STATE OF MICHIGAN

COURT OF APPEALS

JOHN A. BARTON, d/b/a JOHN A. BARTON INSURANCE,

Plaintiff/Counter Defendant-Appellee,

v

THOMAS N. TUCKER, AMERICA ONE TUCKER AGENCY and AMERICA ONE, INC.,

Defendants/Counter Plaintiffs-Appellants.

UNPUBLISHED
March 28, 2000

No. 212960
Washtenaw Circuit Court
LC No. 96-007408-CZ

Before: Bandstra, C.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

After a jury trial, judgment was entered in favor of plaintiff, John A. Barton, on his breach of contract claims and in favor of defendant, Thomas N. Tucker, on his counterclaim for breach of contract. Defendants Thomas N. Tucker and America One Tucker Agency[1] appeal as of right. We reverse and remand for entry of judgment in favor of defendants on plaintiff's breach of contract claims.

Plaintiff and defendant entered into a cooperative sales agreement when the latter joined the Barton Agency in 1991. The parties' contract contained a noncompetition clause in the event of termination of the agreement. After defendant Tucker opened his own insurance agency in 1996, he solicited numerous Barton Agency accounts that had been developed by him during his association with the agency. Plaintiff brought the instant action, claiming that defendant Tucker's solicitation of those accounts violated the noncompetition agreement. Defendant Tucker filed a counterclaim, alleging that plaintiff failed to pay him commissions to which he was entitled under the agreement.

I

Defendants argue that the trial court erred in denying their motion for directed verdict on plaintiff's breach of contract claim.[2] This Court reviews de novo the trial court's decision on a motion for a directed verdict.[3] When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of

the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 634-635; 601 NW2d 160 (1999).

The contractual provision at issue provides:

> For a period of three (3) years from date of termination of this agreement, TUCKER will not for his own account, or in association with any other person, firm or cooperation, in any manner solicit an account owned or controlled by BARTON and not developed through the direct efforts of TUCKER during his association with BARTON and shall not induce any employee of BARTON to terminate his employment.

The primary goal of contract interpretation is to honor the intent of the parties. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999). If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide. *Id*. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). Courts are not to create ambiguity where none exists. *UAW-GM, supra*. The language of a contract should be given its ordinary and plain meaning. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning. *Amtower v William C Roney & Co*, 232 Mich App 226, 234; 590 NW2d 580 (1998). This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning. *UAW-GM, supra*.

Giving the words of the noncompetition provision their ordinary and plain meaning, we conclude that the phrase, "direct efforts," is clear, unambiguous, and not susceptible to multiple interpretations. Reference to a dictionary is appropriate to ascertain the ordinary meaning of a word. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 671 (1997). The word "direct," when used as an adjective, is defined in pertinent part as "without intermediary agents, conditions, etc.; immediate." *Random House Webster's College Dictionary* (1997). The word "effort" ordinarily means an "earnest or strenuous attempt" or "something done by exertion or hard work." *Id*. Considering these definitions, we reject plaintiff's assertion that the phrase, "direct efforts," is ambiguous. Pursuant to the plain language of the noncompetition provision, defendant Tucker was entitled to solicit accounts that were owned or controlled by the Barton Agency if those accounts were developed through his own, immediate exertions. Tucker was not entitled to solicit any other accounts from the Barton Agency.

Significantly, although plaintiff asserts that the term "direct efforts" has more than one interpretation, he has failed to articulate any alternative meaning. Instead, plaintiff simply relies on his testimony regarding his subjective intentions to argue that the contract should be interpreted to prohibit defendant Tucker from soliciting any of the Barton Agency's business. Plaintiff concludes that, because he intended that Tucker should not be able to solicit any business from the Barton Agency, other than that of the latter's own family and friends, the language of the contract should be construed to achieve that result. However, this argument is completely contrary to the well-established principle of contract construction providing that, where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning.[4] See *Amtower*, *supra*.

Moreover, a court should read a contract as a whole and give meaning to all the terms contained within. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). Plaintiff's argument ignores this rule of contract construction by rendering superfluous a portion of the noncompetition provision. If defendant were not entitled to solicit *any* of the Barton Agency's business, other than that of his family and friends, then the words "and developed through the direct efforts of Tucker during his association with Barton" are meaningless.

Plaintiff's reliance on *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195; 220 NW2d 664 (1974), is misplaced. In *Goodwin*, our Supreme Court held that extrinsic evidence may be used to demonstrate the existence of an ambiguity in contract language and to clarify the meaning of an ambiguous contract. See *Goodwin*, *supra* at 209; *Meagher*, *supra*. *Goodwin* does *not* stand for the proposition that extrinsic evidence must always be considered when determining the meaning of contractual language.

Here, plaintiff's use of extrinsic evidence does not establish the existence of an ambiguity in the contract language at issue. In other words, plaintiff did not use extrinsic evidence to establish a reasonable alternative meaning for the phrase, "direct efforts." The mere fact that plaintiff may have intended a different contract than the one to which he agreed does not create an ambiguity in the language of the contract.

In sum, we find that the noncompetition provision clearly and unambiguously permitted defendant Tucker to solicit any accounts from the Barton Agency that had been developed by his personal efforts. Because the contractual language was not susceptible to multiple meanings, the trial court erred in denying defendants' motion for a directed verdict.

II

Defendants also contend that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV). We review the trial court's denial of a motion for JNOV to determine if reasonable jurors could have reached different conclusions when viewing the testimony and all legitimate inference therefrom in a light most favorable to the nonmoving party. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). If reasonable jurors could have reached different conclusions, the jury verdict must stand. *Id*.

Viewing the evidence in a light most favorable to plaintiff, reasonable jurors could not have reached different conclusions about whether defendant Tucker solicited accounts that were not developed through his direct efforts. There was no evidence to support a finding that defendant Tucker solicited any accounts that were not developed through his own efforts during his association with the Barton Agency. To the contrary, the evidence showed that he only solicited accounts that he developed himself. While some Barton Agency accounts, which were not developed through defendant Tucker's direct efforts, transferred to defendant America One Tucker Agency, there was no testimony that defendant Tucker solicited those accounts. Rather, the testimony indicated that those accounts belonged to family and friends of Althena Kelly and were transferred at the clients' requests.

Likewise, reasonable jurors could not have reached different conclusions whether Tucker induced any of plaintiff's employees to terminate their employment. Plaintiff failed to present evidence that defendant Tucker improperly induced any employee of plaintiff to leave his or her employment. At the time of trial, defendant Tucker had several former Barton Agency employees working for him. However, there was no evidence that those employees left the Barton Agency because of defendant Tucker's inducements.

Scott Raspberry left plaintiff's employment approximately four years before defendant Tucker terminated his sales agreement with the Barton Agency and opened his own agency. Raspberry's testimony indicated that he did not leave because of any enticements from defendant Tucker.

The testimony was undisputed that Michelle Black was terminated from plaintiff's employment after this lawsuit had commenced. Thus, Black did not voluntarily leave the Barton Agency and, certainly, there was no evidence that defendant Tucker induced her to leave.

Finally, the evidence indicates that when defendant Tucker solicited Kelly to work for him, she was not even employed by plaintiff. Kelly resigned from the Barton Agency in August 1995, when the evidence presented at trial indicates that Tucker was contemplating a move to Florida. Kelly testified that defendant Tucker did not induce her to leave and that she left because she believed that her new position at Dobson Macomber would provide a good opportunity for her. Deborah Stearns, one of plaintiff's employees, confirmed that Kelly left for a better opportunity, not because of defendant Tucker. The only scintilla of evidence that defendant Tucker may have played a role in Kelly leaving the Barton Agency came from the hearsay testimony of Rosalie Mulligan, who did not work for the Barton Agency when Kelly left. Mulligan testified that Black told her that Kelly left the Barton Agency because "there was something in the agency contract that defendant could not hire anyone who worked for plaintiff if they had not been gone longer than six months." However, Black denied that this conversation took place. Considering this evidence, reasonable jurors could not have determined that defendant Tucker induced Kelly to leave her employment with the Barton Agency.[5]

In sum, even viewing the evidence in a light most favorable to plaintiff, reasonable jurors could not have found that Tucker solicited accounts that were not developed through his direct efforts or that he induced any of plaintiff's employees to terminate their employment with the Barton Agency. Thus, reasonable jurors could not have found that defendant Tucker failed to abide by the terms of the

contract, and the trial court erred in denying defendants' motion for JNOV on plaintiff's breach of contract claims.

Our resolution of these two issues renders it unnecessary to decide defendants' remaining issues on appeal.

Reversed and remanded for entry of judgment in favor of defendants on plaintiff's breach of contract claims. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

[1] Defendant, America One, Inc., is not a party to this appeal. The term "defendants," as used in this opinion, refers only to Tucker and America One Tucker Agency.

[2] Plaintiff argues that this issue is not preserved because the motion for directed verdict was untimely, as it was made at the close of all the proofs, rather than at the close of the plaintiff's proofs. This argument has no merit. While MCR 2.515 permits a motion for directed verdict at the close of the opponent's proofs, it does not require that the motion be made at that time. A motion for directed verdict may be made at the close of all the proofs. See, e.g., *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 376; 572 NW2d 603 (1998); *Mason v Royal Dequindre, Inc*, 455 Mich 391, 394-395; 566 NW2d 199 (1997). Furthermore, defendants were not required to move for summary disposition to preserve this issue.

[3] Plaintiff's contention that this issue is outside the scope of the appeal is without merit. Defendant only had the right to appeal from a final order or final judgment. See MCR 7.203(A)(1). The denial of defendant's motion for a directed verdict was not a final order; nevertheless, an appeal from a final order properly raises issues related to prior decisions in the case. See *Dean v Tucker*, 182 Mich App 27, 29-31; 451 NW2d 571 (1990).

Furthermore, plaintiff cites no authority for the proposition that the failure to list an issue in a docketing statement constitutes a waiver of the issue on appeal. The lack of such authority is understandable, as the adoption of such a rule would frequently preclude independent appellate attorneys from identifying new issues simply because the transcripts had not yet been prepared.

[4] Plaintiff argues that his interpretation of the contract language is reasonable because if he meant to allow defendant to solicit away business, he would not have agreed to pay defendant commissions on previous sales. This argument is disingenuous. There were two separate provisions with regard to what would occur if the sales agreement were terminated. One dealt with the payment of commissions; the other provision was the noncompetition clause. The two provisions are not related. The language of both clauses is clear and unambiguous; consequently, applying the rules of contract construction, each clause should be enforced as written. See *Amtower*, *supra*.

[5] There was testimony that defendant Tucker contacted Stearns to work for him. At the time, Stearns was not employed by plaintiff; moreover, she declined defendant's offer.