[Cite as *Ohio Edn. Assn. v. Lopez*, 2010-Ohio-5079.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Education Association,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
v.		No. 09AP-1165
	:	(C.P.C. No. 06CVH04-4696)
Christopher A. Lopez,		
	:	(REGULAR CALENDAR)
Defendant-Appellant/ Cross-Appellee.	:	

D E C I S I O N

Rendered on October 19, 2010

McNamara and McNamara, L.L.P., Michael R. Szolosi, Sr. and *Michael R. Szolosi, Jr.,* for appellee/cross-appellant.

Christopher A. Lopez, pro se.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Appellant/cross-appellee, Christopher A. Lopez ("Lopez"), is the former assistant executive director and general counsel for appellee/cross-appellant, The Ohio Education Association ("OEA"), a non-profit corporation that serves as a statewide union for public school teachers and support staff. Lopez resigned from employment with OEA effective March 31, 2005, and OEA sued Lopez for breach of his severance agreement.

Lopez filed a counterclaim alleging that OEA had also breached the severance agreement.

{¶2} OEA alleged that Lopez breached a provision in the severance agreement that provided in pertinent part:

> Employee further agrees not to at any time disparage, defame, or otherwise derogate Employer's Officers, Executive Committee Members, employees or agents."

In addition, OEA contended that Lopez breached Section 7 of the severance agreement. Section 7 of the severance agreement incorporates Section 3 of Lopez's employment agreement. The employment agreement provided that Lopez would "not undertake any activity, make any statements, or engage in any conduct that is harmful to or that diminishes in any manner (or that could be reasonably foreseen as such) the relationship between Employer, it members, its employees, and its Subsidiaries."

{¶3} OEA alleged that soon after the execution of the severance agreement in February 2005, Lopez left a voice mail message for Mr. David Latanick, outside counsel for OEA. The message was as follows:

> Davey, you never call me anymore. This is el jeffe. Call me sometime. I'm all settled with the OEA so you don't have to worry about this gag order and all this s___ that slimebag Reardon said to you. So call me 580-1911. Bye.

(Exhibit No. 67.)

{¶4} OEA further alleged that Lopez sent a series of anonymous communications to its personnel beginning in December 2004 until January 2006. Two of the mailings were addressed to Dennis Reardon, the Executive Director of OEA, and are at issue in this case.

{¶5} The first stated on the first page, "BET YOU WISH THIS TECHNOLOGY EXISTED BEFORE THIS HUMILIATING EMAIL WAS SENT We're still laughing about this one!" (Exhibit No. 4.) Attached to the first page was a copy of an ad promoting a way to avoid "reply to all" mistakes when sending emails. The next page was a series of emails from OEA. The first message was from the vice-president of the Professional Staff Union ("PSU"), Tal Hutchins, noting that certain grievances had been settled. Mr. Reardon's wife, Lynn Davis, also an OEA employee, had replied to the email stating, "Thank you, thank you, thank you! Hope you are doing well. I think of you often." Id. There had been rumors at work that Ms. Davis had had a personal relationship with Mr. Hutchins prior to her marriage to Reardon. Ms. Davis maintained that she was merely thanking Mr. Hutchins for his work on the grievances. Mr. Hutchins then inadvertently sent a third email containing these messages to everyone at OEA's headquarters.

{¶6} The second mailing was dated December 19, 2005 and provides as follows:

> Here is your regular reminder about how to proceed with bargaining in 2006.
>
> We will not let you go into a fully PAID holiday "recess" without this reminder. We're sure you will be warm and safe and with all your required medication and doctor's attention.
>
> You have made life a lot more difficult for people who devoted their working lives to OEA. Meanwhile Mrs. Reardon is decked out in a full length fur coat. You know the old saying? "What do you call a pig in a dress? A PIG!" How can you look at yourself in the mirror? You will burn in hell, you bastard.
>
> BEWARE! 2006 will be your worst nightmare come true. President Young has advised PSU's membership that PSU is prepared for whatever it takes to attain equity for ALL OEA employees---past and current. JUSTICE FOR ALL---EMPLOYEES AND RETIREES. Enjoy your holidays; it will be the last time.

(Exhibit No. 13.)

{¶7} The second page of this communication contains the same email chain between Tal Hutchins and Lynn Davis from June 2004.

{¶8} The case was tried before a magistrate who decided in favor of Lopez on OEA's claims and in favor of OEA on Lopez's counterclaim. The parties filed objections, and the trial court overruled the objections and entered judgment for Lopez on OEA's claims and judgment for OEA on Lopez's counterclaim. Lopez filed a notice of appeal on December 14, 2009, and OEA filed a notice of cross-appeal on December 19, 2009. Lopez did not pursue his appeal in this court, and he did not file a brief in opposition to OEA's cross-appeal. OEA, however, has asserted the following three assignments of error:

> I. The Trial Court erred as a matter of law by concluding that Lopez's use of the word "slimebag" to describe OEA Executive Director Reardon was an immaterial breach and caused no damages.
>
> II. The Trial Court abused its discretion by concluding that OEA had not proven by a preponderance of the evidence that Lopez breached the Severance Agreement by transmitting or participating in transmitting OEA Exs. 4 and 13.
>
> III. The Trial Court erred by deeming as moot OEA's objections to the Magistrate's Decision including: (a) that the stipulated damage provision, drafted by Lopez and accepted by OEA, was an unenforceable penalty; (b) that OEA never suffered economic damages from Lopez's three separate incidents of breach; (c) that OEA failed to prove economic damages caused by the emotional harm suffered by third-party beneficiaries of the Severance Agreement; i.e., harm that in any manner affected the relationship between OEA and its employees; and (d) that OEA had not established it was entitled to a permanent injunction, attorney's fees and costs.

{¶9} In his first assignment of error, OEA argues that the trial court was in error when it decided that the use of the term "slimebag" in the voicemail message was not a material breach. Although Lopez denied making the voicemail message, both the magistrate and the trial court found that he had, and there was competent, credible evidence to support that finding. Lopez admitted that he was sometimes referred to as "El Jeffe" and that the phone number given on the message was his. The magistrate also had the benefit of listening to the recorded message and comparing it to Lopez's voice at the trial.

{¶10} The magistrate concluded that the voicemail message did not establish a breach because of its immateriality, and because it caused no damages to OEA. The trial court concluded that under the plain terms of the severance agreement the comment constituted a breach, but it did not constitute a material breach. The trial court noted the personal nature of the voicemail message, and that Lopez believed he was speaking to a friend. The trial court then agreed with the magistrate's conclusion that the breach was immaterial and caused no damages.

{¶11} In order to prevail on a claim of breach of contract, the plaintiff must prove by a preponderance of the evidence: 1) the existence of a contract; 2) performance by the plaintiff; 3) breach by the defendant; and 4) damages flowing from the breach. *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶14.

{¶12} To determine if an alleged breach is material, the factfinder must consider all of the circumstances of the case, including the conduct and relationship of the parties. *Unifirst Corp. v. M & J Welding & Mach., Inc.* (Sept. 27, 1996), 4th Dist. No. 95CA2401. "[T]he determination of whether non-compliance with the terms of a contract is material,

so as to constitute a breach, is a mixed question of fact and law." *Gilbert v. Dept. of Justice* (C.A.F.C., 2003), 334 F.3d 1065, 1071. Appellate review of a mixed question of law and fact requires an appellate court to accord due deference to a trial court's factual findings if the factual findings are supported by competent, credible evidence, and to independently review whether the trial court properly applied the law to the facts of the case. *O'Brien v. The Ohio State Univ.*, 10th Dist. No. 06AP-946, 2007-Ohio-4833, ¶10-12; *Hanna* at ¶16.

{¶13} If what is required by way of contract performance turns on contract interpretation, it is an issue of law which we review de novo. Id. at ¶16; see *Gilbert* at 1071-72, citing *Mass. Bay Transp. Auth. v. United States*, 129 F.3d 1226, 1231. At the same time, what the allegedly breaching party did or did not do is an issue of fact. Id. "Where, the facts are undisputed, the determination of whether there has been material non-compliance with the terms of a contract, and hence breach, necessarily reduces to a question of law." *Gilbert* at 1072. See also *Hanna* at ¶16 (citing *Gilbert*).

{¶14} On the issue of materiality, Ohio courts have applied the Restatement (Second) of Contracts. The Restatement (Second) of Contracts (1981), Section 241, states the following:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

{¶15} The notes to Section 241 go on to state: "This Section therefore states circumstances, not rules, which are to be considered in determining whether a particular failure is material." Id. at 238. More simply, a material breach occurs when a party violates a term essential to the purpose of the agreement. *Kersh v. Montgomery Developmental Ctr.* (1987), 35 Ohio App.3d 61, 62. "Mere nominal, trifling, or technical departures will not result in a breach of contract; slight departures, omissions, and inadvertencies should be disregarded." *Tucker v. Young*, 4th Dist. No. 04CA10, 2006-Ohio-1126, ¶25.

{¶16} Here, the purpose of the separation agreement was to end the employment relationship and resolve all disputes. (Exhibit No. 19, at 1.) The nondisparagement provision was a negotiated term of the agreement. The provision OEA alleged Lopez breached uses the terms "disparage, defame, or otherwise derogate." All of these terms connote harming a person's reputation or causing one to seem inferior. The term "slimebag" is a common slang expression meaning "[a] despicable person, usually a male." McGraw-Hill Dictionary of American Slang and Colloquial Expressions (4th ed.2006), 323. Lopez had worked with outside counsel Latanick for many years and considered him a friend. The voicemail was a statement of opinion that Lopez did not

think well of Reardon. This kind of trifling figure of speech is of so little consequence it cannot be said to be material and should be disregarded.

{¶17} There was no evidence of any harm or detrimental effect to Reardon's reputation because of the message. Lopez's opinion of Reardon was no secret at OEA, or among its employees and outside counsel. Nor was the message disseminated to others. Based on a review of the evidence, we find that competent credible evidence exists that Lopez left the voicemail message for Latanick, which under the strict letter of the agreement constitutes a breach. However, the slang expression is such a part of modern casual speech as to be almost meaningless. OEA could not demonstrate that the message caused any damage to OEA or Reardon. Therefore, the breach is not material, and the first assignment of error is not well-taken.

{¶18} In its second assignment of error, OEA attacks the finding that it had failed to prove that Lopez was involved in sending two pieces of anonymous correspondence to Reardon. OEA contends the trial court ignored circumstantial evidence favorable to their case and engaged in speculation to reach its conclusion.

{¶19} Our standard of review for a claim that a trial court's decision is against the manifest weight of the evidence is whether some competent and credible evidence supports the decision. *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279. In applying this standard of review, we accord deference to the findings of the trial court, because the trial court was best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and to use its observation to weigh the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77.

{¶20} The evidence showed that both letters were found to have Lopez's fingerprint on them. OEA's fingerprint expert found only one print of value on exhibit No. 13, and that was Lopez's fingerprint on the lower left corner of the first page. Exhibit No. 4 however, contained not only Lopez's print on page two, the chain email, but also unidentified fingerprints on pages one and three and on the envelope that did not match Lopez's prints.

{¶21} The magistrate and the trial court found that the subject matter of exhibit No. 13 contained references to the upcoming negotiations between OEA and PSU and a dispute with retirees relating to the termination of certain health benefits. A number of retirees had expressed anger against Reardon and wrote letters repeating the allegations that were contained in anonymous communications that did not have Lopez's fingerprints on them. Since there was no evidence linking those other anonymous communications to Lopez, the magistrate and the trial court concluded it was equally plausible that the anonymous communications came from angry retirees rather than Lopez.

{¶22} There were approximately 34 unidentified prints of persons other than Lopez on the anonymous communications that were submitted into evidence. The fingerprint experts testified that it could not be determined when a fingerprint is placed on a document. Therefore, the magistrate and the trial court found that the presence of Lopez's fingerprints could be consistent with him transmitting or participating in transmitting the documents, as OEA claimed. However, they could just as easily have been consistent with Lopez merely touching, at some point in time, a sheet of paper loaded into a printer, a copier, or a page of a document prepared and transmitted by

others. Faced with two plausible explanations, the trial court concluded that OEA had failed to prove its case by a preponderance of the evidence.

{¶23} Additionally, it has not been shown that exhibit No. 4 was disparaging, defamatory, or derogatory. The mailing mocked the fact that the chain email had been mistakenly sent to everyone at OEA headquarters. While Reardon expressed concern because he thought the emails showed his wife in a pro-union position, Lynn Davis testified she was merely expressing her gratitude for completing a task. Thus, the recipients themselves posited innocent explanations for the chain email. A person would have to be aware of the rumors about Davis' personal life in order to infer there was anything negative in the mailing. Therefore, in and of itself, the mailing did not communicate any disparaging content.

{¶24} Therefore, we agree with the trial court that OEA failed to prove any breaches of contract, and the finding of the trial court was supported by competent, credible evidence. The trier of fact's decision not to accept OEA's version of events is not cause to reverse the matter as against the manifest weight of the evidence.

{¶25} OEA's third assignment of error concerns entitlement to damages. It is rendered moot by our resolution of the first two assignments of error. Based on the foregoing, OEA's first two assignments of error are overruled, and its third assignment of error is rendered moot. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.