STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL USKIEWICZ,

Plaintiff/Counter Defendant-Appellant,

v

CITY OF ALPENA,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
January 21, 2010

No. 285834
Alpena Circuit Court
LC No. 07-001455-CK

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals by right the summary dismissal of his breach of contract claim premised on defendant's failure to abide by the terms of an unambiguous, fully integrated severance agreement. We reverse.

On December 11, 2006, plaintiff was defendant's city manager and was asked to resign during the course of a telephone conversation with the mayor. Following that conversation, plaintiff authored a letter of resignation and attached to it a "letter of understanding" which he signed. The "letter of understanding" indicated that it reflected plaintiff's understanding of the benefits he would receive upon his resignation, and included: (1) three months of pay to run through March 12, 2007, (2) three months of benefits to run through March 12, 2007, (3) payment of unused vacation and personal time, (4) favorable reference for future job prospects, and (5) that the situation be handled in a positive way by both parties.

Thereafter, a severance agreement was drafted by defendant and executed by the mayor, the deputy clerk/treasurer, and plaintiff. The severance agreement indicated that defendant and plaintiff were parties to an employment contract and that plaintiff "has indicated his intent to resign his employment." In consideration for plaintiff's agreement to release defendant from any and all future claims against defendant, legal and otherwise, defendant agreed to (1) accept the resignation, (2) continue plaintiff's pay and benefits "to and including March 12, 2007," and (3) pay plaintiff for "unused vacation and sick days to the present date." The agreement also provided that it constituted the entire agreement between the parties, and "fully supercedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof." Further, it provided that there were "no additional promises, representations, terms or provisions."

When defendant failed to pay plaintiff for his unused sick days, plaintiff sued for breach of contract and promissory estoppel. He eventually filed a motion for summary disposition. Defendant filed a countercomplaint for reformation of the severance agreement or to rescind the agreement. Defendant averred that during the telephone conversation between the mayor and plaintiff before plaintiff resigned, "the parties reached an agreement regarding the terms of [plaintiff's] resignation." Defendant further averred that this "agreement was memorialized in a Letter of Understanding ("LOU") signed by [plaintiff]." Defendant alleged that the ultimate severance agreement "memorialized the agreement," except that a mistake was made. Instead of indicating that defendant would pay plaintiff for unused personal time, it mistakenly indicated that defendant would pay plaintiff for unused sick time. Defendant averred that this constituted a 'scrivener's error and/or a mutual mistake of the parties" and that reformation of the severance agreement was the proper remedy. Subsequently defendant filed a motion for summary disposition asserting these same claims. Plaintiff opposed that motion, primarily arguing that there was no mistake in the severance agreement but, if there was, it was defendant's—who actually drafted the agreement—mistake alone, and thus reformation was not permitted.

First, by opinion and order dated January 17, 2008, the trial court denied plaintiff's motion for summary disposition. The trial court noted that, generally, reformation is not granted unless there is a mutual mistake or there is a unilateral mistake that the other party knows about and conceals, i.e., fraud. In this case, the court held, "there are facts in this matter which, if proven by clear and convincing evidence, may lead to a proper reformation of the severance agreement. Specifically, questions of material fact remain pertaining to whether or not Plaintiff knew of, and concealed, the mistake made by the Defendant in drafting the contract."

Second, by opinion dated May 6, 2008, the trial court granted defendant's motion for summary disposition that sought reformation of the severance agreement. The trial court referenced the fact that plaintiff testified in his deposition that he noticed that the severance agreement provided that he would be paid for unused sick time rather than for unused personal time as indicated in his "letter of understanding," and signed the agreement without comment. The court also noted that after plaintiff notified defendant that he had not received the agreed upon payment for unused sick time, defendant sent plaintiff an "Amended and Corrected Severance Agreement which included, verbatim, the five items listed on Plaintiff Uskiewicz's Letter of Understanding, including the terms 'unused vacation and personal time,'" which plaintiff refused to sign. Because plaintiff knew of the "mistake" in the severance agreement and failed to notify defendant of its mistake, the trial court determined that reformation of the severance agreement was proper and granted defendant's motion for summary disposition. This appeal followed.

Plaintiff argues that the trial court's decisions denying his motion for summary disposition and granting summary disposition in defendant's favor were erroneous for several reasons, including that the fully integrated severance agreement was unambiguous and should not have been reformed. We agree. The trial court's decisions to grant summary disposition and equitable relief are reviewed de novo. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

The law regarding reformation of written instruments is well established:

> Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. [*Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998), quoting *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995).]

A court has the equitable power to reform a contract based on clear and convincing evidence that the contract, as drafted, did not conform to the agreement actually made. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). Accordingly, before a written contract can be reformed, the court must first find that there was a prior agreement already made (and a mistake in reducing that agreement to writing). See 27 Williston, Contracts (4d ed), § 70:100, p 510 ("Reformation is unavailable without evidence of a prior agreement to which the existing, mistaken, written contracts may be reformed."). And, "courts are required to proceed with utmost caution in exercising jurisdiction to reform written instruments." *Olsen*, *supra* at 28.

Here, before reformation is considered, it must first be determined if there was a prior agreement actually made, i.e., there must be "clear evidence that both parties reached an agreement" as to the terms of plaintiff's resignation. See *id*. at 29. That is, until there is proof of the parties' actual intent with respect to the terms of plaintiff's resignation, there is no reference to guide reformation of the severance agreement. Defendant has staunchly contended that plaintiff's "letter of understanding" fulfills that requirement, i.e., it is clear evidence that both parties reached an agreement as to the terms of plaintiff's resignation. We cannot agree.

First, to the extent that plaintiff argues that his "letter of understanding" was inadmissible under the parol evidence rule, we disagree. Such evidence is admissible even in this case involving an unambiguous, fully integrated written contract in an effort to show that the contract was a sham, illegal, or the product of fraud or mistake. See *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998); *Clark v Johnson*, 214 Mich 577, 581-582; 183 NW 41 (1921). Here, defendant claimed that the severance agreement required reformation because of a mistake in the document—it purportedly did not reflect the intentions of the parties, and defendant relied on the "letter of understanding" to establish that claim. According to defendant, the "letter of understanding" proved the alleged mistake. It did not.

The document that has been referred to as a "letter of understanding" is just a written declaration of *plaintiff's* understanding of benefits he would receive upon his resignation. Plaintiff's understanding could certainly have been wrong or incomplete and, considering the terms—and lack of terms—in the severance agreement, his understanding was, indeed, incorrect. In any case, defendant has failed to indicate how this document is "clear evidence that *both* parties reached an agreement," as to the terms of plaintiff's resignation. This "letter of understanding" is not binding and is not a contract. Defendant's mayor, who actually had the telephone conversation with plaintiff, did not execute this "letter of understanding." This "letter of understanding" was not referenced at the City Council meeting during the discussion and acceptance of plaintiff's resignation.

In fact, the severance agreement itself actually belies any claim that plaintiff's "letter of understanding" is "clear evidence that both parties reached an agreement" with respect to the terms of plaintiff's resignation. First, the severance agreement does not include two other "benefits" set forth in plaintiff's "letter of understanding"—a favorable reference for future job prospects and that the situation be handled in a positive way. Second, the severance agreement does not incorporate by reference plaintiff's "letter of understanding" but, instead, by its integration clause, expressly disavows any intent to incorporate plaintiff's "letter of understanding" into the severance agreement.[1] And, third, the severance agreement contained another item not referenced in the "letter of understanding"—plaintiff's agreement to release defendant from any and all future claims against defendant, legal and otherwise.

In summary, plaintiff's "letter of understanding" is not clear and convincing evidence that both parties reached an agreement as to the terms of plaintiff's resignation. See *Casey*, *supra*. Thus, contrary to the trial court's holding and defendant's claims, plaintiff could not have had knowledge of a "mistake" with regard to the terms in the severance agreement. The terms of plaintiff's resignation were not agreed upon *before* the severance agreement was executed. And we reject the trial court's conclusion that plaintiff's "letter of understanding" was a contractual offer that was accepted by defendant. If it was an offer, it was clearly rejected and a counter-offer in the form of the severance agreement was made which (1) failed to include certain terms that were in plaintiff's "letter of understanding," and (2) included other terms not in plaintiff's "letter of understanding." In any case, because there is no clear evidence that both parties reached an agreement on the terms of plaintiff's resignation—including the salary and benefit terms, *before* they entered into the severance agreement, reformation is impossible and the trial court erred in granting this equitable relief.

When contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). The contested term of the severance agreement at issue here—the payment of plaintiff's unused sick days—was clearly set forth in the severance agreement and must be enforced as written. Thus, plaintiff's motion for summary disposition should have been granted.

Reversed and remanded for entry of an order granting plaintiff's motion for summary disposition. We do not retain jurisdiction. Plaintiff is entitled to costs as the prevailing party. MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

[1] The integration clause is lengthy and includes, for example, the following sentence: "This agreement contains and comprises the entire understanding and agreement of and between the City and Uskiewicz and fully supercedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof."