STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. MCBAIN & COMPANY, P.C.,

Plaintiff/Counter-Defendant/Appellant,

v

ROBERT A. BOYCE, C.P.A.,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED

No. 197782
Mecosta Circuit Court
LC No. 94-010611-CK

Before: Neff, P.J., and Jansen and Markey, JJ.

JANSEN, J. (dissenting).

I respectfully dissent. I would affirm the trial court's judgment in favor of defendant.

In its opinion, the trial court found that there was no covenant not to compete because both parties had agreed at trial that they had never discussed a covenant not to compete. Therefore, there was no mutual assent to a covenant not to compete, in spite of the language of the letter sent by McBain to Boyce. The letter, dated January 15, 1991, states, "The purpose of this letter is to outline our agreement and to provide the basis for documents necessary to effect this transaction." The letter further states:

> You and I have agreed that your employment will be for a period of three years (renewable thereafter annually), beginning January 1, 1991. In consideration of your covenant not to compete with our firm after January 1, 1994, we agree to pay you the sum of $900/month ($10,800 in 1994) and the sum of $1,500/month ($18,000 for year) in 1995 in addition to any compensation you might receive as an employee of our firm in those years.

As found by the trial court in its opinion, the parties never discussed a covenant not to compete and there was a lack of mutual assent to such an agreement. As evidence of a lack of mutual assent, the trial court noted that the "covenant not to compete" did not contain any limits as to duration, geographical area, and type of employment. See MCL 445.774a; MSA 28.70(4a) (an employer may obtain a covenant not to compete from an employee if the covenant is reasonable as to its duration, geographical area, and the type of employment or line of business). The trial court also found that

although the letter referenced a further writing, that writing never occurred, again showing a lack of mutual assent. Moreover, the trial court found that the letter was intended to, and did, provide a written basis to support future tax returns. In other words, the real intention of the covenant not to compete was to provide a tax advantage to Boyce, and this was all the covenant was intended to do.

The trial court's factual findings in this case are not clearly erroneous. MCR 2.613(C). Upon review of the entire record, the trial court's factual findings are supported by record evidence and I am not left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Because the trial court's view of the evidence is plausible, the reviewing court may not reverse. *Id.* Contrary to the majority's finding, I find that the trial court's factual findings are supported by the record, and that it was proper for the trial court to consider parol evidence because it is clear that the letter was not a final embodiment of their understanding.[1] *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 411; 285 NW2d 770 (1979). Therefore, I would affirm the trial court's finding that there was no covenant not to compete in this case.

With respect to the question of the year-end bonus, the trial court found that defendant was owed $5,461.71. It so found because the parties had applied a method of computation of five percent of Boyce's W-2 wages for 1991 and 1992. Again, I do not find the trial court's finding to be clearly erroneous. I do not agree with the majority that the phrase, "In our normal system" gives McBain the discretion to give the additional bonus. The entire sentence states, "In our normal system, you [Boyce] would be paid for additional hours expended in excess of 2,350 at the rate of $30/hour *and*, at year end, would receive 5% of these additional monies in the year-end 'perks' combination described above." (Emphasis added). Moreover, given that the letter is clearly not a final embodiment of the parties' understanding, I can find no error in the trial court's decision to apply the prior course of performance and find that defendant was owed five percent of his wages as a year-end bonus.

I believe that the majority has merely substituted its judgment for that of the trial court which is impermissible given that the trial court's factual findings do not clearly preponderate in the opposite direction. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410; 531 NW2d 168 (1995). Since the letter was not a complete integration of the parties' understanding, the trial court properly relied on other evidence to determine the parties' intent and achieve a resolution that essentially put the parties in their original position.

I would affirm the trial court in all respects.

/s/ Kathleen Jansen

[1] The letter itself, which was written by McBain, states, "I would also hope that we can embody this agreement in writing at a later date." As noted by the trial court, such an agreement in writing was never accomplished.