NO. COA10-1613

NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

THOMAS WETHERBY,
Plaintiff

v.

Wake County
No. 07 CVS 18147

B6USA, INC., d/b/a
Bay SixUSA, and
Stephen Hite, individually,
Defendants

Appeal by plaintiff from judgment entered 2 February 2010 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 17 August 2011.

Harris Winfield Sarratt & Hodges LLP, by H. Clay Hodges, for plaintiff-appellant.

Law Office of Michael Lee Frazier, by Michael Lee Frazier, for defendant-appellees.

BRYANT, Judge.

Where competent evidence exists to support the trial court's findings of fact, there was no error in the trial court's conclusions of law that plaintiff was an independent

contractor rather than an employee hired by defendants, and that defendants did not commit a breach of contract with plaintiff. Where the North Carolina Wage and Hour Act was not applicable to plaintiff as an independent contractor, there was no error in the ruling of the trial court to offset any compensation owed to plaintiff.

Plaintiff Thomas Wetherby ("plaintiff") and defendant Stephen Hite ("Hite") have been friends for over thirty years. On 23 December 2006, plaintiff and Hite met to discuss the possibility of working together. Plaintiff was an experienced salesman who had worked for companies such as Pizza Hut, Payne Weber, and Wachovia. At the time of their meeting, plaintiff worked for Lettermark as a salesman but needed to subsidize his income with additional work. Hite worked as the Operations Manager for Defendant b6USA, Inc. ("BaySixUSA"), which specialized in marketing and selling athletic apparel.

During a 23 December 2006 meeting, plaintiff and Hite discussed the potential terms of their employment relationship. Plaintiff informed Hite that he needed an income of $42,000 a year to meet his living expenses because he had recently lost one of his two jobs. Hite reduced their discussion to writing, but neither party ever signed any contractual agreement.

Plaintiff began working for Hite and BaySixUSA[1] in January, 2007 with plaintiff's primary duties being inside sales, both retail and wholesale. In return, plaintiff received a fixed sum of $500 a week and had the potential to make a quarterly bonus if sales increased 35% as compared to the same month the previous year. Plaintiff worked both in BaySixUSA's corporate office and also from his residence, while at the same time maintaining his employment with Lettermark until he was fired by the company in May 2007. On 15 August 2007, Hite and BaySixUSA ended their employment relationship with plaintiff.

A bench trial was held from 27 January 2010 to 29 January 2010 in the Wake County Superior Court. After concluding that the parties entered a verbal contract, that defendants did not breach a contract with plaintiff, that plaintiff was an independent contractor and that defendants did not violate plaintiff's rights under the NC Wage & Hour Act nor the Fair Labor Standards Act, the court entered judgment on 2 February 2010 against defendants, jointly and severally, in the amount of One Thousand Dollars ($1,000.00) as presumed damages for libel per se plus the costs of court. Plaintiff appeals.

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[1] "Defendant Stephen Hite is the Operations Manager of Defendant b6USA, and is a duly authorized representative of Defendant b6USA", per stipulation of the parties.

On appeal, plaintiff raises the following issues: whether the trial court erred in (I) determining that plaintiff was an independent contractor; (II) determining that plaintiff was not an employee of BaySixUSA; (III) determining that defendants did not breach any contract with plaintiff; and (IV) allowing defendants to offset any money owed to plaintiff.

Standard of Review

When reviewing a judgment entered after a non-jury trial, first the reviewing court "look[s] to see whether there is clear, cogent and convincing competent evidence to support the findings [of fact]." *In re Allen*, 58 N.C. App. 322, 325, 293 S.E.2d 607, 609 (1982) (citations omitted). Next, the Court looks at "whether the findings [of fact] support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001). The "trial court, when sitting as trier of fact, is empowered to assign weight to the evidence presented at trial as it deems appropriate." *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 112, 362 S.E.2d 807, 811 (1987); *see also Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971). If there is competent evidence to support the findings of fact made by the trial court, then the findings of fact are binding on appeal even if contrary evidence exists. *Id.* However, we review conclusions of law *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424,

427 (1999).

I. & II.

Plaintiff first argues the trial court erred in finding and concluding that plaintiff was an independent contractor and not an employee of BaySixUSA. We disagree.

An independent contractor is "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Cooper v. Asheville-Citizen Times Publishing Co.*, 258 N.C. 578, 586-87, 129 S.E.2d 107, 113 (1963) (quoting *McCraw v. Calvine Mills, Inc.*, 233 N.C. 524, 526, 64 S.E.2d 658). In determining a worker's status, the test is "whether the employer has the right to control the worker with respect to the manner or methods of doing the work or the agents to be employed in it, or has the right merely to require certain results according to the parties' contract." *Yelverton v. Lamm*, 94 N.C. App. 536, 538, 380 S.E.2d 621, 623 (1989) (citations omitted).

In making a determination as to whether one qualifies as an employee or an independent contractor, the following factors are considered along with other circumstances:

> [Whether] [t]he person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of

> the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes v. Bd. of Trustees of Elon College, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944) (citations omitted).

In the instant case, included in the trial court's finding of fact #5 is the following:

> Plaintiff had complete control over the method by which he sought and closed sales; The Plaintiff worked his own hours, without minimum or maximum requirements, either in or out of the office of the corporate Defendant; The Plaintiff worked for a fixed price, subject to additional bonuses for sales productions; The Plaintiff simultaneously worked for two companies from January through some of May, 2007; and the Plaintiff selected his own work time and work location.

Based on this finding, the trial court concluded that plaintiff was an independent contractor and not an employee of BaySixUSA. The trial court also concluded that defendants did not violate plaintiff's rights under the North Carolina Wage and Hour Act, since plaintiff was an independent contractor and not an employee of BaySixUSA.

In making its determination, the trial court relied on the following evidence: plaintiff had extensive experience in sales;

plaintiff was paid a fixed sum of $500 per week for his efforts to increase sales; plaintiff requested to be classified as a 1099 employee in order to avoid certain taxes; plaintiff was concurrently employed by Lettermark from January until early May 2007; and, plaintiff worked from home and from defendant's office, but had no set hours because plaintiff was hired as an independent contractor for the purpose of increasing sales. Because this evidence of record is competent to support the trial court's findings of fact, these findings are binding on appeal. *See G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 112, 362 S.E.2d 807, 811 (1987).

We note defendant's strong challenge to the trial court's finding of fact #4- "The Defendants never agreed to hire the Plaintiff as an employee"- and his argument that the evidence does not support that finding. However, as we have discussed herein, while there may be some evidence to the contrary on this issue, where, as here the record contains sufficient evidence to support finding of fact #4 and finding of fact #5 that plaintiff was an independent contractor not an employee, such evidence is binding on appeal. *Id.*

Therefore, we hold the trial court did not err in its findings and conclusion that plaintiff was an independent contractor.

III.

Next, plaintiff argues the trial court erred in determining that defendants did not breach a contract with plaintiff and that plaintiff should have also been paid a monthly base salary by defendants as part of the terms of their agreement. We disagree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 369, 618 S.E.2d 867, 870 (2005) (citation and internal quotations omitted). A contract, whether express or implied, requires assent between the parties, mutuality of obligation, and definite terms. *Schlieper v. Johnson*, 195 N.C. App. 257, 265, 672 S.E.2d 548, 553 (2009). In order for there to be a meeting of the minds so as to form a valid contract, "[t]here must be neither doubt nor difference between the parties[; t]hey must assent to the same thing in the same sense, and their minds must meet as to all the terms." *Chaisson v. Red Simpson*, 195 N.C. App. 463, 471, 673 S.E.2d 149, 156 (2009) (citation and internal quotations omitted). "Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980) (citations omitted).

In the instant case, plaintiff presented to the court a document he argued represented a valid employment contract between the parties. The document contained the following information:

> 2007
>
> 1 YEAR COMMITMENT 1/2/07-12/31/07
>
> Base salary as follows:
>
> $500 per week to be paid weekly
> $1340 to be paid monthly
> (or equiv. of $42,000)
> Payment to be made the 15th of the following month.
>
> Bonus as follows:
>
> Pay dates 4/30, 7/31, 10/31, 1/31
> Bonus to be paid 5% over 12% increase of q1-q4 (q1-4/30 pay date, etc)
>
> 1099 employee

Plaintiff argues that this document is an agreement which sets forth key, material terms of an employment contract. Additionally, plaintiff contends that because this document is an agreement any ambiguities in the agreement should be construed against the drafting party, in this case the defendants. However, the trial court found the document to be merely a proposal based on plaintiff's previous statements to Hite regarding the amount of money plaintiff would need to meet his living expenses. Based on additional competent evidence before the trial court that Hite had not agreed to the terms in

the document, the trial court's finding that this document was merely a proposal and not a valid employment contract was supported by the evidence, notwithstanding plaintiff's assertion of contrary evidence. It follows that if there is not a valid employment agreement between the parties, then there cannot be a breach of contract by one of the parties. As a result, we hold the trial court did not err in concluding that defendants did not breach any contract with plaintiff in regards to this document nor in finding that the monthly base salary was not part of any agreement.

IV.

Lastly, plaintiff argues the trial court erred in concluding that defendant's failure to pay plaintiff for work on 13, 14, and 15 August 2007 was counterbalanced by defendant's payment to plaintiff of $500 while on vacation in Florida in May or June 2007. We disagree.

The record shows that plaintiff went to Florida for a week of vacation in May or June 2007. Despite the fact that plaintiff performed no work-related activities during that week, plaintiff still received payment of $500 from defendants. The record also shows that plaintiff worked on 13, 14, and 15 August 2007 but was not paid for that time.

We have held herein, supra, that the trial court did not err in concluding that plaintiff was an independent contractor.

Plaintiff's classification as an independent contractor rather than an employee is important because an independent contractor is not afforded the protection of the North Carolina Wage and Hour Act. *See Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 315, 488 S.E.2d 632, 634 (1997) (holding that only an employee or the Commissioner of Labor may bring suit under the Wage and Hour Act).

The North Carolina Wage and Hour Act states that "[t]he public policy of this State is declared as follows: The wage levels of *employees*, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State. . . ." N.C.G.S. § 95-25.1(b) (emphasis added). Under the Wage and Hour Act, an "employee" is defined as "any individual employed by an employer." N.C.G.S. § 95 25.2(4). Accordingly, as an independent contractor, plaintiff should not have been compensated for his week of vacation. Therefore, plaintiff's argument that defendants violated N.C.G.S. § 95-25.6 pertaining to the North Carolina Wage and Hour Act is overruled.

Nevertheless, because plaintiff was paid by defendant for a week of vacation, but not compensated for three days of work, the trial court concluded that the overpayment for vacation should be counterbalanced by the money owed to plaintiff for

time worked in August 2007. We find no error in the ruling of the trial court to offset any compensation owed to plaintiff.

The judgment of the trial court is affirmed.

Affirmed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).