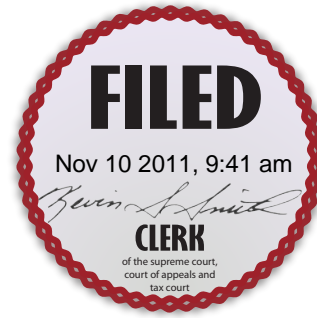


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

DAVID L. MIRKIN
Mirkin Law Offices, P.C.
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

PETER J. RUSTHOVEN
Barnes & Thornburg LLP
Indianapolis, Indiana

JEANINE M. GOZDECKI
Barnes & Thornburg, LLP
South Bend, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

CRAIG S. ALVEY,)

Appellant-Plaintiff,)

vs.)

FOREST RIVER, INC.,)

Appellee-Defendant.)

No. 20A03-1105-PL-216

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0708-PL-77

November 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Craig S. Alvey appeals the trial court's partial grant of summary judgment in favor of appellee-defendant Forest River, Inc (Forest River). More particularly, Alvey claims that the trial court erred by concluding that Alvey's employment contract did not entitle him to 20% of the pretax proceeds earned from the sale of Forest River even though the contract entitled him to 20% of the pretax profits from the operations of the division he had managed. Finding no error, we affirm the decision of the trial court.

FACTS

On May 14, 2002, Alvey was hired to manage the Custom Extrusions Division of Forest River, which was in the business of manufacturing recreational vehicles and trailers. Almost all operational profits from the division, which was essentially Forest River's internal supplier of metal extrusions, came from its sales to other Forest River divisions.

During a May 2002 meeting, Peter Liegl, President of Forest River, signed a pay roll change notice, which was part of Forest River's internal documentation system to inform payroll department employees of the information to enter into the system. Under the pay roll change notice, Alvey's compensation was to be an annual base salary of "\$100,000, plus 20 percent of pretax profits" from the Custom Extrusions Division. Appellant's App. p. 74. According to Alvey's deposition testimony, Liegl also stated at the meeting that "[t]his is what it is today, all pretax profit. And our goal is within the next four to six years to sell this company. So grow this thing as large as you can, as

quick as you can.” Appellant’s App. p. 61. In 2003, Alvey’s compensation exceeded \$290,600, \$442,500 in 2004, \$504,205 in 2005, and \$337,700 for the first three months of 2006.

On August 31, 2005, Forest River was sold to Berkshire Hathaway, Inc., (Berkshire) a large, publicly-held company. The transaction was structured as an asset acquisition, with Forest River’s assets sold to a Berkshire affiliate that then changed its name to “Forest River, Inc.” and carried on the business. Forest River changed its name to “Forest River Liquidation, Inc.,” wound up its affairs, distributed its remaining assets to its two shareholders, and dissolved. Appellant’s App. p. 94-95.

Alvey was not a shareholder of Forest River. He was not consulted about or involved in any way in the decision to sell Forest River and was not informed of the sale until after it was completed.

Alvey’s employment ended in April 2006. In August 2007, he initiated the instant action, claiming, in part,¹ that he was entitled to additional compensation that included 20% of the pretax proceeds from the sale of the Custom Extrusions Division when Forest River was sold to Berkshire.

In November 2009, Forest River moved for partial summary judgment on Alvey’s claim that he was entitled to 20% proceeds from the sale. On August 19, 2010, the trial court entered its order granting Forest River’s motion, concluding that the “agreement”

¹ The original complaint was not included in the record on appeal; however, it appears that there were other claims, inasmuch as Forest River subsequently filed a motion for partial summary judgment.

under which Alvey claimed entitlement to 20% of the sale proceeds was “too vague, indefinite, and uncertain to be enforceable.” Appellant’s App. p. 16.

Following mediation, the parties resolved and filed a stipulation of dismissal on the remaining issues. On May 3, 2011, the trial court entered final judgment. Alvey now appeals.

DISCUSSION AND DECISION

I. Post-Briefing Motions

As an initial matter, Forest River has filed a motion to strike portions of Alvey’s Reply Brief. More particularly, Forest River requests that this Court strike portions of Alvey’s Reply Brief that raise new issues (1) on which Alvey lost in the trial court but did not appeal; (2) that were not argued in Alvey’s opening appellate brief; and (3) for which Alvey cites no supporting authority. Additionally, Forest River has contemporaneously filed a motion for leave to file an Appellee’s Appendix to support its motion to strike, which we grant, and direct the Clerk to file the accompanying Appellee’s Appendix as of October 5, 2011, the date when it was tendered.²

The new issue that Forest River challenges is Alvey’s reliance on alleged employment agreements that other division managers were going to receive proceeds from the sale of Forest River to support his argument that he too was to receive proceeds from the sale. In an order denying Alvey’s motion to compel a response to an

² We also note that on October 17, 2011, Alvey filed a response to Forest River’s motions. Then, on October 21, Forest River filed a motion for leave to file a reply to Alvey’s response and tendered a reply. We grant Forest River’s motion for leave and direct the Clerk to file the accompanying Reply in Support of Appellee’s Motion to Strike as of October 21, 2011.

interrogatory regarding these alleged agreements, the trial court determined that any employment contracts that Forest River had with other employees were irrelevant to Alvey's claim. Appellee's App. p. 23.

On appeal, Alvey does not argue that the trial court erred when it determined that the information he sought regarding employment contracts with other employees was irrelevant. Indeed, Alvey's opening appellate brief omits any reference to any employment contracts with other division managers. Consequently, Alvey has waived the issue. See Estate of Taylor ex rel. Taylor v. Muncie Med. Investors, L.P., 727 N.E.2d 466, 469 (Ind. Ct. App. 2000) (determining that "[w]hen an appellant fails to raise and argue in his or her appellant's brief a cause of action disposed of below, he or she waives the right to challenge the trial court's disposition on appeal"); see also Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) (stating that "[t]he law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived"). Accordingly, we grant Forest River's motion to strike.

II. Standard of Review

Proceeding to the merits, Alvey challenges the trial court's grant of partial summary judgment in favor of Forest River. A grant of summary judgment is reviewed de novo. Williams v. Tharp, 914 N.E.2d 756, 761 (Ind. 2009). When reviewing a grant or denial of summary judgment, we apply the same standard as the trial court. Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269 (Ind. 2009). Considering only

those facts that the parties designated to the trial court, we must determine whether summary judgment is appropriate because the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Id. at 1269-70; see also Ind. Trial Rule 56(C). We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Beatty v. LaFountaine, 896 N.E.2d 16, 20 (Ind. Ct. App. 2008).

III. Sale Proceeds

Alvey contends that the trial court erred by granting Forest River's motion for summary judgment because there was a genuine issue of material fact. More particularly, Alvey maintains that the trial court decided an issue of material fact by concluding that Alvey's employment agreement provided only that he receive 20% of the pretax profits earned on the operation of Alvey's division. Alvey states that the trial court should have found that Alvey's deposition testimony regarding Liegl's statements and the payroll change notice created a genuine issue of material fact and denied the motion.

It is fundamental that a contract, including an employment contract, is unenforceable if it is so indefinite and vague that the material provisions cannot be ascertained. Pepsi-Cola Gen. Bottlers, Inc., v. Wood, 440 N.E.2d 696, 699 (Ind. Ct. App. 1982). Here, the trial court rejected Alvey's claim that his agreed compensation included 20% of the proceeds from the sale of the Custom Extrusions Division because the

“indefinite and uncertain terms of the alleged contract render practical application of Plaintiff’s ‘agreement’ for sale proceeds impossible.” Appellant’s App. p. 16.

In this case, the trial court concluded that basic contract principles posed no difficulty with treating the payroll notice coupled with Alvey’s testimony regarding Liegl’s statements as yielding an agreement that Alvey’s compensation would be 20% of the Extrusions Division’s pretax operational profits. The trial court observed that this is consistent with the purpose of incentive pay arrangements, which reward employees for performance and comport with Generally Accepted Accounting Principles (GAAP). Appellant’s App. p. 14. Perhaps most compelling, there is no “uncertainty” problem, inasmuch as Forest River made these payments and makes no argument that Alvey is not entitled to them.

By contrast, Alvey’s claim that he is also entitled to 20% of the proceeds from the sale of the Custom Extrusions Division creates numerous uncertainty issues. To be sure, the claimed agreement provides no guidance regarding how “net profit” attributable to the sale of the Custom Extrusions Division upon the sale of Forest River would be determined. Furthermore, Alvey admittedly assumed none of the risk associated with Forest River and had no involvement in or even knowledge of the later sale to Berkshire. Appellant’s App. p. 76, 84-85. Moreover, as noted by the trial court,

it [is] virtually impossible to believe that a reasonable trier of fact could find that two savvy businessmen would make a contract amounting to several million dollars without putting a single word in writing or in any way addressing the myriad of issues involved in executing a valid contract for a sizeable portion of the proceeds from the sale of a business.

Appellant's App. p. 16. And Alvey's misunderstanding as to the meaning of the payroll change notice form coupled with any verbal exchange between him and Liegl does not create a material question of fact. Accordingly, we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

KIRSCH, J., and BROWN, J., concur.