DAVID M. BODENHEIMER	*	**NO. 2017-CA-0595**
VERSUS	*	**COURT OF APPEAL**
CARROLLTON PEST CONTROL & TERMITE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2016-08223, SECTION "C"
Honorable Veronica E Henry, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods)

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REVERSED
FEBRUARY 14, 2018

Plaintiff-Appellant, David M. Bodenheimer, appeals the April 5, 2017 judgment of the Orleans Parish First City Court, rendered after bench trial. For the reasons that follow, we reverse the judgment of the trial court, and remand this matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant filed a petition in the First City Court of New Orleans on November 18, 2016. Therein, Appellant stated he worked for Carrollton Pest Control and Termite Company (hereinafter "CPC"), owned by Francis Fasone ("Mr. Fasone"), for twenty-three years prior to his resignation on May 20, 2016. Appellant earned $20.37 an hour and accrued 1.25 vacation days (the equivalent of ten hours based on an eight-hour workday) per month at CPC. At the time of his resignation from CPC on May 20, 2016, Appellant asserted he had used only three of his fifteen accrued vacation days from 2015, in addition to the 6.25 days accrued in 2016, for a total of 18.25 days. Despite Appellant's assertions, CPC paid Appellant for 3.25 days of vacation upon his departure, taking the position that Appellant was only entitled to twenty-six (3.25 days) of the fifty hours (6.25 days) he had accrued in 2016. Appellant sent CPC a written demand for the full 18.25 vacation days to which he believed he was entitled, but CPC maintained that it owed Appellant nothing in addition to the 3.25 days already paid. Accordingly, Appellant filed suit pursuant to La.R.S. 23:631[1] and 23:632[2] for unpaid vacation

[1] In relevant part, La.R.S. 23:631 provides:

A(1)(b). Upon the resignation of any laborer or other employee of any

wages of $2,974.02 plus interest, costs, and attorney's fees, as well as penalty

> kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday for the pay cycle during which the employee was working at the time of separation or no later than fifteen days following the date of resignation, whichever occurs first.
>
> . . .
>
> B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section. The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.
>
> . . .
>
> D. (1) For purposes of this Section, vacation pay will be considered an amount then due only if, in accordance with the stated vacation policy of the person employing such laborer or other employee, both of the following apply:
>
> (a) The laborer or other employee is deemed eligible for and has accrued the right to take vacation time with pay.
>
> (b) The laborer or other employee has not taken or been compensated for the vacation time as of the date of the discharge or resignation.
>
> (2) The provisions of this Subsection shall not be interpreted to allow the forfeiture of any vacation pay actually earned by an employee pursuant to the employer's policy.

[2] In relevant part, La.R.S. 23:632 provides:

> A. Except as provided for in Subsection B of this Section, any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages.
>
> B. When the court finds that an employer's dispute over the amount of wages due was in good faith, but the employer is subsequently found by the court to owe the amount in dispute, the employer shall be liable only for the amount of wages in dispute plus judicial interest incurred from the date that the suit is filed. If the court determines that the employer's failure or refusal to pay the amount of wages owed was not in good faith, then the employer shall be subject to the penalty provided for in Subsection A of this Section.
>
> C. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

wages.

Pursuant to La.R.S. 23:631(B) and La.C.C.P. art. 2592, the matter was heard by summary proceeding. Only two witnesses testified at trial, Appellant and Mr. Fasone.

Appellant testified regarding his extensive work experience at CPC. He stated that when he first interviewed with Mr. Fasone, he was told he would not receive vacation time in his first year. Instead, he understood that he "would earn vacation the first year to be used in the second year." However, he did not recall signing any document to that effect. He recalled that Mr. Fasone would usually come to him at the end of the year asking which days he would like off for the following year, so that Mr. Fasone could plan the schedule.

Plaintiff's exhibit P-1 was entered into evidence, which Appellant explained was a letter he sent to Mr. Fasone via certified mail. The letter was intended to inform Mr. Fasone that he had not paid Appellant his full outstanding vacation wages upon Appellant's resignation. Mr. Fasone responded via letter, entered into evidence as Plaintiff's exhibit P-2, which set forth Mr. Fasone's position that Appellant received payment for those vacation days to which he was entitled. It also referred Appellant to the CPC Policy Manual. Appellant testified he was not aware of any such manual. Another letter, Plaintiff's exhibit P-3, was entered into evidence, wherein Appellant disputed Mr. Fasone's position; Appellant submitted that his vacation days were earned in one year, and used the next. Since he took three days in 2016 prior to his resignation, he believed he was entitled to twelve of

the fifteen earned the previous year, plus the time accrued in 2016. He additionally requested a copy of the referenced policy manual via letter, but Mr. Fasone did not respond. Mr. Fasone ultimately sent a letter to the Louisiana Workforce Commission, entered as Plaintiff's exhibit P-5, which acknowledged receipt of Appellant's letters. Lastly, apparently in response to a request from Mr. Fasone in October, 2015, Appellant provided a letter which he entitled "Fifteen vacation days and sick days earned in 2014 to be used in 2015." This letter was admitted as Plaintiff's exhibit P-6.

On cross-examination, Appellant again stated he was never given a copy of the manual, but did acknowledge his signature on a copy of a manual, though he only remembered seeing the last page. The manual, entered as a defense exhibit,[3] provided in relevant part as follows:

> 6. Vacation may be taken in any one calendar year to the full extent that it has been accumulated provided this does not pose an imposition on C.P.C.
>
> 7. At the end of each calendar year, the amount of earned but unused vacation cannot exceed one time the maximum amount per the employee's longevity bracket amount if not used before the end of the calendar year as herein defined will be lost.
>
> 8. [U]nearned vacation may not be advanced. Unpaid time off may be granted to the mutual convenience of C.P.C. and the employee per the policy on Leave Without Pay.

Appellant also disputed counsel's suggestion that his vacation day request letters were informal. He emphasized that he made sure they were clear to Mr. Fasone in

[3] The defense entered two copies of the policy manual as exhibits D-1 and D-4. At trial, the parties disputed whether Appellant had in fact been provided a complete copy of the manual at the time of his hiring, as only exhibit D-1 contained Appellant's signature. In any event, each exhibit provided the same language regarding CPC's vacation policy. Furthermore, Appellant conceded in brief to this Court that "[t]he trial court acted in its discretion in finding that the policy [manual language] was in effect" at the time relevant to the issues raised on appeal.

order to avoid scheduling issues. He also denied starting his own competing company while working for Mr. Fasone.

The defense proceeded to present its case through the testimony of Mr. Fasone, the owner of CPC for nearly forty-one years. He explained that Appellant resigned suddenly on May 19, 2016, informing Mr. Fasone that his last day would be the next, May 20th, though Appellant did not show up on that last day. He also described how Appellant's final paycheck was tabulated, as well as an additional check for what he described as "PDOs" or "paid days off," previously known as vacation and sick days. He stated that for those PDOs, he tabulated ten hours (1.25 days) per each of the five months Appellant had worked in his last year at CPC. He then subtracted twenty-four hours (3 days) of time Appellant had already used in that same year, resulting in a remainder of twenty-six hours (3.25 days) to be paid.

Appellant's payroll records were admitted as Defense exhibit D-3, indicating PDOs taken by Appellant in 2013, 2014, 2015, and 2016. For each PDO taken in a given year, Mr. Fasone asserted they were earned within the same year. Mr. Fasone was also shown exhibit P-6, which he claimed to have never seen prior to his testimony. He also disputed Appellant's contention that Appellant would submit his PDO requests in such a form as that presented in P-6, or that Appellant had not received CPC's policy manual. He explained that the page with Appellant's signature had a different font from other pages because he used a template provided by his wife from a nursing home where she worked. Mr. Fasone also noted that his dispute with Appellant was the first of its kind since he began his company in 1976. He asserted his policy was always to earn vacation time in one year, and to use it in that same year. He described the letters received by Appellant as harassing, which is why he wrote to the Louisiana Workforce Commission.

On cross-examination, counsel for Appellant asked Mr. Fasone about exhibit D-4, wherein CPCs vacation policy was explained. Specifically, counsel asked about clause seven. Mr. Fasone explained that according to Appellant's "longevity bracket," Appellant was entitled to earn up to fifteen days of vacation per year. Mr. Fasone went on to state "So then it can't be carried the previous year if it was lost after fifteen."

On re-direct, Mr. Fasone clarified that an employee in Appellant's position would earn fifteen days a year, but if he did not use it by the end of the calendar year, it would be lost. He stated he never had a policy of carrying over hours from previous years.

The parties submitted post-trial briefs. On April 5, 2017, the trial court rendered a judgment in favor of CPC, dismissing Appellant's claims with prejudice, and at Appellant's cost. The trial court additionally provided reasons for judgment.[4] The trial court found that the testimony revealed that Appellant either read and understood the policy manual in question, or was provided a satisfactory explanation thereof, at the time of his hiring, as evidenced by his signature in exhibit D-1. The trial court relied in large part on exhibit D-3, which were records kept by Mr. Fasone regarding Appellant's work, vacation, and sick hours, as well as paystubs. The court's review indicated that the "accrued vacation time on the check stub corresponds with the amount of time/days he took off – in the same year of accrual." The court also found it incredible when Appellant asserted he

[4] "Although it is a settled rule that an appeal is taken from a final judgment not from the trial court's reasons for judgment, it is not improper for an appellate court to consider the reasons for judgment in determining whether the trial court committed a legal error." *Winfield v. Dih*, 2001-1357, p.8 (La.App. 4 Cir. 4/24/02), 816 So.2d 942, 948 (citing *Donaldson v. Universal Eng'g of Maplewood, Inc.,* 606 So.2d 980, 988 (La.App. 3 Cir.1992).

worked an entire year with no vacation, and that all the vacation he accrued his first year would have been for the following year. In support, the court referenced the policy manual's provisions establishing that each employee would be subject to an initial four-month probationary period. It further noted the policy's provision stating that full-time employees were entitled to all fringe benefits. The court found Appellant's exhibits did not support his interpretation of the policy manual, and stated that "the policy manual is clear on vacation accrual and use and other records of the company support plaintiff's use of his vacation time in the year accrued." The court subsequently denied a motion for new trial. This appeal followed.

STANDARD OF REVIEW

The interpretation of the language of a contract is a question of law subject to *de novo* review, while factual determinations are subject to the manifest error standard of review. *ETI, Inc. v. Buck Steel, Inc.*, 2016-0602, pp. 4-5 (La.App. 4 Cir. 2/1/17), 211 So.3d 439, 442-43, *writ denied*, 2017-0396 (La. 4/13/17), 218 So.3d 626. More specifically:

> The issue of whether or not the language of a contract is ambiguous is an issue of law subject to the *de novo* standard of review on appeal. *French Quarter Realty,* 05–0933 at p. 3, 921 So.2d at 1027. Contracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law, and the use of extrinsic evidence is proper only where a contract is ambiguous after examination of the four corners of the agreement. *Richard A. Tonry, P.L.C. ex rel. Tonry v. Constitution State Service, L.L.C.,* 2002–0536, p. 3 (La.App. 4 Cir. 7/17/02), 822 So.2d 879, 881. However, "[i]n the interpretation of contracts, the trial court's interpretation of the contract is a finding of fact subject to the manifest error rule." *French Quarter Realty,* 05–0933 at p. 3, 921 So.2d at 1027–28, *quoting Grabert v. Greco,* 95–1781 (La.App. 4 Cir. 2/29/96), 670 So.2d 571, 573. This appellate standard of appellate review with regard to contractual interpretations has been recently clarified by this Court as follows:

> Where factual findings are pertinent to the interpretation of a contract, those factual findings are not to be disturbed unless manifest error is shown. However, when appellate review is not premised upon any factual findings made at the trial level, but is, instead, based upon an independent review and examination of the contract on its face, the manifest error rule does not apply. In such cases, appellate review of questions of law is whether the trial court was legally correct or legally incorrect.
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> *New Orleans Jazz and Heritage Foundation, Inc. v. Kirksey,* 2009–1433, p. 9 (La.App. 4 Cir. 5/26/10), 40 So.3d 394, 401, *writ denied,* 2010–1475 (La.10/1/10), 45 So.3d 1100, *quoting Clinkscales v. Columns Rehabilitation and Retirement Center,* 2008–1312, p. 3 (La.App. 3 Cir. 4/1/09), 6 So.3d 1033, 1035–36.

Fleet Intermodal Servs., LLC v. St. Bernard Port, Harbor & Terminal Dist., 2010-1485, pp. 5-6 (La.App. 4 Cir. 2/23/11), 60 So.3d 85, 89.

ANALYSIS

The Louisiana Civil Code provides that when the words of a contract are clear and explicit, "no further interpretation may be made in search of the parties' intent" so long as such interpretation does not lead to "absurd consequences." La.C.C. art. 2046. "In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text." La.C.C. art. 2056. Furthermore,

> [I]f the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor.

La.C.C. art. 2057. We therefore begin with the plain language of the employment contract.

Upon our *de novo* review, we find that the language of the contract as to vacation is not clear and explicit. This Court recognizes that "[l]anguage does not

have to be simple or easy to be free of ambiguities." *Ellsworth v. West*, 95-0988 (La.App. 4 Cir. 1/19/96), 668 So.2d 402, 404. However, "[u]nder Louisiana law, a contract is ambiguous when it is uncertain as to the parties' intentions and susceptible to more than one reasonable meaning under the circumstances and after applying established rules of construction. *Lloyds of London v. Transcon. Gas Pipe Line Corp.*, 101 F.3d 425, 429 (5th Cir. 1996) (footnote omitted). We find such ambiguity exists in the relevant portions of the employment contract in question. Thus, the trial court committed legal error to the extent it found the policy manual clear as to vacation accrual and use. Accordingly, we conduct a de novo review of the record.[5]

The crux of the parties' dispute revolves around clauses six and seven. Appellee emphasizes that clause six states vacation may only "be taken in any one calendar year to the full extent that it has been accumulated." Appellant, on the other hand, argues clause seven suggests that CPC contemplated that employees would earn vacation time in one year and use it in the following year, relying on the clause's use of "calendar year" twice. That is, the first "calendar year" references the year in which time is earned; the second "calendar year" references the year in which it must be used.

Assuming Appellee's interpretation of clause six were correct – that an accumulated vacation day must be used in the same calendar year – this Court nonetheless must recognize that "[e]ach provision in a contract must be interpreted

[5] "Where the interpretation of contracts made in the district court is erroneous, the fact finding process is interdicted, and the appellate court must then make a *de novo* review of the record to determine which party should prevail." *Maison Orleans P'ship in Commendam v. Stewart*, 14-341 (La.App. 5 Cir. 12/16/14), 167 So.3d 1, 4 (citing *Chambers v. Village of Moreauville,* 11-898 (La. 1/24/12), 85 So.3d 593.

in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La.C.C. art. 2050. To do so would lead precisely to the "absurd consequences" prohibited by La.C.C. art. 2046. Specifically, an employee would earn his or her final vacation day on December 31 of each year, without any opportunity to use that vacation day because it would be "lost" the very next day according to the terms of clause seven. The employees would be unable to use the day any earlier, as clause eight prohibits advancement of vacation days. This Court does note that CPC's records from 2014 indicated that Appellant took January 2, 2015, as a 2014 vacation day. Though not highlighted by either party either during trial or on appeal, this suggests to this Court that CPC may have been aware of this issue in its own policy and either made occasional exceptions or did not enforce the policy as written. As the Civil Code states, "[a] doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties." "[W]here the intent of the parties to a contract is doubtful, the manner in which it has been executed by them can supply a rule for its interpretation." *Chrisman v. Chrisman*, 487 So.2d 140, 141 (La.App. 4 Cir. 1986); *See also Lee v. Pearson*, 143 So. 516, 519 (La.App. 1 Cir. 1932).

Despite the foregoing, the trial court found that application of Appellant's interpretation would similarly lead to absurd consequences, such that an employee would be required to work an entire year without vacation, only to begin using accrued time in his or her second year of employment.

This Court finds that another interpretation may be reasonably made. CPC, through clause seven, recognized that employees may have accrued "earned but unused vacation time" at the end of a calendar year. Furthermore, such amount

"cannot exceed one time the maximum amount per an employee's longevity bracket amount." Though "longevity bracket" is not defined, the contract's use of the phrase "cannot exceed one time" the established amount may be read as placing a cap on the amount of vacation time that can go "unused" in a given year. That is, only the amount in excess of one time the maximum would be lost from one year to the next. Though not argued as such by Appellant, this would seem to suggest an employee can carry over an amount from one year to the next equal to "one time the maximum amount" and use those days in addition to newly-acquired vacation days in the next calendar year.

In light of the foregoing, it cannot be reasonably said that the language of the contract is without ambiguity. "[W]here the terms of the agreement are unclear, ambiguous or will lead to absurd consequences, the court may go beyond the original agreement to determine the true intent of the parties. *Rabenhorst Funeral Home, Inc. v. Tessier*, 95-1088 (La.App. 1 Cir. 5/10/96), 674 So.2d 1164, 1166.

Appellant focused on exhibit D-3, the 2013 through 2016 records maintained by CPC which tracked, among other things, days of vacation used in a given calendar year. Therein, CPC's records indicate Appellant's use of vacation out of a total of fifteen days. For example, when Appellant took a vacation day on October 23, 2015, CPC's records indicate Appellant's use of "1-of-15" days. Appellant, noting that he would not have accrued his full fifteen vacation days until December of that year, argues that the notation and other similar notations prove he had accrued his fifteen vacation days in the year prior to their availability for usage. Appellee, however, argues CPC had no reason to believe Appellant would not earn his full fifteen days of vacation in any given year based on the length of time he had been with the company. Therefore, CPC assumed Appellant would earn all

fifteen days and made notations accordingly. We find that both Appellant and Appellee have made reasonable arguments in this regard. Therefore, the notations are of little probative value.

Appellant and Appellee offered little in addition to the foregoing evidence. Therefore, this Court is left with an ambiguously worded vacation policy, susceptible to numerous interpretations, and little extrinsic evidence to determine the original intent of the parties. Under the circumstances, the Court must interpret the contract against CPC, the party that furnished the text. La.C.C. art. 2056. Furthermore, such interpretation must be favorable to the Appellant. La.C.C. art. 2057. Accordingly, the judgment of the First City Court is reversed insofar as it interpreted the employment contract to require use of vacation days in the same calendar year in which they are earned. Appellant is entitled to vacation wages for the full 18.25 days sought, totaling $2,974.02. In light of this ruling, we further reverse that portion of the judgment assessing all costs to Appellant.

PENALTY WAGES

Concerning the application of La.R.S. 23:632, whether CPC acted in bad faith in failing to pay Appellant the amounts allegedly due is a question of fact subject to the manifest error standard of review. The statute is strictly construed. *Hughes v. Cooter Brown's Tavern, Inc.*, 591 So.2d 1334, 1337 (La.App. 4 Cir. 1991). However, penalties are not imposed if an employer has an equitable defense. *Myres v. Lighthouse Life Ins. Co.*, 368 So.2d 805, 807-08 (La.App. 2 Cir. 1979). There is no statutory provision for what constitutes an equitable defense, but "a good faith dispute as to whether wages are actually owed" is generally sufficient. *Magee v. Engineered Mech. Servs., Inc.*, 415 So.2d 277, 279 (La.App. 1 Cir. 1982). Indeed, this Court has held that "[p]enalties should not be imposed on

the employer when it presents a good faith non-arbitrary defense to its liability for unpaid wages." *Saacks v. Mohawk Carpet Corp.*, 2003-0386, pp. 15-16 (La.App. 4 Cir. 8/20/03), 855 So.2d 359, 370 (*citing Carriere v. Pee Wee's Equip. Co.,* 364 So.2d 555 (La.1978). "Penalty wages may be awarded where the employer fails to pay the amount that is clearly due." *Id.* (*citing Wyatt v. Avoyelles Parish School Bd.,* 2001–3180 (La. 12/4/02), 831 So.2d 906).

In light of the foregoing jurisprudence, and on the record before this Court, we cannot say that Appellant has shown that Appellee acted in bad faith by withholding the vacation wages in dispute. Indeed, Appellee paid Appellant for the vacation wages to which it believed Appellant was entitled. The penalty statute requires more than a mere showing that the wages were due and owing.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the trial court insofar as it denied Appellant's claim for unpaid vacation wages and assessed costs against Appellant. Appellant is awarded $2,974.02, plus judicial interest incurred from the date that the suit was filed. La.R.S. 23:632(B). Each party is to bear its own costs. However, we find the facts of this case do not warrant the imposition of the penalty provision, which would include the award of attorney's fees, as contemplated by La.R.S. 23:632.

REVERSED