NO. COA09-1372

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

GRAPHIC PACKAGING
INTERNATIONAL, INC.,
Plaintiff,

v. Guilford County
No. 08 CVS 14296

SCOTT GILBERTSON,
Defendant.

Appeal by defendant from judgment and order entered 4 September 2009 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 March 2010.

Womble Carlyle Sandridge & Rice, P.L.L.C., by J. Mark Sampson, for plaintiff appellee.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, for defendant appellant.

HUNTER, JR., Robert N., Judge.

In 2007, Graphic Packaging International, Inc. ("plaintiff") paid the moving expenses for Scott Gilbertson ("defendant") to move from Charlotte, North Carolina, to Fort Smith, Arkansas. Plaintiff and defendant entered into a relocation agreement (the "Agreement") regarding the moving expenses, where defendant agreed that he would reimburse plaintiff for any moving expenses incurred if defendant "voluntarily" terminated his employment within two years of his effective date at the Arkansas facility. Defendant worked in

Arkansas for fourteen months before resigning from his position with plaintiff, and plaintiff thereafter brought this action for reimbursement of the moving fees. In its complaint, plaintiff claimed that defendant "voluntarily" terminated his employment. The trial court agreed, and granted plaintiff's motion for summary judgment for damages in the amount of $93,109.45.

Defendant appeals the trial court's order granting summary judgment, and argues that the deplorable conditions in Arkansas, in conjunction with defendant's prior health condition, required him to resign. Defendant therefore maintains that he did not end his employment "voluntarily" as specified in the Agreement. After review, we agree with the trial court that there is no genuine issue of material fact that defendant "voluntarily" terminated his employment, and accordingly we affirm the trial court's order.

BACKGROUND

Defendant began working for plaintiff in 2001 as a printing manager. In 2007, plaintiff offered to move defendant to its Arkansas facility to perform the same job, though on a much larger scale. Plaintiff offered defendant a raise from $78,300 to $92,000. Defendant testified that, prior to accepting the new job, he visited the Arkansas plant three times, and discussed the operations in Arkansas with several people. On 3 May 2007, defendant signed the Agreement with plaintiff:

> I, Scott Gilbertson, acknowledge that as a condition of my employment and/or career development, I am being relocated at the expense of Graphic Packaging International, Inc. (referred to as "the Company").

> I further acknowledge that I will reimburse the Company for any and all expenses related to my relocation, including tax liability paid to me or on my behalf, if within two years of my hire date (if a new hire) or the effective date of the position to which I am being relocated (for existing employees), I:
>
> * Fail for any reason under my control to begin my new assignment in my new location or to permanently relocate to my new location by the date designated by the Company; or
>
> * Voluntarily terminate my employment with the Company.

Defendant began working at the Arkansas plant on 1 June 2007, and shortly thereafter, defendant began to experience difficult working conditions. In his deposition, defendant testified that he would have to work sixty to seventy hours per week, and in addition to his regular working hours, defendant would have to meet with customers after work hours about five or six times a month. The Arkansas plant had very aggressive manufacturing goals, and defendant's supervisor, Mark Audet, pressured defendant constantly to meet these quotas. Meeting these goals was difficult for defendant, however, because the Arkansas plant remained constantly in a state of heavy employee turnover. Defendant also testified that Mr. Audet was verbally abusive.

> Q. And did . . . I understand you to say Mr. Audet verbally abused . . . you and yelled at you?
>
> A. Mr. Audet in a meeting -- and I'm pretty sure Joseph was in the meeting. This is the type of discussion we had. We had problems with quality, production, safety. You've got supervisors and managers in a room. And basically it's -- it's said to you, all right, we don't want -- I don't want to see a

supervisor-manager out there standing on anyone's neck about getting this done. That's reserved for managers. That's -- and that was said smack in meeting with all managers.

Q. . . . [H]e raised his voice in these meetings with all these managers.

A. Oh, sure.

Q. Did he ever single you out and yell at you or verbally abuse you?

A. I think he could -- yes, sure.

Q. Okay, tell me about that. When did it happen?

A. In -- well, multiple meetings. I mean, we had daily meetings.

. . . .

A. And, you know, it would be we got to get this done, you know, and just flat out -- I've never been talked to that way as a manager since -- in -- in my career.

. . . .

A. --- He would undermine decisions. He would basically negate any experience you had.

. . . .

Q. How did he go about undermining your authority or negating your experience? . . . .

A. . . . Mark has got a way of verbalizing a -- what might be a small issue and creating a -- making it much larger than what it is -- undermining your decisions, undermining decisions made by people that report to you. And it -- Mark can do that. And he's pretty damn good at it.

Q. . . . What during group meetings or what individually in sessions with you did he do that you found to be verbally abusive?

A. Oh. Just flat out beat you up about the -- the safety, quality, and production.

It was what are you doing about this, how come you haven't done anything, da, da, da, da. And it was just non-stop.

. . . .

Q. Did he ever call you any personal names?

A. No.

Q. Did he ever swear at you?

A. Sure.

Q. Did he swear at other department managers, too?

A. Sure.

Q. Okay. Besides Mark Audet, are there any other people at the Fort Smith facility who you feel were verbally abusive to you during your time at Fort Smith?

A. No . . . .

. . . .

Q. All right, so in terms of your words describing Fort Smith as a year of hell ---

. . . .

Q. --- The reasons for that were Mark Audet, the lack of manning, or high turnover.

A. Yes.

Q. Any other thing that contributed to this -- or made you describe this as a year of hell?

A. It was -- at the end of the day that's about -- that's enough right there.

In late July 2008, defendant suffered at work what he later claimed to be an anxiety attack due to the stressful nature of the

work environment in the Arkansas facility. In his deposition, defendant described the "attack" as follows:

> A. . . . It was after one of our -- our meetings basically. I made it back up to my office and I was -- my heart was pounding. I -- I couldn't breathe. My wife happened to call at -- right at that moment. She asked what was wrong and I told her. I said I -- I don't know what's going on, I said, but I cannot breathe. I can't -- I've never had an anxiety attack. But that was -- that was an anxiety attack.

Defendant did not see a doctor following the attack, and he was never diagnosed by a physician as to the nature of his symptoms. Defendant instead testified that the symptoms he felt concerned him greatly, because in 1999, defendant experienced a heart attack and had two stints implanted as a result.

A few days after the anxiety attack, an industrial recruiter contacted defendant about a job in Mebane, North Carolina, with one of plaintiff's competitors. Defendant interviewed for the job, and within two weeks, he gave plaintiff three weeks notice that he was taking the job in Mebane. The new job offered a $1,000 pay increase for performing substantially similar duties. Regarding his resignation, defendant stated the following in his deposition:

> Q. And how did you tender your resignation?
>
> A. I went to Mark Audet ---
>
> Q. --- Okay.
>
> A. --- And told him that I was resigning.
>
> Q. And what did you -- tell me what was said in that conversation?

> A. I basically told him I -- I cannot take the pressure of this job.

When defendant tendered his resignation, Mr. Audet reminded defendant of the Agreement, and defendant replied: "Mark, I -- that's -- that's -- it is what it is. I've got to do what I've go to do on -- well, I can't survive this way." Defendant's last day of work was 27 August 2008.

Per the Agreement, plaintiff withheld $2,122.65 from defendant's last paycheck to partially reimburse itself for the moving expenses. In a letter dated 22 September 2008, plaintiff informed defendant that $93,109.45 was the remaining balance to fully reimburse plaintiff's moving costs. On 15 December 2008, plaintiff filed this suit to recover the remaining moving costs from defendant. In his answer, defendant alleged two affirmative defenses: (1) that defendant was constructively discharged and (2) that defendant did not "voluntarily" terminate his employment due to his physical and emotional condition at the time he resigned.

Plaintiff filed a motion for summary judgment on 12 August 2009. The trial court granted plaintiff's motion on 4 September 2009, and awarded plaintiff $93,109.45 with interest dating back to 27 August 2008. Defendant filed notice of appeal to this Court on 21 September 2009, and raises only his second affirmative defense as an issue on appeal: whether defendant "voluntarily" terminated his employment with plaintiff.

ANALYSIS

Jurisdiction and Standard of Review

The trial court's order awarding summary judgment to plaintiff is a final order, and jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). "We review orders granting summary judgment *de novo*." *Self v. Yelton*, __ N.C. App. __, __, 688 S.E.2d 34, 37 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Summary judgment is proper when, viewed in a light most favorable to the non-movant, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c) (2010); *see S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 163-64, 665 S.E.2d 147, 152 (2008). The moving party has the initial burden of showing that there exists no genuine issue of material fact. *Self*, __ N.C. App. at __, 688 S.E.2d at 38. "If a moving party shows that no genuine issue of material fact exists for trial, the burden shifts to the nonmovant to adduce specific facts establishing a triable issue." *Id.*

"Voluntary" Termination of Employment

Defendant argues that the term "voluntary" is ambiguous in the relocation agreement, and therefore defendant is entitled to a

trial by jury to interpret the word's meaning in the Agreement. *See Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421-22, 547 S.E.2d 850, 852 (2001) ("'A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court.' If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury.") (citation omitted). We disagree.

As a threshold matter, defendant has failed to demonstrate how the term "voluntary" in the Agreement is ambiguous. As a general rule, "'[w]hen the language of a written contract is plain and unambiguous, the contract must be interpreted as written and the parties are bound by its terms.'" *Atlantic & E. Carolina Ry. Co. v. Wheatley Oil Co.*, 163 N.C. App. 748, 752, 594 S.E.2d 425, 429 (2004) (citation omitted). "Extrinsic evidence may be consulted when the plain language of the contract is ambiguous." *Brown v. Ginn*, 181 N.C. App. 563, 567, 640 S.E.2d 787, 789-90 (2007). "'An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations.'" *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 922 (2008) (citation omitted). "Thus, if there is uncertainty as to what the agreement is between the parties, a contract is ambiguous." *Id.* "'Whether or not a contractual term is ambiguous is a question of law.'" *Huber Engineered Woods, LLC v. Canal Ins. Co.*, __ N.C. App. __, __, 690 S.E.2d 739, 745 (2010) (citation omitted).

In making a determination on ambiguity, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible[.]" *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 241, 339 S.E.2d 49, 52, *aff'd per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986). Ordinarily, the term "voluntary"

> means "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself. . . . [r]esulting from free choice," Black's Law Dictionary 1413 (5th ed. 1979), "[a]rising from one's own free will," The American Heritage Dictionary 1436 (1980).

Barnes v. The Singer Co., 324 N.C. 213, 216, 376 S.E.2d 756, 758 (1989). The element of free will and choice within this definition is illuminated further by contrasting "voluntary" with its antonym, "involuntary":

> 1 a : springing from accident or impulse rather than conscious exercise of the will . . . b : dictated by authority or circumstance . . . 2 : not subject to control of the will : independent of volition[.]

Webster's Third New International Dictionary 1191 (1971).

In this case, defendant has failed to show any ambiguity or that he and plaintiff had a mutual misunderstanding of the term "voluntary." *See Schenkel*, 362 N.C. at 273, 658 S.E.2d at 922. Defendant's principle contention is that the source of the ambiguity arises from the absence of a specific definition of the term "voluntary" in the Agreement. However, defendant offers no evidence from the record showing that the parties had different definitions in mind at the time they signed the Agreement.

Moreover, defendant fails to explain any difference between the dictionary definition and the manner in which the parties connoted the word "voluntary." Thus, since no ambiguity appears from the record on this contractual term, there is no material issue of fact, and thus defendant is not entitled to a jury trial on this question. *Dockery*, 144 N.C. App. at 421-22, 547 S.E.2d at 852. We now consider whether defendant "voluntarily" left Arkansas under a *de novo* standard of review.

By defendant's own testimony, no one at the Arkansas facility asked defendant to leave, and the record does not show that any of defendant's supervisors threatened him in any way regarding the security of his position. Defendant instead maintained throughout his deposition that the stress level in the plant -- the result of manufacturing quotas, lack of manpower, long hours, and a demanding supervisor -- caused defendant to be concerned about his health in light of his prior heart condition.

Hard work or difficult working conditions known in advance by an employee, under these facts, do not constitute duress. The record does not disclose any illegal conduct plaintiff forced defendant to perform. Defendant did not seek a transfer with plaintiff before resigning, nor did he ask for a furlough to recover his health. Defendant simply did not want to work for plaintiff at the Arkansas facility any further, and when an opportunity was presented to defendant to leave plaintiff's employment altogether, he took it.

Defendant's deposition testimony has little to do with the issue of whether he left plaintiff's Arkansas facility "voluntarily." Defendant testified that he "resigned" due to the harsh working conditions. While this testimony might support a theory of constructive discharge, defendant abandoned this theory both at trial and on appeal. Therefore, we decline to discuss further this theory's application to the case *sub judice*. Plaintiff argues in brief that the constructive discharge doctrine is the only legal theory by which defendant could defend himself against plaintiff's cause of action on the Agreement. We decline to accept this position given that plaintiff is merely claiming that he did not breach the terms of the Agreement.

Viewing the facts in a light most favorable to defendant, the record shows that defendant's resignation was "voluntary" in the ordinary sense of the word. Since defendant has not shown that any genuine issue of material fact exists for trial as to whether he freely and willing due to his personal situation left his position in Arkansas, summary judgment was properly entered in plaintiff's favor. Defendant's assignment of error is overruled, and the order of the trial court is

Affirmed.

Judges HUNTER (Robert C.) and CALABRIA concur.

Report per Rule 30(e).