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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARTIN B. AINBINDER, M.D., *Plaintiff/Appellant*,

v.

DESERT VALLEY RADIOLOGY, PLC, an Arizona professional liability
company, *Defendant/Appellee*.

No. 1 CA-CV 15-0852
FILED 8-31-2017

Appeal from the Superior Court in Maricopa County
No. CV2013-006658
The Honorable Joshua D. Rogers, Judge
The Honorable Colleen D. French, Judge *Pro Tempore*

**AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART,
AND REMANDED**

COUNSEL

Martin B. Ainbinder, Scottsdale
Plaintiff/Appellant

Milligan Lawless, PC, Phoenix
By John A. Conley
Counsel for Defendant/Appellee

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Patricia A. Orozco¹ joined.

S W A N N, Judge:

¶1 Dr. Martin Ainbinder appeals the entry of summary judgment in favor of Desert Valley Radiology (“DVR”) to the effect that he is not entitled to additional severance pay under the terms of his contract with DVR. Based on the language of the contract, we determine that there exist genuine disputes of material fact with respect to Ainbinder’s claims for breach of contract and breach of the covenant of good faith, and a portion of his claims under the Arizona Wage Act. But we conclude that summary judgment was proper on all of Ainbinder’s Wage-Act claims based on payments that were made or should have been made before April 23, 2012. We therefore affirm the summary judgment on those Wage Act claims as barred by the statute of limitations, vacate the award of attorney’s fees, and remand for further proceedings on the remaining Wage Act claims and the breach of contract and breach of covenant of good faith claims.

FACTS AND PROCEDURAL HISTORY

¶2 Ainbinder entered into a member service agreement (“MSA”) on December 13, 2007, making him a member and 16.66% owner of DVR. The MSA incorporated or referred to several provisions of DVR’s 5th amended operating agreement (“OA”), which Ainbinder also signed on December 13 (collectively, “the contract”).

¶3 Ainbinder withdrew as a member on June 10, 2011. Under the MSA, his severance compensation is based on distributions of DVR’s Net Available Cash Flow. After Ainbinder’s departure, DVR made only small distributions of Net Available Cash Flow, with a corresponding effect on payments to Ainbinder.

¹ The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

¶4 Ainbinder sued DVR to recover his severance pay. DVR moved for summary judgment, which the superior court granted. Ainbinder appeals.

DISCUSSION²

¶5 We review motions for summary judgment de novo. *Great Am. Mortg., Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 125 (App. 1997). A party is entitled to summary judgment if there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993). We view the facts and make all inferences in favor of the party opposing a motion for summary judgment. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242, ¶ 7 (App. 2011). We review issues of contract interpretation de novo, looking at “the plain meaning of the words as viewed in the context of the contract as a whole” to “discover and enforce the parties’ intent at the time the contract was made.” *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 475, ¶ 9 (App. 2015) (citation omitted).

I. THERE IS A QUESTION OF FACT AS TO WHETHER SOME OF DVR’S PAYMENTS TO MEMBERS AND FORMER MEMBERS WERE DISTRIBUTIONS OF NET AVAILABLE CASH FLOW.

¶6 Ainbinder contends that DVR disguised distributions to current members as payments for services to avoid paying his severance compensation. He relies on the opinion of his expert forensic accountant and DVR relies on the affidavits of its accountant. DVR argues that it is not financially able to make distributions. But there is evidence in the record that DVR did make payments that should have been treated as “distributions” under the contract for purposes of severance compensation, to which Ainbinder would have been entitled to a portion.

¶7 Attachment A of the MSA provides that members will receive severance compensation “on the same dates and at the same times as [DVR] makes any distributions of [N]et [A]vailable [C]ash [F]low [(“distributions”)] to the then-current members of [DVR] in accordance with Section 6.1 of the Operating Agreement.” The amount paid would be 80% “of the Severance Amount” for one year after termination, 60% the

² We do not address Ainbinder’s arguments concerning the grant of DVR’s request for a change of judge, because such challenges may only be addressed through special action. *Taliaferro v. Taliaferro*, 186 Ariz. 221 (1996).

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following year, 40% the year after, and 20% the final year. “‘Severance Amount’ means the amount that would have been distributed to [Ainbinder], for any period, under Section 6.1 of the Operating Agreement if (i) [Ainbinder’s] engagement had not been terminated in accordance with this Agreement; and (ii) [DVR]’s Net Available Cash Flow was determined in accordance with the definition in this Agreement.” For purposes of severance compensation, but not other distributions:

“Net Available Cash Flow” means, for any period, the excess of gross cash receipts of [DVR] (exclusive of capital contributions to [DVR] and, except to the extent a Majority-in-Interest determines otherwise, proceeds received from any borrowings by [DVR]) over cash disbursements for: (i) all operating costs (excluding severance payments under a [MSA] between [DVR] and a former member of [DVR]); (ii) all principal and interest payments on debts (including member loans); (iii) all asset acquisition costs and capital costs necessary for the maintenance, repair, and improvement of [DVR]’s assets; and (iv) reasonable reserves, as determined by a Majority-in-Interest. Net Available Cash Flow will not be reduced by depreciation, cost recovery deductions, and other non-cash charges. *Further, for purposes of calculating Net Available Cash Flow, the amount of compensation paid to other members of [DVR] under their respective Member Services Agreement will be equal to the compensation paid to such members as of the termination of Member’s engagement hereunder, regardless of whether the actual compensation paid to such members changes following Member’s termination date.*^[3]

(Emphasis added.) Section 6.1 of the OA provides:

6.1 DISTRIBUTIONS OF NET AVAILABLE CASH FLOW.

. . . the Members promptly following the end of each fiscal year and at such other times as a Majority-in-Interest deem appropriate, will determine and distribute [DVR]’s Net Available Cash Flow in accordance with the Members’ Percentage Interests; provided that, distributions of Net Available Cash Flow to which each Member would otherwise be entitled pursuant to this Section 6.1 will be adjusted

³ The OA defines Net Available Cash Flow almost identically but omits the final sentence. The definition in the MSA controls for purposes of severance compensation.

accordingly to account for expenses that are specially allocated to the Members pursuant to Section 7.4.

A. DVR Is Permitted to Retain Reasonable Reserves.

¶8 The parties dispute how the term “cash disbursements for . . . reasonable reserves, as determined by a Majority-in-Interest” should be applied and the legitimacy of amounts DVR contends were kept reserves. DVR contends that “typically” its policy has been to keep \$1 million in reserve, enough to cover “three weeks of operating costs in the event of a disruption of collections.” Ainbinder contends, without citation to the record, that “historically that reserve has been \$0.00.” In his affidavit, Ainbinder states that in the years before his departure, DVR decided to liquidate its reserves and distribute them to members because it had obtained a line of credit that would provide emergency funds if needed. DVR’s year-end cash reserves were over \$1.14 million in 2011, over \$528,000 in 2012, almost \$236,000 in 2013, and over \$157,000 with one month left in 2014.

¶9 Ainbinder first argues that he is entitled to a percentage of DVR’s year-end cash regardless of DVR’s determination of reasonable reserves because the contract only permits “cash disbursements for . . . reasonable reserves” and unless cash is “disbursed” into a “reserve account,” it is not a reserve, but rather money that should be distributed under Section 6.1.

¶10 But there is no evidence that DVR’s practice was to “disburse” its reserves into a separate account, or that Ainbinder himself made such formal “disbursements” when he served as DVR’s Vice President of Finance from 2009 to 2010. We interpret the contract to ensure that DVR would be able to keep adequate reserves to meet its needs, as determined by its majority-in-interest. Nothing in the contract suggests that DVR would lose its ability to retain reserves if it did not do so in keeping with an accounting methodology that was neither expressly required nor historically practiced. Under the contract, the majority-in-interest had the discretion to set reasonable reserve amounts and was not required to segregate those amounts in a separate account. Moreover, there is no evidence to suggest that the amounts DVR designated as reserves were unreasonable.

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B. There Is No Dispute of Fact Concerning Salaries Paid or
Deferred to Members.

¶11 Ainbinder's forensic accountant calculated that DVR owes him \$322,000 in severance compensation. The expert assumed that (1) Section 6.1 of the OA would determine severance pay, (2) DVR may defer, not eliminate, a payment to a former member, (3) "all partner payments to Dr. Chan are attributable to the remaining partners and are not allocated to Dr. Ainbinder," (4) Ainbinder was entitled to 16.66% of DVR's profits, (5) the members agreed to a base salary of \$275,000 per year for each member, and (6) the files provided by DVR are complete. DVR's accountant challenges several of these assumptions.

¶12 As to the fifth assumption, DVR's accountant contends that there was no agreement that members were to be paid \$275,000 per year. Attachment A of the MSA refers only to "compensation" that would be paid to Ainbinder, and provides that such compensation would be the same as the compensation for all members. This compensation is treated separately from distributions. The only evidence on the record indicates that members were indeed paid a salary of \$275,000 per year. No contrary evidence was provided, and we conclude that DVR's accountant's opinion, based solely on a contractual interpretation, does not create a genuine dispute of fact concerning the agreed-upon compensation.⁴

¶13 As to the expert's second assumption, we agree with DVR that the ability to defer payments applies only to members' compensation, and not to distributions under Section 6.1 of the OA or members' severance compensation. Paragraph 2 of Attachment A of the MSA provides:

[DVR] and [Ainbinder] are aware that, from time to time, cash flow impairments may arise which may result in [DVR] being unable to meet all of its current expenses, including Member's compensation. In such event, *[DVR] may defer Member's compensation*, in whole or in part, until [DVR] determines that it is able to pay such deferred compensation; provided, however, that any deferral of Member's compensation will be consistent with the deferment of compensation of other members of [DVR].

⁴ We note that if DVR's accountant was correct that there was not agreement to pay a salary, then *all* payments to members would have been distributions to which Ainbinder is entitled to a portion.

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(Emphasis added.) This provision refers to compensation but makes no mention of severance compensation, which is separately defined in the MSA as based only on distributions made pursuant to Section 6.1 of the OA. The deferral provision therefore does not apply to severance compensation, but salaries paid to members may be delayed without those salaries becoming distributions.

C. There Exists a Genuine Dispute of Fact Concerning Payments Made Under Section 7.4 and Pay Raises to Members.

¶14 For purposes of calculating Net Available Cash Flow, members are assumed to receive the same compensation every year as they did when Ainbinder departed (\$275,000 per year). Therefore, any salary amount paid above \$275,000 is a distribution to which Ainbinder is entitled to a share. His expert identified several such pay increases.

¶15 Similarly, unreimbursed expenses incurred by DVR on behalf of its members are distributions for purposes of severance compensation. Section 7.4 reads in relevant part:

Distributions to the Members of Net Available Cash Flow pursuant to Section 6.1 . . . will be adjusted accordingly to reflect the special allocations required by this Section.

Expenses include so-called “locums tenes coverage,” various business and travel expenses, some medical malpractice insurance, and malpractice judgments and related costs. Section 6.1 provides in relevant part that:

distributions of Net Available Cash Flow to which each Member would otherwise be entitled pursuant to this Section 6.1 will be adjusted accordingly to account for expenses that are specially allocated to the Members pursuant to Section 7.4.

Read together, these provisions require DVR to reduce a member’s share of a distribution by the amount DVR pays for any expense under Section 7.4. Any outstanding balance under Section 7.4 for which DVR has chosen not to seek reimbursement from its members is a distribution for purposes of severance compensation.

D. There Exists a Genuine Dispute of Fact Concerning Payments to Dr. Chan.

¶16 We find no legal support for Ainbinder’s expert’s opinion that “all payments made to Dr. Chan” should be considered distributions. But

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DVR's contention that *no* payments to Dr. Chan should be used to determine Net Available Cash Flow is also flawed.⁵ The MSA provides that:

[F]or purposes of calculating Net Available Cash Flow, the amount of compensation paid to other members of [DVR] under their respective Member Services Agreement will be equal to the compensation paid to *such members as of the termination of Member's engagement hereunder*, regardless of whether the actual compensation paid to *such members* changes following Member's termination date.

(Emphases added.) Ainbinder's accountant reads this provision to mean that any compensation paid to members who joined DVR after his departure should be considered "distributions" for purposes of Section 6.1 of the agreement. We disagree.

¶17 The MSA provides that Net Available Cash Flow is calculated by subtracting, *inter alia*, "all operating costs (excluding severance payments under a [MSA] between [DVR] and a former member of [DVR])." The term "operating costs" is not defined by the agreement. But salaries are an obvious cost of a business, and the agreement clearly intended, as DVR argued at oral argument below, that severance compensation would be based on DVR's profitability after a member's departure, not just the salaries paid to its members and employees. Had the parties intended to define severance compensation based on the compensation *and* distributions paid to all members, they would have said so. By distinguishing between "compensation" which is given "for all services provided," and "severance compensation" which is distributed at certain intervals based DVR's Net Available Cash Flow, salaries are properly considered an "operating cost," not a "distribution."

¶18 But DVR is also incorrect to the extent it assumes *no* payments to Dr. Chan are distributions. All MSAs in this record (including Dr. Chan's) require that each member be paid the same compensation as all other members. Reading this requirement together with the severance compensation provision and the definition of Net Available Cash Flow in the MSA, Dr. Chan is assumed to earn a salary of \$275,000 per year, and any payments above that amount, not otherwise defined, are distributions.

⁵ This calculation is based on the expert's third assumption, which the accountant challenges.

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Because neither side analyzed the payments to Dr. Chan in keeping with these principles, summary judgment was unwarranted.

E. There Exists a Genuine Dispute of Fact Concerning Locum Tenens Payments to Members and Former Members.

¶19 The expert improperly assumed that *all* “locum tenens”⁶ payments to former members are distributions. Under the contract, such payments are considered distributions if they were paid to current members in addition to their salaries. But with respect to former members, such payments are operating costs that should not be “added back” to calculate distributions. But payments made to fill in for members’ absences, whether paid to members, former members, or other third parties (an expense for which the member must reimburse DVR under Section 7.4 of the OA), are distributions if not repaid by the members. Because we cannot determine from this record when such payments were made and the membership status of the recipients at the time of payment, summary judgment was not warranted.

F. There Exists No Genuine Dispute of Fact Concerning Buyouts and Returned Capital Contributions of Former Members.

¶20 Section 8.5 of the OA addresses the withdrawal of a member from DVR. If a member withdraws, “DVR will purchase [the withdrawing] Member’s Interest within ninety (90) days following . . . the [withdrawing] Member’s date of withdrawal. The [withdrawing] Member must sell his or her Interest to [DVR].” The OA prescribes the method for valuing the withdrawing member’s interest (“Agreed Value”). It further provides that “in addition to . . . [the] Agreed Value, the [withdrawing] Member will be entitled to receive any accrued but undistributed amounts of Net Available Cash Flow which the [withdrawing] Member would otherwise be entitled to receive pursuant to Section 6.1 for the period prior to such [withdrawing] Member’s withdrawal.”

¶21 Nothing in the agreement addresses how members’ withdrawals of capital contributions should be considered in calculating Net Available Cash Flow. But Section 2.3 of the OA provides that “[n]o Member will have the right to withdraw or demand the return of all or any part of its Capital Contributions except as agreed in writing by a Majority-

⁶ “Locum tenens” means “a practitioner who temporarily takes the place of another.” Dorland’s Illustrated Medical Dictionary 1088 (31st ed. 2007).

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in-Interest.” Section 2.4 provides that “[n]o Member will be entitled to interest of any kind on account of a Capital Contribution. No Member will have priority over any other Member as to the return of its Capital Contributions.” Net Available Cash Flow excludes capital contributions from the calculation of cash receipts. Though capital withdraws are not addressed explicitly by the definition of Net Available Cash Flow, we do not agree with Ainbinder’s expert’s assumption that repayment of capital contributions is a “distribution” for purposes of Section 6.1. Capital withdrawals and distributions are governed by separate provisions. We find no support in the contract for Ainbinder’s contention that repayment of a capital amount is a distribution to which a former member is entitled to a percentage. Indeed, Ainbinder withdrew his capital contribution following his departure and there is no evidence other members shared in that payment.

G. There Exists a Genuine Dispute of Fact Concerning the
Miscellaneous Checks Paid to Members.

¶22 Section 2.5 of the OA provides that a member may “advance” all or part of the funds necessary to meet DVR’s obligations and such “advances” are considered loans to the company. These member loans are expressly deducted from cash receipts in calculating Net Available Cash Flow. We cannot determine from this record whether the miscellaneous checks were repayments of loans or some other payment permitted by the contract. If they were not, they are distributions to which Ainbinder is entitled to a portion.

¶23 Because we cannot determine from the record whether there were payments that should be considered distributions, we cannot say as a matter of law that DVR is entitled to summary judgment on Ainbinder’s breach of contract and breach of the covenant of good faith claims.

II. SOME OF AINBINDER’S WAGE ACT CLAIMS ARE BARRED BY
THE STATUTE OF LIMITATIONS.

¶24 The record does not show what, if any, severance compensation was improperly withheld. We therefore cannot hold, as DVR argues we should, that DVR’s actions were in good faith and therefore not subject to treble damages under the Wage Act. *See* A.R.S. § 23-355 (authorizing treble damages for unpaid wages); *Schade v. Diethrich*, 158 Ariz. 1, 13 (1988) (holding that treble damages under § 23-355 should not be awarded if there is a good faith dispute as to wages owed).

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¶25 But Wage Act claims are subject to a one-year statute of limitations. A.R.S. § 12-541; *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 218 Ariz. 293, 295–99, ¶¶ 6–27 (App. 2008). Ainbinder left the company in June 2011 and initiated this suit on April 23, 2013. DVR argues that the claim accrued when Ainbinder left DVR. But Section 6.1 of the OA provides that “the Members promptly following *the end of each fiscal year and at such other times as a Majority-in-Interest deem appropriate*, will determine and distribute the Company’s Net Available Cash Flow.” (Emphasis added.) Ainbinder’s claim does not accrue until DVR makes a distribution or fails to make a distribution it was required to make, and that determination is not required until the end of each fiscal year. Thus, the only Wage Act claims that are barred by the statute of limitations are for those distributions that were made or that should have been determined before April 23, 2012.

CONCLUSION

¶26 For the foregoing reasons, we partially affirm the summary judgment on Ainbinder’s Wage Act claims, and we reverse and remand for further proceedings on the breach of contract claims, breach of covenant of good faith claims, and remaining Wage Act claims. Because summary judgment was improperly granted for DVR, the award of attorney’s fees to DVR was improper. We therefore vacate the award.



AMY M. WOOD • Clerk of the Court
FILED: AA