insufficient notice of his termination, Commonwealth Anesthesia did not otherwise breach the employment agreement. Because his claims against Dr. Taylor are not relevant to whether Dr. Scheib received sufficient notice of his termination, Dr. Scheib cannot prove that Dr. Taylor tortiously interfered with the employment agreement. Accordingly, the trial court correctly dismissed Dr. Scheib's claim of tortious interference.

CONCLUSION

We affirm the Fayette Circuit Court's order granting summary judgment in favor of the Appellees as to Dr. Scheib's claims of breach of the SPA, breach of the implied covenant of good faith and fair dealing, and tortious interference with an existing contractual relationship. However, as to Dr. Scheib's claim of breach of the employment agreement, we reverse the trial court's summary judgment and remand for further proceedings consistent with this opinion.

LAMBERT, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, DISSENTS BY SEPARATE OPINION.

SHAKE, SENIOR JUDGE, DISSENTING: Respectfully I dissent from the portion of the majority opinion which affirms dismissal of the interference claim against Dr. Taylor.

The trial court weighed the evidence, regarding both Dr. Scheib's misconduct and the motivations of the other shareholders and made findings, improperly at the summary judgment stage. A jury should have had the opportunity to weigh the credibility of Drs.Taylor, Ginter and Scheib's testimony about what was reported about Dr. Sheib's conduct and his professional comportment. Then the jury would have been charged to determine the motivations of Dr. Taylor in making reports and whether the effort to expel Dr. Sheib was for his pecuniary benefit or to protect the professional service company of a poorly performing employee. The jury should have the opportunity to judge the privilege defense to determine whether it was abused or published with malice. *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 276 (Ky. 1981). The testimony of Dr. Scheib was more than sufficient to create factual questions requiring jury determination.

It makes no difference that the right to fire for no reason was preserved. The facts of this case reveal that it was the reporting by Dr. Taylor that led to the termination. Granted, there may be a qualified privilege but the defense is sound only if the jury believes that it was not abused and that there was no malice.

BRIEFS FOR APPELLANT:

Lisa English Hinkle
Christopher J. Shaughnessy
Lexington, Kentucky

BRIEF FOR APPELLEES:

Richard G. Griffith
Elizabeth S. Muyskens
Lexington, Kentucky