

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL RI'CHARD,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
December 8, 2009

No. 287868
Wayne Circuit Court
LC No. 07-733049-CZ

Before: Cavanagh, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the lower court's order enforcing the terms of the parties' settlement agreement. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 9, 2008, plaintiff filed an emergency motion to enforce a settlement agreement he entered into with defendant on May 16, 2008. The settlement agreement required defendant to reinstate plaintiff to employment "effective on a date mutually agreeable to the parties prior to July 1, 2008 in the non-union position of Trainer in the City of Detroit's Human Resources Department." The agreement also required defendant to pay particular sums of money to plaintiff and his attorney "within thirty (30) days of execution of this Agreement."¹ According to plaintiff, Detroit City Counsel approval was not required for the reinstatement aspect of the agreement, and it approved the settlement amount term on June 24, 2008. Nevertheless, plaintiff was not reinstated and had not been paid the settlement amount.

On July 10, 2008, defendant filed its response to plaintiff's emergency motion to enforce the settlement agreement. Defendant argued that the City Counsel had to approve the financial part of the settlement agreement before a settlement was actually reached. Thus, plaintiff could not be reinstated until the City Counsel had approved the settlement and plaintiff completed his prescreening for rehire. Plaintiff's prescreening was completed by June 27, 2008. Thereafter,

¹ When defendant failed to present the proposed settlement agreement to the Detroit City Counsel, plaintiff filed a motion and the trial court ordered defendant to submit the matter to City Counsel by May 27, 2008. However, defendant admits that "City Counsel did not receive all of the necessary documents to render its decision until June 5, 2008." And the City Counsel did not approve the settlement agreement until June 24, 2008.

plaintiff would have been reinstated to work in accordance with the agreement, but the Coleman A. Young Municipal Building was closed.

It appears that hearings were held on this matter on July 11, 2008, and August 29, 2008, but the discussions were conducted in the judicial chambers and were not recorded. On August 29, 2008, the court entered an order enforcing the settlement agreement. The order provided, in relevant part:

IT IS ORDERED that, pursuant to the settlement agreement between the parties, Defendant shall treat Plaintiff for all employment purposes as having been reinstated on July 1, 2008 to the position specified in the settlement agreement with the salary and benefits specified therein and shall pay to the Plaintiff the salary Plaintiff would have earned at said position from July 1, 2008 through the date of actual reinstatement, such payment to be made within 28 days of the date of this Order.

Defendant appeals from this order.

Defendant argues that the trial court erred in ordering it to treat plaintiff as if he had been reinstated on July 1, 2008, because it was impossible to reinstate plaintiff on that date. We disagree.

Plaintiff asserted an equitable claim for specific performance of the settlement agreement and defendant apparently raised the defense of impossibility. See *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 79-80; 577 NW2d 150 (1998). Whether equitable relief is proper under the facts of a case is a question of law that we review de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008); *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001).

“[T]he law inserts into contracts a clause providing legal excuse from strict performance of the contractual promise in the event that unanticipated circumstances beyond contemplation of the contracting minds and beyond their immediate control make strict performance impossible.” *Bissell v LW Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). “A promisor’s liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform.” *Roberts v Farmer’s Ins Exchange*, 275 Mich App 58, 73-74; 737 NW2d 332 (2007). When impossibility arises after the contract is formed, it is termed a supervening impossibility. *Id.* Absolute impossibility is not necessary, but there must be a showing of “impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.” *Id.* at 74, quoting *Bissell*, *supra* at 285.

Here, defendant argues that it could not fulfill its promise to reinstate plaintiff to employment by July 1, 2008, because reinstatement became impossible after a fire closed down the Human Resources Department where he was to work. We disagree. The settlement agreement provided that defendant was to “Reinstate Plaintiff, Michael Ri’Chard, to employment with the City of Detroit effective on a date mutually agreeable to the parties prior to July 1, 2008 in the non-union position of Trainer in the City of Detroit’s Human Resources Department.” Contractual language is given its plain and ordinary meaning, and is enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005); *English v Blue Cross Blue Shield*

of Michigan, 263 Mich App 449, 471-472; 688 NW2d 523 (2004). To “reinstate” means “to put back or establish again, as in a former position or state.” *Random House College Dictionary* (1997).

Plaintiff could have been reinstated to employment with the City of Detroit effective July 1, 2008, regardless whether the Human Resources Department was open for business. Defendant argues that it could not “access the files necessary to complete the reinstatement certification process until the building reopened on July 9, 2008.” This argument is not persuasive. After the files became accessible, plaintiff’s reinstated status as an employee of the City of Detroit could have been made retroactive to July 1, 2008. The unexpected expense of plaintiff’s compensation accruing while the Human Resources Department was closed does not render defendant’s performance of its contractual obligation impossible. See *Roberts, supra*.

Further, equitable considerations buttress our conclusion. First, the settlement agreement actually provided that plaintiff’s reinstatement was to be effective on a date “prior to July 1, 2008,” not on July 1, 2008. Second, the delay in plaintiff’s reinstatement was primarily defendant’s fault, including that the City Counsel’s vote on the settlement agreement was delayed because of defendant’s failure to act expediently and in compliance with the trial court’s order. In fact, although the Coleman A. Young Municipal Building reopened on July 9, 2008, plaintiff still was not reinstated until July 14, 2008. Third, in compliance with the terms of the agreement, plaintiff successfully completed his required physical and drug screening by June 27, 2008; thus, he tendered full performance. See *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982) (Generally, specific performance is not granted unless the party seeking that remedy has tendered full performance.)

In summary, it was not objectively impossible for defendant to reinstate plaintiff to employment with the City of Detroit effective July 1, 2008, and the trial court properly denied defendant’s request to be excused from performing that part of the settlement agreement. See *Roberts, supra*.

Affirmed. As the prevailing party, plaintiff is entitled to tax costs under MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Donald S. Owens