STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KARIBIAN, Plaintiff-Appellee, v VILLAGE GREEN MANAGEMENT CO, VILLAGE GREEN COMMUNICATIONS INC, VILLAGE GREEN RESIDENTIAL PROPERTIES LLC, a/k/a VILLAGE GREEN COMPANIES, and JONATHAN HOLTZMAN, Defendants-Appellants.	UNPUBLISHED March 25, 2010 No. 287165 Oakland Circuit Court LC No. 2006-078050-CZ

Before: BECKERING, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendants appeal as of right a judgment in favor of plaintiff in the amount of $108,239. The judgment was entered following the trial court's grant of summary disposition in plaintiff's favor. For the reasons set forth in this opinion, we reverse.

I. FACTS AND PROCEDURAL HISTORY

On July 21, 2005, defendants and plaintiff entered into an employment agreement in which defendants hired plaintiff as their chief financial officer (CFO). The agreement was signed by plaintiff and George S. Quay, IV, defendants' president and chief operating officer (COO). Under the agreement, plaintiff was to receive a base annual salary of $160,000, plus an annual bonus. The employment agreement contained the following provision regarding the payment of severance benefits in the event of plaintiff's termination:

> If [defendants] elect[] to terminate [plaintiff's] employment without Cause, [defendants] shall (i) pay to [plaintiff] as a severance benefit six (6) months of continued regular annual salary plus a pro-rated amount (defined below) and (ii) pay on behalf of [plaintiff] six (6) months of any COBRA premium applicable to the continuation of [plaintiff's] health benefit coverage. . . . [Plaintiff] shall not be entitled to receive any severance benefit [sic] described herein, without first executing a full release of liability satisfactory to [defendants]. . . .

The employment agreement defined "Cause" as meaning "any of [plaintiff's] death, disability for a period of greater than twelve (12) weeks, commission of a crime of moral turpitude, insubordination, violation of the Agreement, and/or violation of any standard of conduct of [defendants]."

The employment agreement also contains the following integration clause:

> 5. ENTIRE AGREEMENT/MODIFICATION. This Agreement, in combination with the Employee Confidentiality, Non-Disclosure and Non-Solicitation Agreement to be signed by [plaintiff] (a copy of which is attached hereto as Attachment B and incorporated herein by reference), constitutes the entire agreement between [defendants] and [plaintiff] on the subjects of employment and the termination thereof. This Agreement cannot be modified except in writing signed by both [plaintiff] and an authorized representative of [defendants].

Defendants had an associate handbook that was a reference guide to acquaint employees with defendants' "policies, practices and procedures[.]" The handbook contains a heading addressing "company rules and standards of conduct." Under this heading, there is a list of bulleted activities that the company prohibits. These prohibited activities include "[f]ailure to meet accepted work standards, either quality or quantity of work[,]" "[p]erformance that does not meet the requirements of the position or the Company's business needs" and "[f]ailure to carry out reasonable orders or instructions." Plaintiff signed an acknowledgement regarding the handbook on July 31, 2005.

Defendants were dissatisfied with plaintiff's job performance in many respects. In September 2006, they offered plaintiff the opportunity to resign with a severance package different from and less than the severance benefits set forth in the employment agreement. After plaintiff declined to resign, defendants terminated his employment on September 26, 2006. Thereafter, plaintiff filed a complaint against defendants. In relevant part, the complaint included a claim for breach of contract, in which plaintiff alleged that defendants did not terminate his employment for cause and that he was therefore entitled to payment of severance benefits. On June 1, 2007, plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), arguing that defendants owed him severance benefits because they did not terminate his employment for cause. According to plaintiff, defendants terminated his employment for unsatisfactory job performance, which was not included in the definition of "cause" in the employment agreement. Plaintiff rejected defendants' contention they had cause to terminate plaintiff's employment because the definition of "cause" in the employment agreement includes "violation of any standard of conduct of [defendants,]" and the associate handbook includes job performance as a standard of conduct. According to plaintiff, any consideration of the associate handbook was precluded by the integration clause in the employment agreement.

Defendants filed a responsive brief and a cross-motion for summary disposition. Defendants argued that under the employment agreement, any violation of defendants' standards of conduct constituted cause for termination without payment of severance benefits. According to defendants, the plain meaning of the words "any standard of conduct" in the employment agreement is broad enough to include job performance. Furthermore, defendants asserted, their standards of conduct are summarized in their associate handbook and require satisfactory job performance. Defendants asserted that plaintiff received a copy of the associate handbook

around the time of his hiring and rejected the notion that consideration of the language in the associate handbook amounted to a modification of the employment agreement. In addition, defendants also argued that plaintiff violated other provisions in the employment agreement. According to defendants, plaintiff violated the requirements that he carry out his CFO duties as assigned to him and that he obtain written authorization before he provided his services to others, and these violations established that defendants had additional "cause" to terminate plaintiff's employment.

The trial court granted plaintiff's motion for summary disposition, ruling that because the employment agreement contained an integration clause and the associate handbook that set forth defendants' standards of conduct was not attached to the employment agreement, summary disposition for plaintiff was proper. This Court denied defendants' application for leave to appeal.[1] A judgment was entered on August 12, 2008, awarding plaintiff damages/severance payments in the amount of $108,239. Defendants appeal as of right.

II. STANDARD OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10)[2] is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362;

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[1] *Karibian v Village Green Management*, unpublished order of the Court of Appeals, entered April 2, 2008 (Docket No. 280579).

[2] The trial court did not articulate whether it was granting summary disposition under MCR 2.116(C)(9) or (10). However, because it is clear that the trial court considered documents in addition to the pleadings in granting plaintiff's motion for summary disposition, we conclude that the trial court granted summary disposition under MCR 2.116(C)(10).

547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

Issues concerning the construction and interpretation of contracts are questions of law that this Court also reviews de novo. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 264; 715 NW2d 914 (2006).

III. ANALYSIS

Defendants argue that the trial court erred in granting plaintiff's motion for summary disposition. According to defendants, plaintiff's poor job performance constituted a violation of defendants' clear and unambiguous standards of conduct and qualified as cause for his termination under the employment agreement. In the alternative, defendants suggest that if the "any standard of conduct" language in the employment agreement is ambiguous, summary disposition was precluded because ambiguous contract language presents an issue of fact for the jury. Defendants also contend that plaintiff was terminated for cause under the terms of the employment agreement because plaintiff violated the agreement by failing to perform his assigned CFO duties and by working for others without defendants' express written permission.

Determining whether there is a genuine issue of material fact regarding whether plaintiff violated defendants' standards of conduct or violated the employment agreement requires this Court to interpret the employment agreement. "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If contractual language is clear unambiguous, its meaning is a question of law, and courts must interpret and enforce the contract as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). However, if contractual language is ambiguous, its meaning is a question of fact for the jury to decide. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). In resolving an ambiguous contract, the jury may consider relevant extrinsic evidence, such as the parties' conduct, the statements of the parties' representatives and past practice. *Id.* at 469-470. Extrinsic "evidence is admitted not to add or detract from the writing, but merely to ascertain what the meaning of the parties is." *Id.* at 470 (citation and quotation marks omitted).

The trial court granted summary disposition for plaintiff because the employment agreement contained an integration clause, which precluded consideration of the associate handbook that set forth defendants' standards of conduct. We agree with defendants that the trial court erred in granting summary disposition in favor of plaintiff; however, the basis for our holding is not a flaw in the trial court's integration clause analysis, but our conclusion that the "violation of any standard of conduct" language in the employment agreement is ambiguous and therefore must be construed by the trier of fact.

The "any standard of conduct" language in the employment agreement is ambiguous because it may or may not include an element of job performance. The commonly understood word "any" generally casts a wide net and encompasses a wide range of things. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). "Any" has been defined as "every; all[.]" *Random House Webster's College Dictionary* (2d ed, 1997). The word "standard" is defined in *Random*

House Webster's College Dictionary (2d ed, 1997) as "an average or normal quality, quantity, or level: *The work isn't up to his usual standard*." Thus, the word "standard" includes an element of quality of work. On the other hand, the word "conduct" is associated with an individual's personal behavior. *Random House Webster's College Dictionary* (2d ed, 1997) defines "conduct" as "personal behavior; way of acting[.]" The terms "standard" and "conduct" are somewhat contradictory, at least inasmuch as they reveal the parties' intent regarding whether job performance is included as "any standard of conduct," because one encompasses an element of quality of work, while the other does not. A contract is ambiguous when its terms are susceptible to more than one meaning, *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007), or "when its words may reasonably be understood in different ways[,]" *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). Given the employment agreement's use of both the word "standard" and the word "conduct," the employment agreement is fairly susceptible of two constructions, one which includes job performance as a "standard of conduct," and the other which does not include job performance as a "standard of conduct."[3] Because the employment agreement may or may not include job performance as a standard of conduct, the language is ambiguous. The meaning of ambiguous contractual language is a question of fact for the jury to decide. *Klapp*, 468 Mich at 469.

In resolving the ambiguity in the employment agreement, the jury may consider relevant extrinsic evidence.[4] *Id.* at 469-470. The fact that the employment agreement contains an integration clause does not preclude the consideration of extrinsic evidence to assist the jury in construing the ambiguous contractual provision:

> A statement in the writing that it contains all terms agreed upon and that there are no promises, warranties, or other extrinsic provisions, is a statement of fact that may actually be untrue. The written document may itself be obviously incomplete on its face; or it may be expressed in ambiguous language. Cases may be found in which oral testimony was admitted and the express statement disregarded, on the ground that it is necessary for interpretation and for the filling of gaps. [6 Corbin, Contracts (revised ed), § 578, p 119.]

Absent a finding of ambiguity in the employment agreement, the trial court's ruling regarding the integration clause would have been correct. Parties include integration clauses in contracts "to establish a written agreement as the exclusive basis for determining their intentions concerning the subject matter of the contract." *UAW-GM*, 228 Mich App at 497. When parties indicate in a contract that the contract is to be a full and complete integration of their agreement,

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[3] In the employment agreement, the definition of cause includes "commission of a crime of moral turpitude" and "insubordination," both suggestive of personal conduct. Because the definition of cause does not expressly include job performance or work quality, the meaning of the phrase "any standard of conduct" is not entirely clear.

[4] The consideration of relevant extrinsic evidence to aid in the construction of an ambiguous contract does not violate the parol evidence rule. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470; 663 NW2d 447 (2003).

this Court has given this expressed declaration full effect. See *id.* at 493-499. In this case, there was an explicit integration clause that, absent an ambiguity in the employment agreement, would have precluded the consideration of the standards of conduct as defined in the associate handbook. However, because the employment agreement contains ambiguous language, the jury must resolve this ambiguity and, in doing so, the jury may consider extrinsic evidence, including, to the extent that it is relevant, the associate handbook. *Klapp*, 468 Mich at 469-470.

In granting plaintiff's motion for summary disposition, the trial court did not address defendants' argument that they had cause to terminate plaintiff based on his violation of the employment agreement. Nevertheless, this Court can address an issue that was raised before, but not decided by, the trial court if the trial court record provides the facts necessary to review the issue. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

The definition of "cause" in the employment agreement includes "violation of the Agreement[.]" The employment agreement required plaintiff to "perform such duties for [defendants] as shall be assigned to him from time to time by the President and COO or Chairman and CEO . . . ." The employment agreement also provided that plaintiff "shall perform no services, whether compensated or uncompensated, for any other entity without the express written authorization of [defendants.]" We find that defendants established an issue of fact regarding whether plaintiff failed to perform duties assigned to him by the COO and CEO, but failed to establish a genuine issue of material fact regarding whether plaintiff performed services for another entity without defendants' written authorization.

Because plaintiff, as the moving party, supported his motion for summary disposition with documentary evidence, defendants, as the party opposing the motion, could not merely rest on the allegations or denials in their pleadings, but were required to demonstrate with supporting evidence that a genuine and material issue of fact existed. MCR 2.116(G)(4); *Reed v Reed*, 265 Mich App 131, 140-141; 693 NW2d 825 (2005); *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). A party opposing a motion for summary disposition based upon the lack of a material factual dispute must, by affidavit, deposition, admission or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 321-322; 575 NW2d 324 (1998), rev'd in part on other grounds 474 Mich 1119 (2006). In this case, defendants attached excerpts of plaintiff's deposition and excerpts of the deposition of Quay, defendants' president and COO, to their brief in response to plaintiff's motion for summary disposition. In addition, defendants attached documentary evidence to their brief and amended brief in support of their cross-motion for summary disposition.[5]

[5] Documentary evidence attached to defendants' brief and amended brief in support of their cross-motion for summary disposition can be considered in determining the existence of a genuine issue of material fact regarding whether defendants terminated plaintiff for violating the employment agreement. MCR 2.116(G)(5) provides that "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed in the action or submitted by the parties*, must be considered by the court when the motion is based on subrule
(continued…)

Defendants contend that plaintiff violated the contractual provision that he not perform services for another entity without defendants' express written authorization by performing work for his wife, Linda Darian, DDS. In support of this contention, defendants provided plaintiff's W-2 forms for the years 2004, 2005 and 2006. The W-2 forms indicate that plaintiff's wife's dental practice paid him $4,080 in 2004, $5,550 in 2005 and $3,750 in 2006. In addition, defendants provided a letter from Dr. Darian in which she stated that plaintiff was "tokenly compensated for his ad hoc mentoring." Plaintiff began working for defendants on July 21, 2005, and defendants terminated his employment on September 26, 2006. Plaintiff's W-2 for 2004 is irrelevant because plaintiff did not work for defendants at all in 2004. Furthermore, plaintiff's W-2 forms for 2005 and 2006 do not establish a genuine issue of material fact regarding whether he performed services in violation of the employment agreement. Plaintiff worked for defendants for approximately five months in 2005 and for approximately nine months in 2006. The W-2 forms indicate that plaintiff received income from his wife's dental practice in 2005 and 2006, but do not establish when plaintiff received this income. Thus, the W-2 forms do not establish an issue of fact regarding whether plaintiff's income from his wife's dental practice was earned during the months in 2005 and 2006 when plaintiff was employed by defendants. Moreover, this documentary evidence does not, by itself, establish an issue of fact regarding whether plaintiff failed to obtain the written authorization of defendants to provide services for his wife because none of the documentary evidence cited by defendants addresses the written authorization issue.

However, defendants did establish a genuine issue of material fact regarding whether plaintiff violated provisions in the employment agreement that required him to perform duties assigned to him by defendants' COO and CEO. According to defendants, the affidavit of Jonathan Holtzman, defendants' chairman and CEO, as well as statements by president and COO George S. Quay IV and statements made by plaintiff himself, establish an issue of fact regarding whether plaintiff violated the employment agreement by failing to perform duties that were assigned to him. We have reviewed plaintiff's deposition and conclude that plaintiff's statements do not establish an issue of material fact in this regard. In addition, Holtzman's affidavit also does not establish an issue of fact regarding whether plaintiff violated the employment agreement. In his affidavit, Holtzman averred that plaintiff "failed to carry out my reasonable orders and instructions." However, he did not articulate what specific orders he assigned plaintiff and how plaintiff failed to carry them out. Conclusory allegations in an affidavit that are devoid of detail are not sufficient to create a genuine issue of material fact.

(…continued)

(C)(1)-(7) or (10)." (Emphasis added.) Defendants had filed their brief in support of their cross-motion for summary disposition as well as their amended brief in support of their cross-motion for summary disposition before the the trial court held the hearing to decide plaintiff's motion for summary disposition. Because the documentary evidence attached to defendants' brief and amended brief in support of their cross-motion for summary disposition was "then filed in the action or submitted by the parties," the trial court could consider it when deciding plaintiff's motion for summary disposition. See *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973) (holding that the trial court properly considered documentary evidence submitted with a previous motion for summary disposition filed by the opposing party in deciding a subsequent motion for summary disposition).

Hamade v Sunoco, Inc (R & M), 271 Mich App 145, 163; 721 NW2d 233 (2006); MCR 2.119(B)(1).

However, testimony in Quay's deposition established an issue of material fact regarding whether plaintiff violated the employment agreement by failing to perform duties that were assigned to him. In Quay's deposition, he asserted that plaintiff failed to perform specific duties that he and CEO Holtzman assigned to him regarding a pregnant employee. According to Quay:

> Quite clearly, my issue with [plaintiff] in regard to Miss Sigmond is that he was given a directive by me and I believe by Mr. Holtzman to document performance issues of an employee that at that point had reporting responsibilities in him. [Plaintiff], consistent with other reasons for why he was terminated, failed to fulfill that direction in a timely manner.

In addition, Quay stated:

> And the spirit of the discussion . . . with [plaintiff] in his performance evaluation was because he did not react to information and did not follow through on directives. A performance memo to Mrs. Sigmond that should have been delivered before a [maternity] leave then didn't occur until after the leave had commenced. And [plaintiff] had months in which he was being told to deal with his employee in which he just quite frankly didn't . . . .

These statements establish an issue of material fact regarding whether plaintiff failed to perform specific duties that Quay or Holtzman assigned to him. Thus, we conclude that there was a genuine issue of material fact regarding whether plaintiff violated the employment agreement in this manner.

Defendants finally argue that the trial court made improper findings of fact. It is true that in ruling on a motion for summary disposition under MCR 2.116(C)(10), the trial court is not to make findings of fact. *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). However, contrary to defendants' argument, the trial court did not engage in improper fact-finding in this case. Defendants argue that the trial court incorrectly stated that "plaintiff was fired for failing to comply with the standards of conduct set forth in the company handbook." Defendants failed to include the full context of the trial court's statement in this regard. In fact, the trial court stated on the record: "Defendants contend plaintiff was fired for failing to comply with the standards of conduct set forth in the company handbook." This statement is not an improper finding of fact, but the trial court's characterization of defendants' reason for firing plaintiff. Even if it was an incorrect characterization of defendants' reason for terminating plaintiff's employment, it does not amount to an improper finding of fact. For the same reason, defendants' contention that the trial court made an improper finding of fact when it stated that "[p]laintiff . . . contends the standards set forth [in the associate handbook] do not apply to him as he has a written contract that is fully integrated" is also without merit. Again, reading the statement in full, it is clear that the trial court was merely attempting to characterize plaintiff's argument in this regard. Contrary to defendants' arguments, the trial court's statements did not constitute improper fact-finding.

Reversed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello