In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00361-CV

RENUKA POLIMERA, Appellant

V.

CHEMTEX ENVIRONMENTAL LABORATORY, INC., Appellee

On Appeal from the County Court at Law No. 1
Jefferson County, Texas
Trial Cause No. 112302

MEMORANDUM OPINION

Renuka Polimera appeals the trial court's judgment awarding $20,000 in damages to Chemtex Environmental Laboratory, Inc. for breach of an employment contract that contained a liquidated damages clause. We find the contract and liquidated damages clause unenforceable under Texas law. We reverse the judgment of the trial court and render a take-nothing judgment in favor of appellant.

BACKGROUND

Chemtex performs environmental and waste water testing. Chemtex uses nonimmigrant workers to fill some of the positions in its lab. Nonimmigrant workers are persons who are going through the process of obtaining a green card so that they may work permanently in the United States as an immigrant worker. Chemtex sponsors such nonimmigrant workers in obtaining their green cards. This process allows employers such as Chemtex to hire foreign nationals to fill positions for which there are purportedly no qualified U.S. workers available. Appellant, Polimera, came to the United States in January 2001 on a student visa to pursue a masters degree. She planned to stay in the United States permanently after obtaining her degree. Polimera obtained her master's degree in 2002. In August 2002, Chemtex hired Polimera. Through her employment with Chemtex, Polimera obtained an H-1B temporary work visa and began the process of obtaining a permanent work visa known as a green card.

Polimera testified that obtaining a green card through employer sponsorship is a three-step process that involves, among other things, the following employer cooperation: (1) the employer must provide labor certification to the immigration authorities, (2) the employer and applicant must file a visa petition called an I-140, and (3) the employer and applicant must file an I-485 asking for adjustment of the employee's nonimmigrant status to that of a permanent resident. At trial, it was undisputed that obtaining a green card through employer sponsorship is a process that may take a considerable amount of time.

Chemtex began the sponsorship process with Polimera in 2002. The first step of the process was accomplished by obtaining the appropriate labor certification. In April 2007, Chemtex and Polimera completed the second step of this process by filing the required I-140 form, which was approved shortly thereafter. Polimera testified that in June 2007, the United States Citizen and Immigration Services issued an announcement allowing visa availability for all nonimmigrant workers who had completed the first two steps of the process. According to Polimera, this announcement gave her until August 17, 2007, to complete the third stage of the immigration process by submitting her I-485. While the exact nature of the announcement is unclear from the record, it was undisputed by the parties that the June 2007 announcement gave Polimera a short window of time to submit her I-485 to have her status adjusted to permanent resident. Polimera testified that she needed Chemtex to provide proof of her permanent full-time employment to pursue her application for permanent status adjustment through the I-485.

A few days before the filing of her I-485, Chemtex presented Polimera with an employment contract. The contract stated in pertinent part:

> This agreement is between Chemtex Environmental Laboratory, Inc., Employer, and Renuka Polimera, an at-will employee, hereinafter called Employee. Employee desires to <u>begin</u> employment with Chemtex Environmental Laboratory, Inc. on an at-will basis, or to <u>continue</u> prior employment with Chemtex Environmental Laboratory, Inc. on an at-will basis. Employer desires to hire Employee on an at-will basis. In consideration of the continued employment of Employee by Employer, and processing immigration by Employer and Employee agree to the following:

. . . .

> 6. Commitment by Employee. Liquidated damages. Employee understands that Employer may expend time, resources and money in connection with making Employee a productive employee, and that the employment of Employee is an investment by Employer. Employee agrees that he will not voluntarily leave employment with Employer, or be discharged by Employer for cause, for a period of two (2) years from the later of the date of this agreement or the date Employee receives his green card (the "effective date"). Should Employee violate this paragraph, then it will be difficult for Employer to determine its damages. Therefore, Employee agrees that in that event, Employee shall be liable to Employer, as liquidated damages, and not as a penalty, in the following amounts: (a) If Employee's employment ends less than one (1) year from the effective date, $20,000.00; (b) If Employee's employment ends on or between the first anniversary of the effective date but less than two (2) years from the effective date, $10,000.00. If Employer discharges Employee for any reason other than for cause, then this paragraph is void. In all cases, Employee is an at-will employee, and is not guaranteed employment for any length of time.

Polimera testified that she believed that if she did not sign the agreement Chemtex would terminate her employment preventing her from obtaining her green card. Polimera understood that if Chemtex terminated her, she would have to "start over" the process of obtaining a green card through a new employer. Additionally, Polimera explained that her H-1B temporary work visa was dependent on her employment and was set to expire in August 2008.

Polimera further testified that she was required to pay Chemtex the fees associated with the filing and processing of her immigration papers. In addition to losing the time associated with obtaining her green card, Polimera stated that she did not want to lose the money she had already paid in connection with the immigration process. C.N. Reddy,

President of Chemtex, testified that Polimera was presented with the employment contract "[a]t least two or three days[]" prior to signing and returning it to Chemtex. Chemtex submitted Polimera's I-485 on August 13, 2007. Polimera signed and returned the employment contract on August 14, 2007. As of the date of trial in May 2010, Polimera was still waiting to receive her green card.

Chemtex terminated Polimera for cause on September 30, 2008. Following Polimera's termination, Chemtex made a demand for $20,000 pursuant to the liquidated damages provision in the employment contract. When Polimera failed to make payment in accordance with this demand, Chemtex filed suit against Polimera for breach of contract. Following a bench trial, the trial court awarded Chemtex $20,000 in damages, plus attorney's fees. The trial court also entered findings of fact and conclusions of law. Polimera filed a motion to set aside the judgment and motion for new trial, which were denied by the trial court. This appeal followed.

In several issues, Polimera challenges the following: (1) the trial court's failure to apply federal immigration law, (2) the trial court's finding that Polimera did not execute the contract under duress, (3) the validity of the contract and the liquidated damages clause, (4) the trial court's findings of fact and conclusions of law, and (5) the trial court's denial of Polimera's motion for new trial.

VALIDITY OF CONTRACT AND LIQUIDATED DAMAGES CLAUSE

At trial, Polimera argued that the contract was illegal and that the liquidated

damages clause was an unenforceable penalty. In pertinent part, the trial court found in its findings of fact that Polimera was terminated for cause, Polimera breached the agreement by being terminated for cause, the contract was not an illegal contract, and the contract was not void as against public policy. In its conclusions of law, the trial court found that Polimera was liable to Chemtex for the principal sum of $20,000. In her post trial motions, Polimera argued that the trial court erred in finding that a valid contract existed and that the liquidated damages clause was enforceable.

A trial court's designation of a finding as a "finding of fact" is not controlling on appeal. *See Ray v. Farmers' State Bank of Hart*, 576 S.W.2d 607, 608 n.1 (Tex. 1979); *Jensen v. Covington*, 234 S.W.3d 198, 205 (Tex. App.—Waco 2007, pet. denied). Whether a valid, enforceable agreement exists is a question of law. *Meru v. Huerta*, 136 S.W.3d 383, 390 (Tex. App.—Corpus Christi 2004, no pet.). Likewise, whether a liquidated damages clause is enforceable is a question of law. *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991). Because the trial court's findings as to the validity of the contract and its provisions are better characterized as conclusions of law, we will review them de novo. *See Smith v. Smith*, 22 S.W.3d 140, 143-44 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (op. on reh'g).

To recover for breach of contract the plaintiff must prove: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; [and] (4) damages sustained [by the plaintiff] as a result of the

breach." *Winchek v. Am. Express Travel Related Servs., Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Thus, there must be a valid, enforceable agreement to support an award of damages for breach of contract. *See id*.

The parties do not dispute that Polimera was an at-will employee. An "[a]t-will employee[] may contract with [her] employer[] on any matter except those which would limit the ability of either employer or employee to terminate the employment at will." *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994), *overruled on other grounds by Alex Sheshunoff Mgmt. Servs, L.P., v. Johnson*, 209 S.W.3d 644 (Tex. 2006); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003). Generally, the continued employment of an at-will employee cannot constitute consideration for a valid contract with her employer. *See Light*, 883 S.W.2d at 644; *J.M. Davidson*, 128 S.W.3d at 228. The Court in *Light* explained:

> Consideration for a promise, by either the employee or the employer in an at-will employment, cannot be dependent on a period of continued employment. Such a promise would be illusory because it fails to bind the promisor who always retains the option of discontinuing employment in lieu of performance. When illusory promises are all that support a purported bilateral contract, there is no contract.

Id. at 644-45 (footnotes and citations omitted); *compare Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 301-02 (Tex. 2009) (holding that company's non-illusory offer to split proceeds from a sale or merger with any original employees who remained at the company until such sale or merger, was an offer for a unilateral contract that was accepted by the

employees who performed their illusory promise to stay until such merger occurred).

Consideration is a fundamental element of an enforceable contract. *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex. App.—San Antonio 1999, pet. denied). In the present case, the contract states, "[i]n consideration of the continued employment of [Polimera] by [Chemtex], and processing immigration by [Chemtex,]" Polimera agrees that she "will not voluntarily leave employment with [Chemtex], or be discharged by [Chemtex] for cause, for a period of two (2) years from the later of the date of this agreement or the date [Polimera] receives [her] green card[.]" Because Polimera remained an at-will employee, Chemtex retained the option to terminate her at any time. Likewise, Polimera retained the option to leave. Because the covenant that forms the basis of the agreement is dependent on the continued employment of Polimera, it is illusory. *See Light*, 883 S.W.2d at 645; *J.M. Davidson*, 128 S.W.3d at 228. Because the contract was not supported by valid consideration, no enforceable contract exists.

Additionally, even if the contract were an enforceable agreement under Texas law, the liquidated damages provision therein is unenforceable. A valid liquidated damages clause estimates in advance the just compensation a party will accrue if the other party to the contract fails to perform. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 664 (Tex. 2005). "Whether a contractual provision is an enforceable liquidated damages provision or an unenforceable penalty is a question of law[.]" *Phillips*, 820 S.W.2d at 788. In determining whether a liquidated damages clause is enforceable, courts examine

(1) whether the harm caused by the prospective breach of the contract is incapable or difficult of estimation and (2) whether the amount of liquidated damages called for is a reasonable forecast of just compensation. *Id*. If either element is lacking, the liquidated damages clause is unenforceable. *Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 810 (Tex. App.—Dallas 1999, no pet.). Evidence regarding the difficulty of estimating damages and whether the amount of liquidated damages is a reasonable forecast of just compensation, must be viewed as of the time the contract was executed. *Baker v. Int'l Record Syndicate, Inc.*, 812 S.W.2d 53, 55 (Tex. App.—Dallas 1991, no writ) (op. on reh'g); *see also Oetting v. Flake Unif. & Linen Serv., Inc.*, 553 S.W.2d 793, 796 (Tex. App.—Fort Worth 1977, no writ).

"If the liquidated damages are proven to be disproportionate to the actual damages, the liquidated damages can be declared a penalty and recovery limited to actual damages." *TXU Portfolio Mgmt. Co., L.P. v. FPL Energy, LLC*, 328 S.W.3d 580, 589 (Tex. App.—Dallas 2010, pet. filed) (citing *Baker*, 812 S.W.2d at 55). The burden of proving a penalty defense is on the party challenging the liquidated damages clause. *Baker*, 812 S.W.2d at 55; *see also Urban Television Network Corp. v. Creditor Liquidity Solutions, L.P.*, 277 S.W.3d 917, 919 (Tex. App.—Dallas 2009, no pet.). Generally, the party asserting this defense must prove the amount of the other party's actual damages, if any, to show that the liquidated damages set forth in the agreement were not an approximation of actual loss. *Baker*, 812 S.W.2d at 55; *TXU Portfolio*, 328 S.W.3d at 589.

At trial, Reddy testified that Chemtex only required the employees who were going through the process of getting their green card to sign the employment contract at issue. Chemtex required citizen employees to sign non-compete agreements that did not contain the liquidated damages clause. Reddy explained that the contract was an "incentive for the employees to continue working" in return for Chemtex "helping them get through the green card process." Reddy testified that Chemtex is damaged when nonimmigrant employees leave, but he was unable to estimate the damages Chemtex suffered as a result of their departure.

We note that the liquidated damages provision of the contract states that the "Employer may expend time, resources and money in connection with making Employee a productive employee[.]" Reddy testified that Chemtex employees receive training regarding laboratory practices and analysis that are performed at Chemtex. He explained that sometimes employees need to be trained with regard to specific testing instruments. When asked whether these employees receive any formal training, versus on the job training, Reddy responded that they are required to learn Chemtex's standard operating procedure. According to Reddy, Polimera's training would not have been completed by 2007 because training is a "continuous process." However, Reddy admitted that such job training applies equally across the board to both nonimmigrant workers and U.S. citizens. Chemtex presented no evidence that it would suffer any actual loss with respect to training it expended solely on nonimmigrant workers Chemtex sponsored through the immigration

process. Additionally, in an at-will employment relationship, either party may terminate the employment relationship at any time for good cause, bad cause, or no cause at all, without liability for future lost wages. *See, e.g., Exxon Mobil Corp. v. Hines*, 252 S.W.3d 496, 503 n.6 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The liquidated damages provision, as set forth in Chemtex's at-will employment agreement, violates that principle as a matter of law.

Reddy also testified that Chemtex was required to complete paperwork and advance expenses to its immigration attorney in connection with its sponsorship of nonimmigrant workers applying for a green card. However, Reddy conceded that Chemtex required Polimera to reimburse Chemtex for any expenses advanced on her behalf. Polimera testified at trial that when Chemtex presented her with the employment contract in August 2007, she had already paid "[s]omething close to 14,000" dollars to obtain her green card. Polimera explained that she paid Reddy and he paid the immigration attorneys. Polimera stated that she paid some of these expenses from her personal account and some by allowing Chemtex to deduct the expenses from her paychecks. The evidence established that Chemtex deducted $500 from each of Polimera's paychecks from February 2003 through March 2003, August 2005 through November 2005, and January 2006 through April 2006, for a total of $5,000.[1]

[1] We note that the $500 deductions were a significant reduction in Polimera's paychecks. The evidence established that when Polimera was hired in 2002 her starting

Several days prior to being presented with the employment contract, and shortly before the deadline to file her I-485, Polimera received an email from Reddy with an attached statement seeking payment of the remaining fees associated with processing her green card application, as well as her husband's application. The statement set forth a total fee of $9,425. However, the statement credited Polimera with the $500 paycheck deductions from August 2005 through November 2005 and January 2006 through April 2006, leaving a balance of $5,425. The email stated, "Please look over these figures and need the check by morning." The evidence established that Polimera gave Chemtex two checks the following day in the amounts of $3,000 and $1,560, for a total of $4,560. In addition to fees associated with the processing of immigration documents on behalf of Polimera and her husband, the statement sought fees for the filing of immigration documents on behalf of Polimera's children, including her daughter. However, Polimera explained that because her daughter was already a U.S. citizen, Reddy adjusted the balance owed to delete the improper fees. Polimera testified that she paid Chemtex in full for all the expenses associated with her and her family's immigration process.

Reddy testified that Chemtex advanced expenses for the processing of Polimera's immigration and required her to reimburse Chemtex for those expenses. Reddy

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salary was $27,270. Additionally, the testimony established that when Polimera was terminated in August 2008 she earned an annual salary of $33,000. Further, Chemtex did not offer any evidence of written authorization from Polimera authorizing the employer to make such deductions. Tex. Labor Code Ann. § 61.018(3) (West 2006).

acknowledged that he personally put together the statement of fees he sent to Polimera. Reddy explained that the fees generally reflected that attorneys' bill for filing the documents, but he could not say exactly what each bill entry represented. In addition to the fees listed for filing and processing various documents, the statement included attorneys' fees, advertisement costs, and fees for "miscellaneous" expenses. Reddy acknowledged that his balance sheet may have been inaccurate and that if "there were other checks she might have given" him, he expected Polimera to "subtract [that amount] and give [him] the difference." Additionally, he acknowledged that the balance may have been adjusted to delete improper fees for processing immigration documents for Polimera's daughter. Though Reddy testified he could not say "for sure" that he was paid the full amount of fees owed by Polimera, he stated that he had no reason to disagree with her testimony that she had paid the full amount owed. Chemtex presented no evidence disputing Polimera's contention that she paid Chemtex in full for all fees and expenses associated with Chemtex's sponsorship of her and her family's immigration to the United States.

The evidence, when viewed at the time the contract was executed, does not establish that the liquidated damages called for were a reasonable forecast of just compensation for any damages and therefore, fails to meet the second prong of the test. The contract does not provide that Chemtex was going to advance expenses or retain legal counsel on behalf of the nonimmigrant workers or that this worker would be responsible for payment of the

value of any services rendered by Chemtex on behalf of the nonimmigrant worker related to the immigration process. Polimera presented evidence that she reimbursed Chemtex in full for all expenses advanced by Chemtex on her behalf related to the immigration process, and Chemtex did not present any evidence contradicting or disputing her documentary evidence or testimony. Thus, the liquidated damages provision for the payment of $20,000 was not a reasonable forecast of just compensation for any allowable damages resulting from Polimera's breach of the agreement. We hold the liquidated damages clause is unenforceable.

We sustain issue three. We need not address Polimera's remaining appellate issues. Tex. R. App. P. 47.1. We reverse the judgment of the trial court. Because we find no valid contract exists, we render judgment that Chemtex take nothing from and against Polimera.

REVERSED AND RENDERED.

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CHARLES KREGER
Justice

Submitted on April 15, 2011
Opinion Delivered May 19, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.