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**IN THE
COURT OF APPEALS OF INDIANA**

MATTHEW B. KERN,)
)
Appellant-Plaintiff,)
)
vs.) No. 82A05-0602-CV-66
)
GREGORY J. LOOMIS and ANN LOOMIS,)
)
Appellees-Defendants.)

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Scott R. Bowers, Judge
Cause No. 82D03-0401-PL-428

December 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Dr. Matthew Kern appeals the trial court's order granting Dr. Gregory Loomis and Mrs. Ann Loomis's motion for summary judgment. Dr. Kern raises several issues that we consolidate and restate as one: whether latent ambiguities in the contract at issue preclude summary judgment. We conclude that the contract does contain latent ambiguities requiring factual determinations, and affirm, in part, and reverse and remand, in part.

Facts and Procedural History

The facts most favorable to Dr. Kern, the nonmoving party, indicate that Dr. Kern was an employee of a neurosurgical medical practice owned by Dr. Loomis in Evansville, Indiana. In November 1998, Dr. Loomis was injured when he slipped and fell at St. Mary's Medical Center. As a result of injuries sustained in this accident, Dr. Loomis was unable to continue his practice and entered into a written contract (the "Contract") to sell his practice to Dr. Kern. The Contract was executed on April 16, 1999, and included the following provision:

(E) Disability Payments to Ann. Provided this matter closes, [Dr. Kern] shall pay to Ann the sum of Five Thousand Dollars (\$5,000.00) per month for thirty-six (36) months with the first payment to be made at Closing and a like sum on the 16th day of each month thereafter with the last payment to be made on April 16, 2002. These payments to Ann shall terminate earlier if Ann dies before April 16, 2002, or if [Dr. Loomis] earns as a physician¹ \$250,000.00 (not including payments from [Dr. Loomis's] disability insurance carrier) in any calendar year before April 16, 2002. If Ann dies before April 16, 2002, the last \$5,000.00 payment will be made on the 16th day of the month following her date of death. If [Dr. Loomis] earns \$250,000.00 (not including payments from [Dr. Loomis's] disability insurance carrier) in any calendar

¹ The phrase "as a physician" is not typed, but is written in pen and initialed by both Dr. Loomis and Dr. Kern. Throughout the Contract, several other clauses are added in this manner.

year, the last \$5,000.00 payment will be made on the 16th day of the month in which [Dr. Loomis's] earnings first total or exceed \$250,000.00 in a calendar year. [Dr. Kern] may prepay any installment, in whole or in part, without penalty.

Appellant's Appendix A at 30 (emphasis added).

In December 1999, Dr. Loomis filed suit against St. Mary's. Dr. Kern alleges that while the suit was pending, Dr. Loomis told Dr. Kern that if the suit succeeded, Dr. Kern would receive a refund on the payments he had made to Mrs. Loomis. This statement was not reduced to writing and Dr. Loomis denies having made these statements.² In July 2001, a jury returned a verdict awarding Dr. Loomis \$16,950,000 for loss of income, pain and suffering, and medical expenses. See St. Mary's Med. Ctr. of Evansville v. Loomis, 783 N.E.2d 274, 282 (Ind. Ct. App. 2002). After St. Mary's appeal was decided, Dr. Loomis and St. Mary's entered into a settlement agreement (the "Settlement"). In December 2001, Dr. Kern informed Dr. Loomis that because Dr. Loomis had received compensation for his lost income, Dr. Kern was no longer obligated to make the monthly payments to Mrs. Loomis. Dr. Kern also requested that Mrs. Loomis return the \$120,000 Dr. Kern had already paid under the Contract.

Dr. Kern filed suit demanding return of the payments he had already made to Mrs. Loomis, and the Loomises filed a counterclaim demanding the remaining \$60,000 in payments. The trial court granted the Loomises' motion for summary judgment, and

² Because this is an appeal from the trial court's grant of the Loomises' motion for summary judgment, we will assume that Dr. Loomis did make these statements for purposes of our review. See Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mut. Ins. Co., 779 N.E.2d 21, 28 (Ind. Ct. App. 2002), trans. denied ("In reviewing a grant of summary judgment, we accept as true those facts alleged by the non-movant.").

awarded the Loomises roughly \$100,000, including the \$60,000 in undelivered payments, pre-judgment interest, attorney fees, and costs. Dr. Kern now appeals.

Discussion and Decision

I. Standard of Review

Summary judgment is appropriate when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C). We review a trial court’s grant of summary judgment de novo, construing all facts and making all reasonable inferences from the facts in favor of the non-moving party. Progressive Ins. Co. v. Bullock, 841 N.E.2d 238, 240 (Ind. Ct. App. 2006), trans. denied. Summary judgment is generally appropriate for questions of law, such as interpreting a written contract. Orthodontic Affiliates, P.C., v. Long, 841 N.E.2d 219, 222 (Ind. Ct. App. 2006). However, when a written contract contains ambiguous terms, the trier of fact must determine the facts necessary to interpret the contract. Id. Therefore, when a contract has ambiguous terms, summary judgment is not appropriate unless no factual finding is necessary to resolve the ambiguity. Id.

II. Is the Contract Ambiguous?

When interpreting a contract, we give unambiguous terms their plain and ordinary meaning. Simon Prop. Group, L.P. v. Mich. Sporting Goods Distribs., 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005), trans. denied. We will not find a term to be ambiguous merely because two parties disagree about the term’s meaning. Id. Instead, we determine whether reasonable people could determine that the term has more than one meaning. Id.

The Loomises argue that the Contract is not ambiguous on its face, and therefore, we may not look to extrinsic evidence to determine if an ambiguity exists. However, by definition, a latent ambiguity is not discovered until an attempt is made to apply the terms of the contract. See Black's Law Dictionary 80 (7th ed. 1999) (defining "latent ambiguity" as "[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed"). Therefore, in demonstrating that a contract contains a latent ambiguity, a party inherently must introduce extrinsic evidence, and we will consider such evidence when determining whether the terms of the contract are ambiguous. Simon Prop. Group, L.P., 837 N.E.2d at 1071.

Dr. Kern argues that the Contract contains three latent ambiguities, which we consolidate and restate as: (1) the Contract does not specify what should be included in Dr. Loomis's earnings; and (2) the Contract does not indicate when accessions are "earned." We will address each in turn.

A. What Is Included in Dr. Loomis's Earnings?

1. Net or Gross Earnings

Dr. Kern argues the Contract is ambiguous because it does not specify how to calculate the amount that Dr. Loomis earns in a year. Dr. Kern argues that calculation should be Dr. Loomis's practice's gross receipts, which totaled more than \$250,000 in 1999. The Loomises argue the plain meaning of "earns" dictates that the calculation reduce Dr. Loomis's gross receipts by the exclusions and deductions allowed by the Internal Revenue Code, and that his earnings for purposes of the contract should be the same as his taxable income for federal tax purposes. However, the Loomises also argue the plain meaning of

“earns” is found in the online Merriam Webster Dictionary: “to receive as a return for effort and especially for work done or services rendered . . .,” and therefore, “what one earns is what one receives.” Appellees’ Brief at 11. The Loomises’ own arguments demonstrate the latent ambiguity encountered when calculating Dr. Loomis’s earnings. The two “plain meanings” offered by the Loomises conflict with each other, as Dr. Loomis received much of the money that he deducted for federal tax purposes, e.g., business expenses such as travel and entertainment. The contract is ambiguous as to what expenses, if any, should be deducted or excluded from Dr. Loomis’s gross receipts to determine his earnings for purposes of the Contract. Therefore, a factual finding of the parties’ intent is required to make this determination, and summary judgment is not appropriate.

2. Settlement Proceeds

Dr. Kern also argues that the Contract’s terms contain a latent ambiguity as to whether or not proceeds from the Settlement should be included in Dr. Loomis’s earnings. We disagree. Dr. Kern argues that because a portion of the jury’s verdict was to compensate Dr. Loomis for lost future earnings,³ see St. Mary’s Med. Ctr., 783 N.E.2d at 282, Dr. Loomis earned part of the Settlement “as a physician.” Regardless of any merit this argument may have, the fact remains that no evidence exists that any portion of the Settlement was meant to compensate Dr. Loomis for lost future earnings. Even assuming that a portion of the Settlement was meant as compensation for lost future earnings, no facts alleged give us any

³ Dr. Loomis argues that the jury returned a general verdict, and that “whether any part of the verdict was to compensate Dr. Loomis for lost earnings may be a disputed fact.” Appellees’ Brief at 16. A reasonable interpretation of the facts in Dr. Kern’s favor indicates that part of the verdict was compensation for lost income, and we assume so for purposes of our review.

way of discerning what portion of the settlement amount was so allocated. Therefore, on the specific facts of this case, we hold that the money Dr. Loomis received through the Settlement cannot be considered money he earned as a physician for purposes of the Contract, and we affirm the trial court's grant of summary judgment as to this issue.

B. When Is Dr. Loomis's Money Earned?

Dr. Kern argues that the Contract does not unambiguously indicate when Dr. Loomis's accessions to wealth should be considered earnings. Dr. Kern argues that Dr. Loomis earns money when the right to payment arises. The Loomises argue that the plain meaning of "earns" indicates that something is earned when it is received. We disagree.⁴

We think it sufficient to give three examples of when income is considered "earned" before it is received. First, under the Indiana Uniform Consumer Credit Code, "earnings" are defined as "compensation paid or payable" Ind. Code § 24-4.5-1-301(9) (emphasis added). Thus, for purposes of Indiana consumer credit law, compensation may be "earned" before it is received. Second, under Indiana statute, "[p]ayment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment." Ind. Code § 22-2-5-1. This statute indicates that, for purposes of Indiana employment law, employees "earn" their wages before actually receiving their wages. Third, Black's Law Dictionary defines

⁴ The parties' arguments regarding this timing issue focus primarily on the Settlement, as Dr. Loomis entered into the Settlement after the applicable time period, but arguably had the legal right to payment during the applicable time period. As we hold that the Settlement proceeds are not considered funds earned as a physician, the matter of timing is irrelevant in regard to the Settlement; regardless of whether the Settlement proceeds were "earned" when the right to payment arose or when payment was received, the proceeds were never "earned as a physician." However, the issue of timing could foreseeably come up on remand, and we address the issue solely in regard to Dr. Loomis's other accessions to wealth.

“earn” as “1. To acquire by labor, service, or performance. 2. To do something that entitles one to a reward or result, whether it is received or not.” Black’s Law Dictionary 525 (emphasis added). While the parties could certainly have included a definition of “earns” in the Contract that would require Dr. Loomis to receive income before it is “earned,” the plain meaning of “earn” does not require that the compensation actually be received.

The parties’ arguments about timing amount to a disagreement about whether Dr. Loomis’s earnings should be calculated using cash basis or accrual method accounting. Under the cash basis accounting method, a transaction is not considered income or an expense until payment is actually made or received. See Black’s Law Dictionary 20. On the other hand, the general premise of the accrual accounting method is that income is reported when it is earned, rather than when it is received, and clearly contemplates earning payment as distinct from receiving payment. See id. Both these methods of accounting are generally accepted, see 26 U.S.C. § 446(c) (generally allowing federal taxpayers to use either cash basis or accrual method accounting), and the word “earns” in no way unambiguously refers to the cash basis method of accounting. As we have noted, that determination may affect whether Dr. Loomis earned over \$250,000 in 1999. See footnote 5, supra.

We hold that the Contract contains a latent ambiguity as to when Dr. Loomis’s accessions to wealth should be considered “earned.” A factual determination is necessary to determine the parties’ intent; therefore, summary judgment is not appropriate.

Conclusion

We conclude that genuine issues of material fact exist as to (1) what should be included in Dr. Loomis’s earnings; and (2) whether Dr. Loomis’s accessions to wealth are

“earned” when the right to payment arises or when payment is actually received. Therefore, we reverse the trial court’s order granting the Loomises’ motion for summary judgment and remand for the trier of fact to resolve these latent ambiguities.

Affirmed, in part, and reversed and remanded, in part.

SHARPNACK, J., and NAJAM, J., concur.