BANK ONE, LOUISIANA	*	**NO. 2004-CA-0392**
VERSUS	*	**COURT OF APPEAL**
NEMO VISO	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-16539, DIVISION "F"
Honorable Yada Magee, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, Judge Dennis R. Bagneris Sr., Judge Edwin A. Lombard, and Judge Leon A. Cannizzaro Jr.)

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AMENDED AND
AFFIRMED as AMENDED

The Appellant, Nemo Viso appeals an adverse district court judgment which ordered him to reimburse monies to the Appellee, BankOne, as a result of the Appellant's breach of his employment contract. We AMEND and AFFIRM and AMEND the district court judgment.

Facts and Procedural History

This matter arises out of contract, specifically, an alleged breach of an employment contract. In November 1994, the Appellant, Mr. Nemo Viso was hired by the First National Bank of Commerce (hereinafter "FNBC"), which was located in New Orleans, Louisiana. Mr. Viso's official job title was "Vice President of the Industrial Services Group," and he was responsible for targeting and providing financial services exclusively to industries that had physical plant property and equipment used to manufacture and fabricate goods. Subsequently, Mr. Viso was promoted to another position as the Vice President of the Hospitality Group. In this position Mr. Viso provided banking and lending services to businesses in the hospitality industry. In 1996, Mr. Viso was given a new promotion and title as the Vice President of the Energy Group. He was responsible for

providing banking and lending services to energy providers in the state.

In October, 1997, Mr. Viso was advised that FNBC was going to merge with BankOne, the Appellees. In 1998, as a result of BankOne's concern that key employees would find other employment, BankOne drafted a "Retention Agreement" and offered it to certain key employees. The Agreement created term employment to those employees and also provided financial incentives for specific periods of time. The record indicates that only 25 employees out of 4200 were offered the agreements. Mr. Viso was selected as one of the 25 employees.

On or about July 20, 1998, Mr. Viso executed the Agreement. Under the terms of the Agreement, Mr. Viso was to remain employed by BankOne from July 20, 1998 through July 31, 2000. The Agreement provided that Mr. Viso would receive three separate payments, which each equaled 33 ⅓ % of his salary, payable on July 1, 1998, July 1, 1999, and July 1, 2000. The gross amount of each payment was $26,700, less any federal and state taxes, FICA, and Medicare taxes due. In consideration of signing the Agreement, Mr. Viso was paid a lump sum of $26,700.00 in July 1998. However, under the terms of the Agreement, Mr. Viso would have to forfeit any unpaid benefits and reimburse BankOne for any lump sum payments he received in the event he chose to voluntarily resign from his position before July 31,

2000.

Following the execution of the Agreement, Mr.Viso contends that his position as Vice President of Energy Services Group was eliminated. Mr. Viso further asserts that in September 1998, as a result of BankOne's subsequent merger

with First Chicago, there was no longer any Energy Services Group division in Louisiana, even though his job title remained Vice President of Energy Services Group. Mr. Viso indicated that he was relieved of both his Energy Services accounts and clients at that time. His supervisor at the time, Mr. Ashton Ryan, was also laid off due to the elimination of the Energy Services Group.

Mr. Viso insists that in addition to his regular salary, he would also receive year-end bonuses based on his job performance; however, in 1998, he did not receive one because he did not have a client base or accounts with which to work, and essentially, he had no job. Additionally, Mr. Viso recalled that prior to his own lay-off, his supervisor, Mr. Ryan, personally informed him that his position would be eliminated in October, 1998. Mr. Ryan was later terminated because his position as supervisor of the Energy Services Group had been terminated.

On or about October 27, 1998, Mr. Viso tendered his resignation letter

to BankOne. Unbeknownst to BankOne, Mr. Viso had accepted employment with Deposit Guaranty, another financial institution. However, he did not indicate that he had accepted new employment in his resignation letter to BankOne.

After Mr. Viso's separation from the Company, BankOne contacted Mr. Viso, via letter, and advised him that since he resigned he would have to reimburse the monies he received. A subsequent written request was sent to Mr. Viso; however, he failed to respond to both communications.

On October 13, 1999, BankOne filed suit in the Civil District Court in Orleans Parish to recover the monies paid to Mr. Viso. On January 13, 2000, Mr.

Viso filed an Answer and Reconventional Demand seeking payment for the remaining two (2) installments under the Agreement.

A two (2) day bench trial was held on November 17-18, 2003. On November 19, 2003, the district court rendered judgment in BankOne's favor in the amount of $26,700, with each party to bear his own costs. In its reasons for judgment, the district court opined that on the date of his resignation on October 27,1998, Mr. Viso's position had not been

terminated. The district court concluded that although Mr. Viso and other employees did fear that their positions would be terminated, Mr. Viso did not wait for the termination to occur; therefore, he breached the Agreement. This appeal followed.

On appeal, Mr. Viso argues that the district court erred in rendering the adverse judgment. Specifically, he argues that the district court erred: 1) when the court refused to allow the admission of BankOne's "pink slips" executed by BankOne's Human Resources department concerning his supervisor's termination; 2) when the court cast Mr. Viso liable for repayment of sums paid to the taxing authorities; and 3) finally, when the district court did not find that BankOne had eliminated his position via "involuntary termination," in violation of the "Retention Agreement."

Discussion

In Hornsby v. Bayou Jack Logging, -- So.2d -- (La. 5/06/05), 2005 WL 1058888**,** the Supreme Court reviewed the appellate standard of review under the manifest error standard as follows:

> An appellate court may not set aside a district court's finding of fact in the absence of manifest error or unless it is clearly wrong. Stobart v. State, Through DOTD, 617 So.2d 880, 882 (La.1993). In order to reverse a factfinder's determination of fact, an appellate court must review the record in its entirety and meet the following two-part test: (1) find that a reasonable factual basis does not exist

> for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. Stobart, 617 So.2d at 882. On review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently. Ambrose v. New Orleans Police Dept. Ambulance Service, 93-3099 (La.7/5/94), 639 So.2d 216, 221. However, this court clarified in Ambrose that our purpose in Stobart was not "to mandate that the district court's factual determinations cannot ever, or hardly ever, be upset." Ambrose, 639 So.2d at 221. Recognizing that great deference should be accorded to the fact finder, the court of appeal and this Court have a constitutional duty to review facts. *Id.* To perform its constitutional duty properly, an appellate court must determine whether the district court's conclusions were clearly wrong based on the evidence or are clearly without evidentiary support. *Id.*

Hornsby at **8.

In his first assignment of error, Mr. Viso argues that the district court erred when it refused to allow the admission of a "pink slip" issued by BankOne concerning his supervisor's termination. Mr. Viso had two supervisors prior to the conflict which forms the basis of this suit. Mr. Michael Jesse Shannon, Mr. Viso's supervisor while he was employed with the Energy Services Group, was eventually laid off by BankOne. Another supervisor, Mr. Ashton Ryan, was subsequently laid off from the Energy Services Group when the department and his position as manager were

eliminated on October 15, 1998. Mr. Viso contends that on or around that date, his supervisor at the time, Mr. Ryan, advised him that as a result of the Energy Services Group elimination, that his position was also eliminated.

At trial, Mr. Ryan confirmed that he was employed by BankOne up until October 15, 1998. However, Mr. Ryan testified that although there were generally informal discussions between employees around the office, the conversations were speculations about the merger. Additionally, he testified that he was not privy to information concerning Mr. Viso's termination from BankOne. In fact, he indicated that at the time of his departure, there was still an Energy Services Group division at BankOne.

Mr. Barry Mulroy, a former BankOne Human Resources representative also testified that although he was privy to Mr. Viso's separation from the company, he explained that he had such knowledge as a result of Mr. Viso's meeting with Mr. David Spell, the Executive Vice President of FNBC, who had received Mr. Viso's resignation letter. Mr. Mulroy testified that he did not have a conversation with Mr. Viso concerning his termination until *after* Mr. Viso tendered his resignation letter to Mr. Spell. Mr. Mulroy recalled a meeting, which he described as an exit interview, which occurred as a result of Mr. Spell informing Mr. Mulroy that he and Mr. Viso had a "difference of opinion" concerning the terms of

the Retention Agreement. Mr. Mulroy testified that as a result of his conversation with Mr. Spell and having received a copy of Mr. Viso's resignation letter, he instructed his secretary to schedule a meeting with Mr. Viso to discuss the Agreement terms. During this meeting, he informed Mr. Viso that he would not be eligible to receive the payments under the Agreement because Mr. Viso's position had not been eliminated.

The "pink slip" at issue in this first assignment of error was proffered among other items collectively listed on the Plaintiffs'exhibit list. These "proffered" items were not numbered along with the other exhibits. At trial, the district court allowed the evidence to be placed into a sealed envelope and labeled "Exhibit A," after Mr. Shannon testified, but the record indicates that the items contained in the Proffer were not admitted during Mr. Shannon's testimony at trial. However, the fact that these documents were not admitted at trial, does not affect Mr. Viso's argument that the district court was manifestly erroneous in not admitting these materials into evidence. "The meaning and intent of the parties to a written instrument, including a compromise, is ordinarily determined from the instrument's four corners, and extrinsic evidence is inadmissible either to explain or to contradict the instrument's terms." Ortego v. State, Dept. of Transp. and Development, 96-1322 689 So.2d 1358, (La. 2/25/97) *citing* Dixie

Campers, Inc. v. Vesely Co., 398 So.2d 1087, 1089 (La.1981); *see also* Leenerts Farms, Inc. v. Rogers, 421 So.2d 216, 218 (La.1982).

The document itself, the "pink slip," is not the "smoking gun" which provides additional evidentiary support to Mr. Viso's argument in challenging the terms of the overall Agreement. BankOne was in a major re-structuring mode and it was generally discussed among all of the employees that a number of people may be laid off. However, Mr. Shannon, who had been employed by the First National Bank since 1968, was scheduled to retire in a few years, and the record indicates that in lieu of retiring, he had opted to stay on with the company in order to qualify for the monetary incentives provided by signing the Retention Agreement. Thus, if it is Mr. Viso's contention that Mr. Shannon's termination marked the end of his employment, his argument does not have merit. The "pink slip" was not relevant to Mr. Viso's case because extrinsic evidence in a contract case is inadmissible when weighed against the generally accepted "four corners rule" for interpreting contracts. Therefore, we find no error in excluding the "pink slip" materials at trial.

In his second assignment of error, Mr. Viso argues that the district court erred when it cast Mr. Viso liable for repayment of sums paid to the taxing authorities. "A person who has received a payment or a thing not

owed to him is bound to restore it to the person from who he received it." La. C.C. 2299. Although we find that the district court correctly determined that reimbursement was proper under the facts of the case *sub judice*, Mr. Viso himself only received $16,418.04, after state and federal taxes, FICA, and Medicare taxes were deducted from the $26,700 payable under the Agreement. Therefore, we find that the district court erred in casting Mr. Viso in judgment for the full $26,700 paid by BankOne, rather than taking the deducted amounts into consideration. As the funds assessed for tax purposes were paid directly to the taxing authorities by BankOne, those funds were not received by Mr. Viso. To award BankOne the entire $26,700, would unjustly enrich them as a matter of law, and BankOne should only be entitled to the amount paid directly to Mr. Viso. "The amount of compensation due is measured by the extent to which one had been enriched." La. C.C. 2299.

Additionally, BankOne's counsel has conceded that the district court judgment exceeds the amount prayed for in BankOne's *Petition for Damages*. Therefore, we disagree with the district court and find that the reimbursement amount should be consistent with BankOne's prayer, and we AMEND the judgment to adjust the sums payable to BankOne to $16,418.04.

In his third assignment of error, Mr. Viso argues that the district court erred when it did not find that BankOne had eliminated his position via "involuntary termination," in violation of the Retention Agreement.

The Retention Agreement provided in part:

> Purpose
>
> In order to ensure your continued employment, the Company (for the purpose of this Agreement, Company is defined as BankOne Corporation) will provide you with a financial benefit (described herein) to remain employed during the period of this Agreement.
>
> Guidelines
>
> By signing this Agreement, you agree to continue your employment with the Company during the Agreement period in the position you currently hold and to maintain a satisfactory level of performance. There are certain events which could cause management to terminate this Agreement, including:
>
> *Your voluntary termination of employment.*
> If you chose to resign before the ending date of this Agreement, this Agreement terminates and you forfeit any unpaid benefits provided by this Agreement and by signing this Agreement, you agree to repay in full all monies received under this Agreement at the time of your resignation.

> *Your termination for cause…*
>
> ***
>
> *You are involuntarily terminated due to position elimination.*If you are involuntarily terminated during the term of this Agreement, due to your position being eliminated, all remaining monies due under this Agreement will be paid to you. You will not be required to pay any monies already paid to you in accordance with this Agreement.
>
> *You transfer to a new position and assume new responsibilities within Banc One [sic] Corporation…*

The Agreement provided that Mr. Viso would continue his employment with BankOne in his position as Vice President of Energy Services Group, provided that he maintained a satisfactory level of performance. Mr. Viso argues that since his clients and accounts were re-assigned, it was virtually impossible for him to perform his duties and qualify for the incentives under the Retention Agreement. However, this is a red herring. The real issue is whether Mr. Viso's actions or BankOne's actions constituted a breach of the Agreement.

The record indicates that Mr. Viso willfully signed the Agreement on July 20, 1998, with the understanding that if he resigned, he would no longer

qualify for benefits. Although his clients and accounts were taken away, he was still paid a regular salary, and had he not pursued and accepted new employment, he would have received the additional two payments as specified in the Agreement. The fact is, unlike Mr. Shannon, Mr. Viso was not involuntarily terminated. The Agreement specified that as long as Mr. Viso reported to work, and as long as he did not voluntarily resign and maintained his employment with BankOne, he would continue to enjoy the benefits included in the Agreement.

The Agreement clearly specified that as a result of an involuntary termination, or in other words, if Mr. Viso was laid off by BankOne, he would remain eligible for the benefits provided for in the Agreement. However, Mr. Viso's employment was not terminated as a result of involuntary factors beyond his control. As discussed earlier, Mr. Viso reported to work and was never given any indication that he was laid off by BankOne. The record indicates that Mr. Viso more than likely relied on office discussions and general speculation, made by co-employees, however, the record is clear that no one in a position of authority officially gave him a pink slip. The record does indicate that Mr. Viso tendered a resignation letter, and he met with Mr. Mulroy to discuss not only the resignation letter, but to also discuss the fact that he was no longer eligible for the financial

incentives in the Agreement because of his resignation.

Although Mr. Viso could have argued that his job was constructively terminated because the majority of his duties and his job were reassigned, the most compelling evidence is the Agreement itself. The fact is BankOne did not terminate Mr. Viso. The Agreement was very specific in distinguishing that Mr. Viso's continued eligibility was solely dependent on his remaining a *voluntary* employee. In other words, as long as BankOne continued to pay him a salary, regardless of his lack of duties, Mr. Viso would have remained eligible for the incentives, as long as he continued to report to BankOne. This was the duty required of him. Thus, as to factors, beyond Mr. Viso's control, he would not be held accountable if BankOne laid him off, in fact, he would still receive the financial incentives for his loyalty to BankOne.

The bare bones facts of the case *sub judice* are straight-forward. Mr. Viso received a financial incentive of $26,000, less taxes, after signing the Agreement. However, sometime before tendering his resignation, Mr. Viso met and interviewed with another financial institution, First Guaranty, and had accepted employment with them while he was still under contract with BankOne. Mr. Viso neglected to inform BankOne that he had accepted a new position, and he was well aware that he would not be eligible for the

additional payments because of his acceptance of the new job with First Guaranty. Needless to say, the fact that Mr. Viso accepted employment with another institution, coupled with his acceptance of nearly $27,000 from First Guaranty for moving expenses are relevant to this case because they constitute willful, voluntary acts on Mr. Viso's part to leave BankOne.

In the matter before us, the contract is clear and unambiguous. There was only one condition that Mr. Viso had to meet in order to not breach the Agreement, this condition was to not voluntarily terminate his employment. As this Court determined in Barbe v. A.A. Harmon & Co., 1994-2423 (La. App. 4 Cir. 1/7/98), 705 So.2d 1210, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. Civ. Code Ann. art. 2046. This rule applies to employment contracts. s*ee, e.g.,* Tompkins v. Schering Corp., 441 So.2d 455, 458 (La. App. 2d Cir.1983). The meaning and intent of the parties to a written instrument is ordinarily determined within the four corners of the document, and extrinsic evidence is inadmissible either to explain or contradict the terms of the instrument. Brown v. Drillers, Inc., 93-1019 (La.01/14/94), 630 So.2d 741, 748." Barbe at 1216. Additionally, "[t]he parties may make their own contracts, and however unusual they may be or what drastic or unreasonable features there

may be therein, they form the law between them and should be enforced so long as they do not contravene good morals or public policy. Leon v. Dupre, 144 So.2d 667 (La. 4 Cir. 1962) *See also* Salles v. Stafford, Derbes & Roy, Inc., 173 La. 361, 137 So. 62; Blakesley v. Ransonet, 159 La. 310, 105 So. 354.

Thus, we find that BankOne's pursuit of the monies it paid to Mr. Viso was appropriate due to Mr. Viso's resignation. We do not find that the Agreement was breached by BankOne when Mr. Viso's duties on the job were reassigned. Although Mr. Viso argues that he could not perform his job, and that his division was no longer in operation, he had not been terminated by the Company, and as we have determined, the Company was in major restructuring mode. Additionally, out of 4200 FNBC employees, only a few were offered the Retention Agreements during the merger. Therefore, we find that conditions of "involuntary termination" were not met because Mr. Viso did not wait to be laid off or terminated, rather, he tendered his resignation willfully and voluntarily.

Therefore, we find the district court did not err in finding that Mr. Viso breached the employment contract.

DECREE

For the aforementioned reasons, we AFFIRM the district court judgment with respect to the inadmissibility of the pink slip into evidence; we AFFRIM the district court solely on the issue of casting Mr. Viso in judgment, but we AMEND the judgment to reflect that only $16,418.04 is due to BankOne; and we AFFRIM the district court judgment in finding that Mr. Viso breached his employment contract by tendering his resignation prior to the end of the employment term specified in the contract.

AMENDED AND
AFFIRMED as AMENDED