

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD D. NEWSUM,

Plaintiff-Appellant,

v

WIRTZ MANUFACTURING COMPANY, INC.,
CONBRO, INC., PRECISION PLASTIC SHEET
COMPANY, AND OXMASTER, INC.,

Defendants-Appellees.

UNPUBLISHED

August 14, 2008

No. 277583

St. Clair Circuit Court

LC No. 06-000534-CZ

Before: Markey, P.J., and White and Wilder, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent.

Precision Plastic Sheet Company (Precision), plaintiff's employer under the employment contract, ceased operations and plaintiff's position was eliminated because of business conditions before the five-year term of the contract was up. Once that happened, Wirtz was obligated under the agreement as follows: "Wirtz shall use its best efforts to place the Employee in a position with Wirtz or one of its affiliated companies under substantially the same duties and responsibilities (compensation and benefits will remain unchanged) as set forth in this Agreement."

Plaintiff's employment contract with Precision set forth four types of duties and responsibilities for plaintiff's position as Vice President of Business Development at Precision, three of which were specifically sales and marketing: "Promoting the sale of and soliciting orders for products manufactured, marketed, sold and delivered by Employer," "Establishing, maintaining, and servicing the accounts of Employer's customers, and "Providing such reports, market information, and forecasts to Employer as it may require from time to time." The fourth duty was "[s]uch other tasks as may be assigned . . . from time to time. . ."

A reasonable fact-finder could conclude on this record that Wirtz did not use its best efforts to place plaintiff in a position with substantially the same duties and responsibilities. Plaintiff testified, and a reasonable fact-finder could conclude from documentary evidence submitted below that, despite a number of requests for clarification by plaintiff, Wirtz never made clear what the new position, which was unnamed, would entitle. Wirtz's communications with plaintiff in April, August and September 2005 gave varied descriptions of the position: as

dealing with “materials management,” a “management position, which may include manufacturing, planning, purchasing, sales functions,” and a position “involv[ing] sales, account management and working with the production side to coordinate the sales with production planning and quality.” Documentary evidence plaintiff submitted below supports that defendant Wirtz gave him varying descriptions of the position he was offered, and that Wirtz refused to clarify what the actual responsibilities of the position would be. Beyond that, however, plaintiff presented ample evidence from which a reasonable fact-finder could conclude that the position descriptions Wirtz proffered were not substantially similar to the position plaintiff had held with Precision. Plaintiff’s career, including at Precision, had been in high-level strategic sales. Plaintiff’s counsel noted at oral argument before this Court that the position Wirtz offered plaintiff differed from his position at Precision in that the latter had involved no production planning, no production side work, or quality control. Plaintiff’s counsel reiterated that plaintiff had no prior experience in these areas, and that the varied descriptions of the position at Wirtz did include these responsibilities and thus were not substantially similar to his position at Precision.

Plaintiff also submitted evidence below that in 2005, including in August and September, Wirtz was in negotiations to hire a “Director of Sales and Marketing” based in Port Huron, and that Ken Warshefski, a human resources manager at Wirtz, offered the position to John Sims, in September or October 2005. Warshefski testified on deposition that the Director of Sales and Marketing position with Wirtz required the same skills as the Vice-President of Business Development position plaintiff had held with Precision. Warshefski agreed that plaintiff was qualified for the position, and when asked why he did not offer plaintiff the position, answered that he did not have a response.

Given this record, a reasonable fact-finder could conclude that Wirtz did not use its best efforts to place plaintiff in a substantially similar position. A reasonable fact-finder could conclude that the generalized position descriptions (with no title) Wirtz provided plaintiff were not “substantially the same” as plaintiff’s duties and responsibilities as Vice President of Business Development at Precision, notwithstanding defendant’s statement in an email to plaintiff that “This is the type of work you performed for Conbro/Precision Plastics.”

I thus conclude that the circuit court erred in granting defendants summary disposition on the basis that defendants offered plaintiff a substantially similar position. A genuine issue of fact existed on this issue and the question was for a jury.

The circuit court also improperly concluded that plaintiff breached the employment agreement by not taking the position in Port Huron. A reasonable jury could conclude that Wirtz first breached the employment agreement, by failing to use its best efforts to place plaintiff in a substantially similar position, and that plaintiff did not breach the agreement.

Nor do I agree with the circuit court that defendants were entitled to judgment as a matter of law on the question whether they owed plaintiff the retirement benefits specified in the employment contract. The employment contract does not state that plaintiff’s performance for the full five years of the agreement was a condition precedent to entitlement of the retirement benefits. The employment agreement states that plaintiff’s annual payment was to commence on September 22, 2009, well after the five-year term of the agreement was to expire. On the other hand, the agreement provides that defendants shall provide plaintiff with the retirement benefits

“during the term of his employment,” i.e., October 12, 2002 to October 12, 2007. The two provisions are at odds, and the contract is not unambiguous and thus susceptible to interpretation as a matter of law. Therefore, the circuit court erred in concluding that the contract unambiguously provides that plaintiff was to earn the payments over the course of the contract and in granting defendants summary disposition on this issue.

I would reverse and remand for further proceedings.

/s/ Helene N. White