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IN THE COURT OF APPEALS OF INDIANA

TIM BRAUNER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 02A04-1106-PL-321
	)	
RM & JP INVESTMENTS, INC. f/k/a TOOLS, DIES AND MOLDS CO.,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
Cause No. 02C01-0912-PL-155

December 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Tim Brauner appeals the trial court's denial of his motion for partial summary judgment and grant of the motion for summary judgment filed by RM & JP Investments, Inc. ("RM & JP"), formerly known as Tools, Dies and Molds Co. ("TD & M"). Brauner raises two issues which we revise and restate as whether the court erred in granting RM & JP's motion for summary judgment and in denying Brauner's motion for summary judgment. We affirm in part, reverse in part, and remand.

The relevant facts as designated by the parties follow. In November 1997, Brauner became employed by TD & M as Materials Manager. During Brauner's employment, Robert Muhn was the President of TD & M, and Brauner reported directly to Muhn. In 2006, Muhn informed Brauner that TD & M was considering selling the company. Brauner became concerned about his employment with TD & M, and asked Muhn for a contract of employment. Muhn told Brauner that he was agreeable to a contract of employment, but never provided Brauner with a contract.

In 2008, Brauner prepared drafts of a Letter of Understanding Regarding Employment ("Letter of Employment") and a Letter of Understanding Regarding Compensation upon Sale or Substantial Ownership Alteration of TD & M ("Letter of Compensation"). Muhn reviewed the agreements, made some revisions, and signed the agreements with an effective date of January 1, 2008.

The Letter of Employment stated in part:

> This will confirm the understanding arrived at between us with respect to the employment of Tim Brauner with TDandM (the Company) in the event the Company is sold or the Company's ownership interest is substantially altered.

* * * * *

Employment with the Company, and the compensation received as a result thereof, are of the extreme importance to the Company and the Employee, and the Employee desires limited assurance that such compensation will remain forthcoming in the event the Company is sold or the Company's ownership interest is "substantially altered", in the future. (Substantially altered is defined as a change of more than 40% ownership in common stock of the Company)

The parties to this agreement, therefore, agree as follows:

1. Effective Term. In the event the Company is sold or the Company's ownership interest is substantially altered, this agreement becomes effective for a period of three (3) years from the date of sale or substantial alteration of the Company's ownership interest. (The Effective Term)

2. Limited Compensation Guaranty. In the event the Company is sold or the Company's ownership interest is substantially altered, Employee is guaranteed for the effective term of this Agreement a compensatory salary of not less than $54,600 per year (Guaranteed Salary) plus any bonuses or company benefits that were given prior, whether or not Employee is retained in the employment of the Company. Notwithstanding the foregoing, Employee is not entitled to his Guaranteed Salary for the Effective Term if he voluntarily terminates employment with the Company without "good cause". Good Cause for voluntary termination of employment would be if Employee's job responsibilities were substantially reduced without his input and/or consent. At the expiration of the Effective Term, or upon voluntary termination of employment with the Company by Employee without good cause, this Agreement and all guarantees contained herein shall terminate without further liability on the part of the Company.

3. Restrictive Covenant. For the Effective Term of this Agreement, Employee may Be retained in the capacity of Director of Materials and Manufacturing to the Company at the Guaranteed Salary. During the term of such employment, Employee shall devote his time and effort to furtherance of the Company's affairs and shall conduct himself in accordance with the directions of the Company's Board of Directors.

4. Agreement: This agreement coexists with, and supplements, preexisting employment contracts and agreements entered into between the Company and Employee, and shall be construed in existence and in accordance therewith.

Appellant's Appendix at 129-130.

The Letter of Compensation stated in part:

> This will confirm the understanding arrived upon between us with respect to the compensation Tim Brauner will receive from TD& M (the Company) in the event the Company is sold or the Company's ownership interest is substantially altered.
>
> This agreement made effective January 1, 2008 between the Company and Tim Brauner.
>
> The parties to this agreement, therefore, agree as follows:
>
> 1. At such time that the Company is sold or ownership interest is substantially altered (substantially altered is defined as a change of any kind to more than 40% ownership in common stock of the Company), Tim Brauner will receive monies equal to 5% of the net proceeds of the sale of the Company, when such net proceeds are realized, payable in a lump sum or increments, at the discretion of Tim Brauner.
>
> 2. Agreement: The terms of this agreement are encompassed by this written agreement that all concerned parties are signing. No other terms or agreements affecting this agreement exist, or were made, either verbally or in writing.
>
> 3. This agreement will be interpreted by Indiana laws.

Id. at 131.

On June 12, 2009, RM & JP filed Articles of Amendment with the Indiana Secretary of State and began operating under its current name, RM & JP, instead of TD & M.[1] At some point in 2009, RM & JP entered into a transaction with Cummings

[1] Muhn's deposition reveals the following exchange:

> Q. When was RM & JP Investments, Inc., that named entity, formed, if you know?
>
> A. It was negotiated during the sale of the company that by releasing the company name of TD&M, we would have to have a different name is all. So it was basically a name change.

Holdings, LLC ("Cummings") in which Cummings operated as TD & M at the same location, with the same equipment, and engaged in the same business.[2] RM & JP agreed to sell assets to Cummings in exchange for Cummings assuming certain debt of RM & JP and agreeing to pay RM & JP certain funds over time which would not equal nor exceed the outstanding obligations retained by RM & JP. RM & JP sold the rights to the "names Tools, Dies & Molds, Co. and TD & M" to Cummings. Id. at 125. After the transaction, RM & JP still owned two pieces of equipment, a promissory note, and two accounts receivable. "The sale to Cummings did not involve the sale, exchange or transfer of any stock in [RM & JP] and the shareholders of [RM & JP] are identical in both identity and shares held now as they were both at the time of the asset sale and January 1, 2008." Id. at 31. Brauner did not receive five percent of the net proceeds of any sale between TD & M and Cummings.

After the transaction, when someone would call Muhn, he would state that "[t]he company's been purchased and it was now under Cummings LLC or whatever." Id. at 46. However, Muhn also told Brauner: "[W]e didn't sell the company. You were told – you know, you've been a party to this thing the whole time. We were unable to sell the company. And we were, we were in the dilemma that we either had to liquidate the

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Appellant's Appendix at 105.

[2] Muhn stated in his affidavit that "[o]n April 10, 2009 [RM & JP] entered into an Asset Purchase Agreement with [Cummings] whereby [RM & JP] agreed to sell assets to [Cummings] in exchange for Cummings assuming certain debt of [RM & JP] and agreeing to pay [RM & JP] certain funds over time which will not equal nor exceed the outstanding obligations retained by [RM & JP]." Appellant's Appendix at 31. Brauner stated in his affidavit that "on June 5, 2009 the owners of TD & M entered into a transaction with [Cummings] whereby Cummings operated as TD & M, at the same location, with the same equipment, and engaged in the same business." Id. at 36.

company or sell the assets to Dave Cummings." Id. at 107. Muhn described the business of RM & JP as "to wind up everything." Id.

After June 5, 2009, Cummings required Brauner to pay a portion of his health insurance premiums. Brauner told Muhn that under the Letter of Compensation he was to retain his same benefits including the payment of his health insurance premiums. Muhn conferred with the other owners and agreed, and Brauner received a check from RM & JP for $1,000 which represented the health insurance premiums that Cummings would require Brauner to pay through the end of 2009. Muhn told Brauner that they would work out the continued payment of health insurance premiums after January 1, 2010. In November 2009, Cummings terminated Brauner's employment.

On December 17, 2009, Brauner filed a complaint against RM & JP alleging that RM & JP breached the terms of the Letter of Employment and Letter of Compensation. On February 5, 2010, RM & JP filed an answer and counterclaim alleging that Brauner's claims were frivolous, unreasonable, and/or groundless and requested "that judgment be entered against [Brauner] for costs of suit, for attorney fees, and other appropriate sanctions." Id. at 26. On October 1, 2010, RM & JP filed a motion for summary judgment. That same day, Brauner filed a motion for summary judgment and argued that the plain and ordinary meaning of "sale of company" included an asset sale and that the intent of the parties was to include an "asset sale" as the sale of the company.[3] Id. at 83, 85. Brauner designated an affidavit in which he stated that he intended that the term

[3] On appeal, Brauner states that "[a]lthough captioned as a Motion for Summary Judgment, Brauner's Motion was actually a motion for partial summary judgment as it did not address Brauner's damages." Appellant's Brief at 2 n.1.

"sale of company" include, but not necessarily be limited to, a sale of substantially all of the assets. Id. at 35.

On November 10, 2010, the court held a hearing and, without findings, denied Brauner's motion for partial summary judgment and granted RM & JP's motion for partial summary judgment.[4] On November 18, 2010, the court entered an order clarifying its earlier order "[i]n that Defendant's Motion for Summary Judgment was granted only on those claims specifically contained therein – i.e. specifically not including Defendant's Counterclaim, which remains pending." Id. at 12. On June 10, 2011, the court entered an order again denying Brauner's motion for partial summary judgment and stated that "[t]here being no just reason for delay, the Court certifies this entry of judgment as a final appealable order." Id. at 13.

The issue is whether the court erred in granting RM & JP's motion for partial summary judgment and in denying Brauner's motion for partial summary judgment. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied his day in court. Id. A party moving for summary judgment bears the initial burden of showing

[4] The record does not contain a transcript of this hearing.

no genuine issue of material fact and the appropriateness of judgment as a matter of law. Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 975 (Ind. 2005). If the movant fails to make this prima facie showing, then summary judgment is precluded regardless of whether the non-movant designates facts and evidence in response to the movant's motion. Id.

Brauner argues that the phrase "company is sold" in the agreements was not defined in the agreements and that the phrase must be given its plain and ordinary meaning. Brauner argues that "[t]he common parlance of a company being 'sold' includes a sale of virtually all of the assets when the purchaser continues operations under the same name, at the same location, with the same equipment and employees, and uses the same telephone number and website." Appellant's Brief at 10. Brauner also points out that the agreements "were triggered if the company was sold *or* if the ownership of the company was substantially altered which was defined to mean a change in the ownership of the stock," and "clearly 'sale of the company' was intended to mean something *other* than the transfer of shares of stock because the parties covered that scenario." Id. at 11. Brauner contends that "[e]ven if the Court should find that the term 'sold' is ambiguous in this context, TD & M's Motion for Summary Judgment should have been denied because there is *at least* a genuine issue of material fact regarding the parties' intent." Id. at 12. Brauner points to Muhn's deposition, in which he referred to the "sale" of the company. Id. at 13. Brauner also argues that the trial court erred in denying his motion for summary judgment and "[f]or the reasons set forth above, Brauner asserts that the Agreements are unambiguous and, read as a whole, lead to the

inescapable conclusion that if substantially all of the assets were sold such a transaction would mean that the 'company was sold' triggering the payout provisions of the Agreements." Id. at 15.

RM & JP argues that the sale of the company or substantial change in stock ownership did not occur. RM & JP argues that "the term 'Company is sold' has the plain and ordinary meaning to dispose of the entity TD & M by a sale," and that the phrase "certainly does not mean to sell assets owned by the company." Appellee's Brief at 4. RM & JP argues that the phrase "can only mean to sell the company itself. The disposition of the legal entity TD & M by sale." Id. RM & JP also argue that the use of extrinsic evidence is not proper to determine intent as no ambiguity exists. RM & JP also argues "even if a term is ambiguous, the Court does not utilize whatever subjective intent Brauner might have held in secret to interpret ambiguous terms." Id. at 6. RM & JP argues that "Brauner's intent was to cover situations in which control of the company is effected," and "[b]y drafting both triggers, Brauner intended to cover the situations whereby existing owners lose control over the Company either by a sale of 100% of the stock or a new investor gaining control by purchasing a controlling interest in the Company." Id. at 7. RM & JP argues that "[t]here is simply no evidence that the Contracts were ever intended to cover sale of assets." Id. RM & JP also points out that Muhn initially testified that Cummings was originally going to buy the company, backed out of the deal, and later "came back to the table" and negotiated the sale of assets. Id. RM & JP further argues that the agreements were without consideration because "Brauner didn't change his position in any way nor did he give up anything in exchange

for this agreement." Id. at 9. RM & JP also argues that "Brauner is not entitled to any compensation because there were no proceeds generated from the Cummings sale." Id.

Generally, "[i]nterpretation of a contract is a pure question of law and is reviewed de novo." Dunn v. Meridian Mut. Ins. Co., 836 N.E.2d 249, 252 (Ind. 2005). If its terms are clear and unambiguous, courts must give those terms their clear and ordinary meaning. Id. Courts should interpret a contract so as to harmonize its provisions, rather than place them in conflict. Id. "We will make all attempts to construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless." Rogers v. Lockard, 767 N.E.2d 982, 992 (Ind. Ct. App. 2002). "A contract will be found to be ambiguous only if reasonable persons would differ as to the meaning of its terms." Beam v. Wausau Ins. Co., 765 N.E.2d 524, 528 (Ind. 2002), reh'g denied. "When a contract's terms are ambiguous or uncertain and its interpretation requires extrinsic evidence, its construction is a matter for the fact-finder." Johnson v. Johnson, 920 N.E.2d 253, 256 (Ind. 2010).

As to Brauner's claims under the Letter of Compensation regarding whether he is entitled to five percent of the net proceeds, we conclude that the designated evidence reveals that RM & JP was entitled to summary judgment. Even assuming that TD & M was sold, the designated evidence reveals that RM & JP agreed to sell assets to Cummings in exchange for Cummings assuming certain debt of RM & JP and agreeing to pay RM & JP certain funds which would not equal nor exceed the outstanding obligations retained by RM & JP. Thus, there are no net proceeds and no proceeds from which to pay Brauner five percent. Under the circumstances, we conclude that RM & JP is

entitled to summary judgment on Brauner's claim that he was entitled to five percent of the proceeds.[5]

With respect to the Letter of Employment, we observe that Brauner does not argue that the company was "substantially altered." Indeed, the designated evidence reveals that the transaction did not affect the quantity of shares held by the shareholders of RM & JP. Thus, we cannot say that the ownership interest was "substantially altered," which the agreements defined as "a change of more than 40% ownership in common stock of the Company" or "a change of any kind to more than 40% ownership in common stock of the Company." Appellant's Appendix at 129, 131.

Thus, we turn our attention to whether TD & M was "sold." The word "sold" is generally defined as the "[p]ast tense and past participle of sell," and "sell" is defined as "[t]o exchange or deliver for money or its equivalent," "[t]o give up or surrender in exchange for a price or reward," and "[t]o exchange ownership for money or its equivalent." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1581, 1653 (2006). "Sell" is also defined as "[t]o transfer (property) by sale." BLACK'S LAW DICTIONARY 1391 (8th ed. 2004). Here, the agreements stated that in the event that "the Company is sold," and "Company" was defined as TD & M, Brauner would receive the

[5] Brauner argues that RM & JP "claims that [he] is not entitled to judgment on the Agreements because there were no net proceeds," and that "this argument was raised in *response* to Brauner's Motion for Partial Summary Judgment, not in *support* of TD & M's Motion." Appellant's Reply Brief at 10. We observe that RM & JP designated evidence in support of its motion for summary judgment which indicated that RM & JP agreed to sell assets to Cummings in exchange for Cummings assuming certain debt of RM & JP and agreeing to pay RM & JP certain funds over time which would not equal nor exceed the outstanding obligations retained by RM & JP. Further, in Shepherd v. Truex, 819 N.E.2d 457, 461 (Ind. Ct. App. 2004), the trial court granted summary judgment in favor of defendants, and the plaintiff argued on appeal that the defendants failed to file a memorandum or brief in support of their motion for summary judgment. The court observed that the defendants "did not submit a memorandum in support of their motion, but none is required by the trial rules." 819 N.E.2d at 461.

stated guaranteed salary plus bonuses and benefits. Appellant's Appendix at 129, 131. On one hand, the designated evidence reveals that Cummings operated as TD & M at the same location, with the same equipment, and engaged in the same business, and that the business of RM & JP was "to wind up everything." Appellant's Appendix at 107. On the other hand, the designated evidence reveals that after the transaction, RM & JP, formerly known as TD & M, still owned two pieces of equipment, a promissory note, and two accounts receivable. Further, the parties do not point to the designated evidence and our review of the designated evidence does not reveal the value of the two pieces of equipment, the promissory note, or the two accounts receivable, the value of the assets and obligations transferred to Cummings, the relative values of the assets transferred as compared to those retained by RM & JP, or the significance of the retained assets in light of the nature of TD & M's business. The designated evidence reveals that Brauner requested that RM & JP admit that RM & JP "sold all or substantially all of its assets to Cummings," and RM & JP responded by stating: "RM & JP is without sufficient information to either admit or deny this request as the term 'substantially all' is not defined." Id. at 125. The designated evidence does not contain documents specifically related to the transaction between Cummings and TD & M. In response to an interrogatory asking to identify the assets sold by RM & JP to Cummings, the date of the sale, and "each document and witness in support thereof," RM & JP objected "to the Interrogatory as it seeks the production of information which is confidential pursuant to the terms of a confidentiality agreement." Id. at 114. Accordingly, there is at least an issue of fact as to whether the transaction between RM & JP constituted a sale to

Cummings. Thus, we conclude that the court erred in granting RM & JP summary judgment as to Brauner's claims under the Letter of Employment.

Lastly, regarding the issue of consideration, RM & JP argues that Brauner "was not entitled to judgment as a matter of law because the agreement he is attempting to enforce is without consideration." Appellee's Brief at 8. Brauner's motion for partial summary judgment and brief in support of his motion did not explicitly address the idea of consideration. RM & JP argued in its response to Brauner's motion for partial summary judgment that "[a]s evidenced by his own Affidavit, Brauner didn't change his position in any way nor did he give up anything in exchange for this agreement," that he "was employed prior to the agreement," and that he "was employed by Cummings after the sale."[6] Appellant's Appendix at 146. RM & JP also argued, without citation to the designated evidence, that "[t]here is no evidence that [Brauner] paid any monies for this agreement; that he surrendered any benefits; nor changed his position in any way." Id. On appeal, RM & JP makes similar arguments. In his reply brief, Brauner argues that he provided consideration for the agreements or at least consideration is a question of fact. Brauner points to the Letter of Employment which stated that "[e]mployment with the Company, and the compensation received as a result thereof, are of the extreme importance to the Company and the Employee . . . ." Id. at 149.

The Indiana Supreme Court has held that "the at-will employment relationship may be converted to a relationship in which the employer may terminate the employee

[6] We observe that RM & JP did not address the issue of lack of consideration as a reason in support of its motion for summary judgment, designate any evidence regarding Brauner's lack of consideration in connection with its motion for summary judgment, or argue that it was entitled to summary judgment on this basis on appeal.

only for good cause," but "[i]n order to achieve the termination-for-good-cause status, the employee must provide adequate independent consideration." Wior v. Anchor Indus., Inc., 669 N.E.2d 172, 175 (Ind. 1996), reh'g denied. Based upon the designated evidence, we conclude that there is an issue of fact as to whether Brauner provided consideration and that Brauner is not entitled to summary judgment.[7]

For the foregoing reasons, we affirm the trial court's grant of RM & JP's motion for summary judgment with respect to the Letter of Compensation, reverse the grant of RM & JP's motion for summary judgment with respect to the Letter of Employment, and affirm the denial of Brauner's motion for summary judgment.

Affirmed in part, reverse in part, and remanded.

MAY, J., and CRONE, J., concur.

[7] Brauner relies upon Ackerman v. Kimball Int'l, Inc. 634 N.E.2d 778 (Ind. Ct. App. 1994), adopted in relevant part by 652 N.E.2d 507 (Ind. 1995). In Ackerman, in exchange for the employee's promise not to compete with the employer or divulge the employer's confidential business information, the employee received the employer's promise to continue his at-will employment. 634 N.E.2d at 781. The court held that "[a]n employer's promise to continue at-will employment is valid consideration for the employee's promise not to compete with the employer after his termination." Id. Because Ackerman involved an employee's promise not to compete or divulge information and addressed whether the employer's promise to continue at-will employment constituted consideration on the part of the employer, we cannot say that Ackerman is instructive.