

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000910-MR

KENNETH HOLLAND

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 14-CI-01619

BAUMANN PAPER CO., INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND J. LAMBERT,
JUDGES.

CLAYTON, JUDGE: A forty-plus-year career employee of a paper company was offered early retirement in 2013 due to his disability. The employee then learned that the company did not believe the employee's Salary Continuation Agreement ("Agreement"), which provided a post-employment monthly payment for 180 months, was in effect in spite of the employee's and the corporate secretary's

signatures on the Agreement, in spite of a corporate resolution saying the Agreement was in effect, and in spite of the life insurance policy the company had taken out on the employee to cover the Agreement's cost.

The employee sued, and the trial court granted summary judgment in the company's favor, finding that the Agreement was not a valid contract. This appeal follows, with the employee claiming the trial court erred by granting summary judgment in Baumann Paper's favor. After a careful review, we hold that the case should be reversed and remanded.

FACTS

Beginning his employment with Baumann Paper Co., Inc. ("Baumann Paper") in 1971, Kenneth Holland worked as a warehouse employee and supervisor. Almost forty years later, in 2013, Holland had some medical difficulties with his heart and took a twelve-week Family Medical Leave Act ("FMLA") absence. Upon returning, Baumann Paper had Holland evaluated twice by medical staff at BaptistWorx to determine whether Holland could perform his job duties. Each evaluation netted the same result – Holland's medical status precluded him from performing his job functions.

On December 9, 2013, Baumann Paper sent Holland a letter stating his FMLA leave was expiring, and the company would not be able to make reasonable accommodations for Holland's disabilities. The letter further stated, "As we discussed today, you qualify for early retirement, but must retire to rollover your 401(k) and profit sharing benefits."

Holland then signed a letter dated December 20, 2013, stating he was resigning from Baumann Paper. He requested that his 401(k) funds be made available to him. He also, by separate letter dated the same day, wrote:

In light of the fact that I am permanently and totally disabled from any employment for which I am qualified, whether with or without reasonable accommodation, I hereby apply for the disability income benefits provided by the agreement entered into between Baumann Paper Co., Inc. and me in 1987. By continuing my employment with Baumann Paper Co., Inc. until this date and leaving that employment only because of the disability caused by my heart condition, I have fulfilled the obligation to Baumann Paper Co., Inc. required by that agreement to qualify for the disability income benefits which I am demanding.

Subsequently, Baumann Paper informed Holland that the Agreement never became binding because the company president did not sign it.

The Agreement came into existence in the late 1980s. Sometime around the year 1987, Baumann Paper's president informed its employees that it was "deactivating" its pension plan. In a memo sent to "select[] personnel" who are "key to the growth and welfare [sic] of the company[,]" the company had "added a supplemental plan[.]" The meeting was to be held on February 11th, 1988, and at the meeting Baumann Paper's life insurance agent would be in attendance "to explain this plan to you."

As Fred Baumann, the then-president of the company, explained in his deposition, the plan proposed to him by the insurance agent would work as follows: the company would take out life insurance policies on select employees

and then offer those employees a salary continuation agreement, paying the select employees fixed sums for fixed periods of time following their retirements. In Holland's case, the Agreement would pay an unreduced \$2,083.33 benefit per month for 180 months if Holland was 66 years of age and had worked for Baumann Paper for at least 20 years. With the high interest rates that existed in the late 1980s, Fred Baumann explained, Holland's \$250,000.00 life insurance policy was expected to return sums over and above the death benefit value. Accordingly, when the life insurance policy paid out, its proceeds would more than cover the company's cost for the salary continuation agreement.

A meeting was held, and the insurance agent explained the plans to the employees. One of those employees, Ruth Willoughby, would later explain in a deposition that because the company was getting rid of its pension plan, she had started to look for another job. When this salary continuation plan was explained to her at the meeting, she decided to stay, because "that was one of the main things I went [to work at Baumann Paper] for, was a pension plan." She stated in her deposition that the insurance agent, Manfred Benndorf, spoke to all of the key employees as a group before speaking to everyone individually. The meeting was held at Baumann Paper's office, and during her individual meeting with the insurance agent and Baumann Paper's president:

A. He just said it was a continuation because of our employment with Baumann Paper, and that it would be to our benefit. It was a benefit for us because we no longer had a pension plan, and that this would be available to us after we retired, if we met the contract.

Q. Did you receive a salary continuation agreement that evening?

A. Yes, I did.

Q. Was the agreement that you received signed by anyone?

A. It was signed by Mitchell Baumann [Baumann Paper's secretary].

(Deposition, Ruth Willoughby, pp. 9-10).

Willoughby believed her salary continuation agreement was still in effect. She further stated that the salary continuation agreement influenced her employment with Baumann Paper, “[b]ecause I had started to look for another job. I had taken the post office exam and two or three other things, and I had intended to leave because I no longer had a pension plan. So when this was offered, I agreed to stay on.” (Deposition, Ruth Willoughby, p.12).

Holland also received a copy of the Agreement. The Agreement in the record shows signatures of Holland and Baumann Paper's then-secretary, Mitchell Baumann. No seal is affixed, and the two signature lines for witnesses are blank.

Though the Agreement lacked signatures, a Corporate Resolution signed by the secretary purporting to memorialize the company minutes from the Board of Directors' meeting held on July 14, 1987, shows that the company purchased life insurance on Holland. Fred Baumann admitted in his deposition that the company did purchase a \$250,000.00 life insurance policy on Holland.

Fred Baumann also admitted that the company gave Holland nothing in exchange for Holland's permission to qualify for and allow the company to take an insurance policy out on his life.

A second Corporate Resolution purporting to memorialize a Board of Directors' meeting held on August 12, 1987, stated as follows:

WHEREAS, Kenneth Holland is currently employed by Baumann Paper Co., Inc. as its Supervisor; and

WHEREAS, Kenneth Holland has been associated with Baumann Paper Co., Inc., since September 27, 1971, and has performed his duties in a diligent and skillful manner, resulting in substantial benefits to Baumann Paper Co., Inc.; and

WHEREAS, it is in the best interest of Baumann Paper Co., Inc., to retain the services of Kenneth Holland of Baumann Paper Co., Inc., and to continue to benefit from his knowledge, experience, and business contacts; and

WHEREAS, Baumann Paper Co., Inc. is willing to provide Kenneth Holland with an incentive to remain in its service; and Kenneth Holland is willing to continue his efforts on behalf of Baumann Paper Co., Inc. in exchange for additional incentive benefits;

IT IS HEREBY RESOLVED that Baumann Paper Co., Inc. approves the Non-qualified Salary continuation Agreement, dated August 12, 1987 which has been executed by Kenneth Holland and the President of Baumann Paper Co., Inc. on behalf of Baumann Paper Co., Inc. and subject to ratification.

In spite of these documents, Fred Baumann stated that he never signed the Agreement for any of the employees, thus he believed the agreements were not valid. Instead, he developed a 401(k) plan through another agent and established it

as a retirement program supplement for the profit-sharing trust the company also offered. Fred Baumann explained that he informally informed each employee during the summer of 1988 that the company would not be adopting the Salary Continuation Agreements. The company nonetheless kept the life insurance policy on Holland because he was a “key man,” and the funds would be used to replace his value to the company in the event that he died.

The company secretary, Mitchell Baumann, was also deposed. She verified her signatures on the forms. She also verified that she signed similar forms for Charles Gray, who, in 1987, was vice president of sales and one of three directors of Baumann Paper. Mitchell Baumann and Fred Baumann were the other two directors. Mitchell Baumann explained that she only signed the Salary Continuation Agreements and the corporate resolutions relating to the same because Gray allegedly kept harassing her about signing them. She believed she signed the documents sometime in 1988.

STANDARD OF REVIEW

The only issue before this Court is whether the trial court erred by granting summary judgment. A trial court considering the summary judgment motion must view “[t]he record . . . in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). “Appellate review of a summary judgment involves only legal questions

and a determination of whether a disputed material issue of fact exists.” *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). “So we operate under a de novo standard of review with no need to defer to the trial court’s decision.” *Id.*

Under that review, summary judgment should only be granted “when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). “The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). “[I]mpossible’ is used in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

I. Breach of contract claim.

Holland first argues the trial court erred by granting Baumann Paper summary judgment on the breach of contract claim. Holland argues that a valid contract existed – that Baumann Paper ratified the Agreement and breached its obligations under the same – and that there are no material issues of fact to be determined other than damages. Baumann Paper responds that the trial court

correctly granted summary judgment in its favor by finding the Agreement was not enforceable.

After a review of the record and applicable law, we find the trial court erred. A valid contract existed pursuant to the terms of the Agreement, thus Baumann Paper was not entitled to summary judgment. However, a material issue of fact remains regarding whether the contract was breached because Holland had to be totally disabled in order to quit his employment prior to his sixtieth birthday. Should the fact-finder determine Holland was totally disabled, a damages assessment would then be required. Accordingly, the case will be reversed and remanded for further proceedings.

We begin with whether a valid and enforceable contract existed. “The requirements generally associated with contracts are ‘offer and acceptance, full and complete terms, and consideration.’” *Commonwealth v. Morseman*, 379 S.W.3d 144, 149 (Ky. 2012) (quoting *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002)). Here, the evidence is uncontroverted that the Agreement was signed by Holland and Baumann Paper’s Secretary. The evidence is also uncontroverted that a document titled “CORPORATE RESOLUTION” was signed by Baumann Paper’s Secretary and states as follows:

WHEREAS, Kenneth Holland is currently employed by Baumann Paper Co., Inc. as its Supervisor; and

WHEREAS, Kenneth Holland has been associated with Baumann Paper Co., Inc. since September 27, 1971, and has performed his duties in a diligent and skillful manner,

resulting in substantial benefits to Baumann Paper Co., Inc.; and

WHEREAS, it is in the best interest of Baumann Paper Co., Inc., to retain the services of Kenneth Holland of Baumann Paper Co., Inc. and to continue to benefit from his knowledge, experience, and business contacts; and

WHEREAS, Baumann Paper Co., Inc. is willing to provide Kenneth Holland with incentive to remain in its service; and Kenneth Holland is willing to continue his efforts on behalf of Baumann Paper Co., Inc. in exchange for additional incentive benefits;

IT IS HEREBY RESOLVED that Baumann Paper Co., Inc. approves the Non-qualified Salary Continuation Agreement, dated August 12, 1987, which has been executed by Kenneth Holland and the President of Baumann Paper Co., Inc. on behalf of Baumann Paper Co., Inc. and subject to ratification

Meeting of the Board of Directors of Baumann Paper Co., Inc. held on August 12, 1987.

[signed Mitchell Baumann] Secretary.

These two documents, read together, create a valid contract that satisfies the Statute of Frauds.¹ The Statute of Frauds requires an agreement that cannot be completed in one year to be memorialized in writing. Kentucky Revised Statutes (KRS) 371.010(7). “Separate writings may form the memorandum of contract required by the Statute of Frauds.” *Lonnie Hayes & Sons Staves, Inc. v. Bourbon Cooperage Co.*, 777 S.W.2d 940, 942 (Ky. App. 1989) (citing *Restatement of Contracts 2d*, § 132; 72 Am.Jur.2d *Statute of Frauds* § 371). The

¹ The parties also address a third document: the memorandum sent to “select employees” by Baumann Paper’s then-president Fred W. Baumann, Jr. As we find the Agreement and Corporate Resolution together are sufficient to create a binding contract, we need not address whether the memorandum comports with the Statute of Frauds.

writings must be written “in such a manner that one can connect them [to the written offer] and determine the terms of the contract without the aid of parol evidence.” *Antle v. Haas*, 251 S.W.2d 290, 295 (Ky. 1952).

Here, there is no material issue of fact that the two documents are connected, nor that the terms of the contract cannot be determined without the aid of parol evidence. The Corporate Resolution refers to the “Non-qualified Salary Continuation Agreement[.]” The Agreement is titled “SALARY CONTINUATION AGREEMENT.” The phrase “non-qualified” in the Corporate Resolution, which is not included in the Agreement’s title, is not fatal to the two documents’ connection, as Baumann Paper argues. “Non-qualified” simply refers to the tax implications of the offered plan. *See, e.g.*, 26 U.S.C. § 409A, 26 C.F.R. § 1.409A-1, *Brasley v. Fearless Farris Serv. Stations, Inc.*, CV-08-173-S-BLW, 2010 WL 1727840 (D. Idaho, Apr. 26, 2010) (“Jones testified that he originally believed that both the Fearless Plan and the Stein plan were non-qualified plans which were, in essence, ‘golden handcuffs’ plans for a small number of employees.”). The instant Agreement was likewise a non-qualified “golden handcuff” type plan that was meant to retain key employees; it was an offer of a monthly stipend following retirement if the employee remained with the company for many decades. Accordingly, the term “non-qualified” in the resolution serves to connect the resolution to the Agreement.

Baumann Paper further argues that because the Agreement does not refer to the Corporate Resolution, the two writings do not refer to one another.

Baumann Paper cites to *Guangzhou Consortium Display Product Co., Ltd. v. PNC Bank, Nat. Ass'n*, 956 F.Supp.2d 769 (E.D.Ky. 2013), to support this argument. In that case, which is not binding on this Court, it was argued that an authorization document, an e-mail exchange, and a draft term note all combined to form a memorandum of contract pursuant to the Statute of Frauds. The court rejected this argument, noting that “none of these documents refer to each other[.]” *Id.* at 777. The e-mails and draft term note did not refer to the authorization “at all.” *Id.* And the authorization “makes no mention of the e-mails or the draft term note.” *Id.*

Unlike *Guangzhou*, though, the instant case only has two relevant documents: an Agreement, which lays out the terms of the offer; and the Corporate Resolution, which refers to the Agreement and states that the company has approved of the Agreement. These facts are more akin to *Antle v. Haas*, 251 S.W.2d 290 (Ky. 1952), where two writings referred to a written offer “in such a manner that one can connect them with it and determine the terms of the contract without the aid of parole evidence.” *Id.* at 295. Just viewing them on their face, the two documents in the instant case unquestionably are connected.

The Agreement initially states as follows:

WHEREAS, Employee has been employed by the Company since September 27, 1971 in the capacity of Supervisor and by reason thereof has acquired experience and knowledge of considerable value to the Company, and

WHEREAS, the company wishes to offer an inducement to Employee to remain in its employ by compensating

him beyond his regular salary for services which he had rendered or will hereafter render; and

WHEREAS, the Employee is willing to continue in the employ of the Company until his retirement,

NOW, THEREFORE, it is mutually agreed as follows. . .

These declarations are almost identical to the declarations contained in the Corporate Resolution. Both documents express that Baumann Paper intends to induce Holland to remain in the company. Both documents also use a similar typeface and format, and they both include Baumann Paper's Secretary's signature.

The Corporate Resolution further refers to the Agreement and states, "Baumann Paper Co., Inc. approves the Non-qualified Salary Continuation Agreement, dated August 12, 1987 which has been executed by Kenneth Holland and the President of Baumann Paper Co., Inc. on behalf of Baumann Paper Co., Inc. and subject to ratification." Baumann Paper argues that this line destroys any connection between the two documents because the Agreement does not have a date, nor does it have Baumann Paper's President's signature. While these are two minor discrepancies in the documents, we find the discrepancies not fatal to the analysis of whether the two documents are connected. The substance and intent of the two documents are the same, and the terms of the contract can be determined by viewing both documents. Thus, we find no Statute of Frauds violation to read the two documents together to create a binding, written contract.

Baumann Paper next argues that Baumann Paper's Secretary's signature on the Agreement does not bind the corporation because she had no

authority to so bind the corporation. This argument is faulty because it requires us to separate the Corporate Resolution from the Agreement. As the company secretary, she had the authority to authenticate records of the corporation and to maintain custody of the minutes of the meetings of the board of directors. KRS 271B.1-400(24). Her signature on the Corporate Resolution both authenticates it as a corporate record and demonstrates custody of the minutes of the meeting of the board of directors.

Baumann Paper also argues that Kentucky Rules of Evidence (KRE) 1004, which permits copies of original documents to be admissible only if the original is lost or destroyed, not obtainable, or in possession of the party opponent, bars the use of the Agreement because the fully executed copy of the Agreement has not been introduced. This argument is faulty for three reasons. First, it implicitly concedes that there was at one point a fully executed copy of the Agreement, which we do not believe is Baumann Paper's ultimate argument. Second, having reviewed the record, there does not appear to be any dispute between the parties that Holland's copy of the Agreement is the only one in existence, thus KRE 1004 would not prohibit its introduction. Third, nothing in KRE 1004 requires the original document to be fully signed and executed and sealed. It appears in this case only Holland and the corporate Secretary signed the document. Thus, this copy is of the original, and its introduction satisfies KRE 1004, as the original is either lost, destroyed, or not obtainable.

Baumann Paper further argues that the Corporate Resolution cannot bind the company because the resolution is neither complete nor valid. We have reviewed the statutes cited by Baumann Paper and find none support its argument. The resolution is signed by the company's secretary, states it is a resolution from the board of directors' meeting that was held on August 12, 1987, and states the company approves the Agreement. It is valid and complete.

If Baumann Paper believes its secretary wrongfully signed the document, it should pursue indemnification from her. Holland justifiably relied on the documents and assertions made to him by Baumann Paper. Given the totality of the facts before us, even in the absence of a corporate resolution we would be hard-pressed to find against Holland. *See, e.g., Tarrants v. Henderson County Farm Bureau*, 380 S.W.2d 274 (Ky. App. 1964) (holding that a formal corporate resolution is not necessary to bind a company, as a company may be bound by implication and ratification). The Corporate Resolution and the Agreement are sufficient, however, to bind Baumann Paper to its agreement with Holland.

Finally, Baumann Paper argues that even if the Agreement were valid, Holland did not satisfy the terms of the Agreement. It is undisputed that Holland retired just prior to turning sixty years of age. Under the Agreement, because Holland was not yet sixty years of age, Holland needed to suffer a "total disability" in order to still qualify for benefits under the Agreement. Baumann Paper argues that Holland did not suffer a "total disability." Having reviewed the record, we find that whether Holland suffers from a "total disability" is a material issue of fact

that remains in dispute. Thus, we reverse and remand for further factual finding on this issue.

Baumann Paper alternatively argues that even if Holland suffered a total disability, Holland is not entitled to payment until he has reached age 60 and achieved twenty years of service employment. It appears Holland has completed both requirements. Thus, this issue is meritless.

Finally, Baumann Paper argues that the Agreement requires the employee to terminate his employment in order to receive funds pursuant to the Agreement. Baumann Paper notes that at one point Holland believed he had been fired, thus, Baumann Paper argues, Holland did not terminate his employment. We find this argument disingenuous. When Holland sought unemployment benefits, Baumann Paper filed a response stating that Holland had not been terminated from his employment. Furthermore, Baumann Paper sent a letter to Holland informing Holland that he qualified for early retirement. Clearly, Baumann Paper did not believe it had terminated Holland from his employment.

Accordingly, we hold that the Agreement constitutes a valid contract. We reverse the trial court's conclusion to the contrary and its grant of summary judgment in Baumann Paper's favor. We remand for further proceedings regarding whether Holland suffered a total disability, and, if so, to what damages Holland is entitled.

II. Quantum meruit and unjust enrichment claims.

Holland next argues that if there is no valid and enforceable contract, then he is entitled to recovery under *quantum meruit* or unjust enrichment theories. We need not address these issues, as we hold that a valid and enforceable contract existed.

III. Fraud.

Finally, Holland also made a claim of fraud based on a December 9, 2013-dated letter from Baumann Paper stating that Holland qualified for early retirement. Holland accepted early retirement, but he did not receive the early retirement benefits under the Agreement. Holland states Baumann Paper's actions constitute fraud. The trial court granted summary judgment on this claim because it believed Holland's claim was for a breach of contract, not fraud, and *Brooks v. Williams*, 268 S.W.2d 650 (Ky. 1954), expressly precludes such actions. We do not agree.

In *Brooks* the Court held:

It is a general rule that fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on representations or statements that involve mere matters of futurity or things to be done or performed in the future. . . . If, by the terms of a contract, a person promises to perform an act in the future and fails so to do, the failure is a breach of contract, not a fraudulent or deceitful act, as we understand the term in law.

268 S.W.3d at 652 (citation omitted). *Brooks* does not stand for the proposition that one may never bring both breach of contract and fraud claims. Instead, if the

claims are one in the same – i.e., the defendant failed to perform pursuant to the contract – only then is the fraud claim subsumed into the breach of contract claim.

Here, the fraud alleged is not the breach of contract, but, rather, Baumann Paper's inducement to get Holland to retire prior to age sixty so he would not be paid pursuant to the Agreement. A party may bring both breach of contract and fraud claims. *See, e.g., Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4 (Ky. 2005). To establish the fraud claim, the party must establish: “a) material representation, b) which is false, c) known to be false or recklessly made, d) made with inducement to be acted upon, e) acted in reliance thereon, and f) causing injury.” *Id.* at 11 (citation omitted).

As Holland has made such a claim and there exist disputed material facts regarding the same, the trial court should not have granted Baumann Paper's motion for summary judgment. Therefore, we reverse and remand for further proceedings on Holland's fraud claim.

CONCLUSION

The trial court erred by granting summary judgment to Baumann Paper. The Agreement is a valid contract. Material issues of fact remain regarding whether the company breached its duty under the contract, as the factual question of whether Holland was totally disabled remains, and whether and to what extent Holland suffered damages. Likewise, material issues of fact still remain regarding

Holland's fraud claim. Thus, the trial court's order is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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