In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-10-00081-CV

MILTON E. AUNAN, II, Appellant

V.

VHA SOUTHWEST COMMUNITY HEALTH CORPORATION,
D/B/A COMMUNITY HEALTH CORPORATION, Appellee

On Appeal from the 102nd Judicial District Court
Bowie County, Texas
Trial Court No. 09C0385-102

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Milton E. Aunan, II, was executive vice president and chief financial officer of Wadley Health System and Wadley Regional Medical Center (collectively, Wadley), until his resignation, which became effective December 31, 2008. The end of Aunan's employment came between at least two potential sales of Wadley—the former potential sale falling through and the latter closing. This case concerns Aunan's claim for severance benefits under the Letter of Agreement (Contract) governing his employment.

Aunan initiated this case claiming breach of the Contract by VHA Southwest Community Health Corporation, d/b/a Community Health Corporation (CHC), the successor employer to Wadley by way of a transfer of the Contract. Aunan claimed he was entitled to the contractually specified severance package on the termination of his employment. Faced with competing motions for summary judgment, the trial court granted CHC's motion, denied Aunan's second partial motion for summary judgment,[1] and rendered judgment that Aunan take nothing. We reverse the trial court's judgment and remand this case for further proceedings consistent with this opinion.

Aunan was originally hired by Wadley. The Contract provided, in pertinent part:

> 2. The President/Chief Executive Officer may, at his discretion, terminate your employment at any time, and for any reason, by giving written notice to you. Upon such termination, all rights, duties and obligations of both parties shall cease, except that the Medical Center shall continue to pay you your then monthly salary

[1]The trial court previously denied Aunan's first motion for summary judgment. That action is not the subject of this appeal.

> for a period of twelve (12) months (including the month in which termination occurred) as an agreed upon severance. . . . Also, during this period, the Medical Center agrees, at its expense, to keep your group life and group health insurance fully in effect and to provide you with out-placement services . . . .
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> 3. The severance arrangements described in Paragraph 2 shall be available if Wadley Health System and/or Wadley Regional Medical Center shall sell, merge, joint venture or lease all of or a material part of its assets or business, directly or indirectly, and as a result you are terminated.
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> 4. You may also terminate your employment at any time, for any reason, by giving at least 30 days' advance written notice to the President/Chief Executive Officer, but if you do, all rights, duties and obligations of both parties will cease and you will not be entitled to any severance benefits, unless said termination is pursuant to Paragraph 8 herein. . . . .
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> . . . .
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> 8. If Wadley Health System and/or Wadley Regional Medical Center shall sell, merge, joint venture or lease all of or a material part of its assets or business, directly or indirectly, or closes, you may terminate your employment at your discretion or be retained as Executive Vice President/CFO of any successor corporation to or holding company of the Wadley Health System. If you elect to terminate your employment at such time, you shall be entitled to the same severance arrangement as is applicable under Paragraph 2 when the President/Chief Executive officer terminates your employment. Any election to terminate your employment under this Paragraph must be made prior to the finalization and/or closing of the transaction whether it be, a joint venture, merger, sale or closure.

Shortly after it was signed, the Contract was assigned to CHC.

Several years into Aunan's employment, financial stresses contributed to a perceived need to sell the hospital. That environment ultimately developed into this dispute.

November 6, 2008, is a date important to this case. As of that date, efforts to sell Wadley were about four months old. Both Christus St. Michael Health System (Christus) and Brim

Healthcare, Inc. (Brim), had been suitors to purchase the hospital. On November 6, Christus and Wadley had a pending, unbinding letter of intent providing the expectation that Wadley assets would be sold to Christus. Aunan had received a copy of a "Q&A" document stating Christus and Wadley "announced on Wednesday, Oct. 22, 2008, that they have agreed to enter into a non-binding Letter of Intent (LOI) wherein CHRISTUS would acquire Wadley and consolidate the two community health providers into a single system." The document "indicated that only an Administrator and Chief Nursing Officer would make up the Administrative Team at Wadley." On November 5, Aunan "attended a Wadley board of directors meeting whereby the imminent sale of Wadley . . . was discussed in detail." By his letter dated November 6, Aunan gave notice under the Contract of his election to resign. In the letter, he referenced Wadley's prospective sale of assets to Christus and added information suggesting that Wadley was in a financial condition at the time that made it likely that Wadley could continue operations for no more than sixty days under the conditions existing at the time. Aunan's letter set December 4, 2008, as his last day of employment. If all had continued as expected, the situation would have been relatively straightforward. But things changed, dramatically.

With his last day of employment approaching, Aunan found a new position with a hospital in Iowa. But Wadley believed it needed Aunan's continued presence. That prompted chairman of the board of directors, Fred Norton, to send an e-mail to other Wadley executives.

> I think this is an "over-reaction" by [Aunan]. We need and *want* him to stay to see us through this. I think the intent of the provision he cites is to give him a

> severance if he does not become employed by the successor entity (by his choice or by the entity's choice). He only needs to communicate that choice "prior" to closing. He has now done that. He does not need to separate from service prior to closing—although he seemingly has the right to do so. I hope he will choose to remain on the payroll until the transaction closes, and then he collects his severance afterward.

Wadley approached Aunan and convinced him to remain on board temporarily; the following e-mail was exchanged among Wadley executives:

> As you can see [Aunan] is exercising his rights under his employment contract to protect his severance. He and I have spoken about this, and he is not looking to leave Wadley, nor is there anything magic about his December 4th date. This is merely the 30 day notice required under his contract. This letter was triggered by the attached "20 questions" distributed publicly recently which talked of keeping an administrator and a CNO, no mention of a CFO. Therefore, it appears, that he has been "noticed." I will say, that I would like -- and Wadley needs -- now, more than ever, [Aunan]'s presence here at least through the closing. Can we set up a contractual arrangement to keep him here while protecting his rights?

On November 19, 2008, Christus withdrew from the existing letter of intent. The letter of intent "was officially withdrawn by another proposed letter of intent, dated November 25, 2008," which the Wadley board of directors rejected December 3, 2008. Aunan was aware of the board's decision. Wadley began to search for other potential buyers.

Meanwhile, Aunan obtained an extension with his new employer to start January 5 "so he could remain at Wadley to see [it] through the transaction." By his letter of December 19, 2008, Aunan—still employed under the Contract—referenced his November 6 letter and extended his last day of employment to December 31, 2008.

On December 23, 2008, Wadley and Brim picked up discussions about the possibility of

Brim being the purchaser.

After working through December 31, Aunan left Wadley for his first active date of his new employment in Iowa, commencing January 5, 2009.

Wadley's discussions with Brim ultimately resulted in a preliminary sale agreement dated January 14, 2009, the same day Wadley filed bankruptcy. In a subsequent auction held in the bankruptcy proceeding, Brim outbid Christus and became the purchaser at a sale, which was closed March 1, 2009.

When Aunan did not receive the severance package described in paragraph two of the Contract, he sued CHC for breach. During discovery, Aunan obtained the following testimony from Michael Lieb, Chief Executive Officer of Wadley: "Q. Do you see any requirement in Mr. Aunan's Employment Contract as depicted in Deposition Exhibit No. 2 that requires Mr. Aunan to stick around until the transaction closes? A. I do not." Aunan filed a motion for partial summary judgment citing Lieb's testimony and Norton's e-mail in which he wrote Aunan did "not need to separate from service prior to closing -- although he seemingly has the right to do so."

CHC also filed a motion for summary judgment. Attached was the affidavit of James A. Summersett, III, former Chief Executive Officer of Wadley, stating:

> The purpose for including [paragraph eight] . . . was to provide the executive with a financial incentive to remain employed with WHS while a change-of-control transaction is being negotiated and finalized. WHS was concerned that once executives at WHS found out that the hospital might be sold, they would seek out

> and accept other employment while the negotiations were still ongoing, which could severely hinder negotiations and the closing of the transaction.

CHC argued that paragraph eight's language "[i]f you elect to terminate your employment at such time" meant such time as "Wadley Health System and/or Wadley Regional Medical Center shall sell, merge, joint venture or lease all of or a material part of its assets or business." Although the election to terminate employment must have been made "prior to the finalization and/or closing of the transaction," CHC argues that the transaction between Wadley and Christus never closed and that, because Aunan had left prior to the asset purchase agreement and the closing of the Brim transaction, his letter notices could not be seen as a notice under paragraph eight with regard to the Brim transaction. In sum, CHC argued that Aunan's notices constituted a paragraph-four notice of termination of employment and that, therefore, Aunan was not entitled to any severance benefits.

Aunan responded by claiming that he had met the requirements of paragraph eight, (1) that he give notice "prior to the finalization and/or closing of the transaction" and (2) that there be some closing of a transaction. He also argued that the phrase "at such time" was ambiguous.

After reviewing the summary judgment evidence, the trial court ruled in favor of CHC. We now review the trial court's summary judgment.

We employ a de novo review of the trial court's grant of a summary judgment, which is based on written pleadings and written evidence rather than live testimony. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *see* TEX. R. CIV. P. 166a(c). Summary

judgment was proper if CHC established there were no genuine issues of material fact such that it was entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt.*, 690 S.W.2d 546, 548 (Tex. 1985); *French v. Gill*, 252 S.W.3d 748, 751 (Tex. App.—Texarkana 2008, pet. denied); *see* TEX. R. CIV. P. 166a(c). During our analysis of the traditional motion, and in deciding whether there is a disputed material fact issue which precludes summary judgment, we take evidence favorable to Aunan as true and resolve all doubts in his favor. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Nixon*, 690 S.W.2d at 548. When both sides move for summary judgment, the court is to review both sides' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

In addressing whether summary judgment was appropriate, we must decide first whether the Contract is ambiguous. We look to the Contract as a whole and give effect to each provision when determining whether paragraph eight is ambiguous. *Besteman v. Pitcock*, 272 S.W.3d 777, 785 (Tex. App.—Texarkana 2008, no pet.) (citing *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983)). If the court could properly give paragraph eight a definite or certain legal meaning or interpretation, then it was not ambiguous. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. 2009). Just because the parties advance conflicting interpretations of the Contract, that does not make it ambiguous. *Hicks v. Castille*, 313 S.W.3d 874, 880 (Tex.

App.—Amarillo 2010, pet. filed). An ambiguity exists if the contract language is susceptible to two or more reasonable interpretations after applying the applicable rules of construction. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774 (Tex. 2006); *Enter. Leasing Co. of Houston v. Barrios*, 156 S.W.3d 547 (Tex. 2004).

"The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). "We construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive.'" *Frost Nat'l Bank v. L & F Distribs., Ltd*., 165 S.W.3d 310, 312 (Tex. 2005) (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527 (Tex. 1987)); *see Old Republic Sur. Co. v. Palmer*, 5 S.W.3d 357, 360 (Tex. App.—Texarkana 1999, no pet.); *Nat'l Convenience Stores, Inc. v. Martinez*, 784 S.W.2d 468, 471 (Tex. App.—Texarkana 1989, writ denied) ("a reasonable interpretation of an agreement will always be preferred to one which is unreasonable").

Looking at the Contract as a whole, one can see that it sought to accomplish the business activity of obtaining Aunan's full time, professional services as Executive Vice President and CFO of Wadley, to bind him to confidentiality, to bind him for one year after his termination not to compete with Wadley in its market area or solicit its employees away, and to bind him from interfering with Wadley employees and from diverting any business from Wadley. In exchange,

not only was Aunan to be paid during his employment, but also he was to receive twelve months' severance payments if he was terminated or if he resigned under certain circumstances. The severance payments were part of the package intended to persuade Aunan to agree to the terms of Wadley's employment initially. According to Summersett's summary-judgment affidavit, the severance provisions were, in part, intended to encourage Aunan to continue his services, without undue worry about his financial future, even when his employer encountered serious business stresses and was trying to find a buyer.

Turning to the language central to this dispute, the first three sentences of paragraph eight control how Aunan could qualify for severance benefits. The first sentence provides that, if Wadley sells, merges, or stops doing business, Aunan had two contractually provided options, either to resign his position or to continue his employment as CFO of any successor corporation or holding company in the Wadley system. The second sentence provides that, if Aunan elected to resign "at such time," he could entitle himself to severance benefits, as if he had been terminated. The third sentence provides, "Any election to terminate [Aunan's] employment under this Paragraph must be made prior to the finalization and/or closing of the transaction . . . ."

Paragraph eight was triggered, because the Wadley assets were sold to Brim in a closing conducted March 1, 2009—the end of an eight-month effort to find a buyer for the financially stressed hospital operation. Therefore, Aunan could have been able to terminate his employment and to qualify for severance benefits, if he followed the terms of the Contract. This case turns on

what the Contract means when it describes Aunan's qualifying action as electing to terminate his employment "at such time" and whether the summary-judgment facts disqualify him from severance benefits as a matter of law.

Aunan argues that the phrase "at such time" means any time before the closing of a transaction, i.e., that the Contract required only that a sale or other transaction had to occur and that he had to make his election before the finalization or closing of the transaction. Because, on November 6, 2008, Aunan notified Wadley of his decision to terminate employment, and a sale to Brim closed March 1, 2009, Aunan believes he is entitled to severance benefits as a matter of law. If those were indeed the only requirements, however, then any employee who wanted to assure himself or herself of severance benefits in the event of any future sale, no matter how remote, could give a resignation notice at any time during his or her term of employment and thus be entitled to severance benefits if any sale were to occur in the future. That interpretation seems dubious.

On the other hand, CHC claims that the phrase "if you elect to terminate your employment at such time" means that Aunan's employment must have terminated at the time of the sale. From CHC's argument—in which it points out that Aunan's last day of employment with Wadley, that is, December 31, 2008, "occurred more than two months prior to the sale of the assets"—CHC effectively argues that Aunan's last day of employment must have been precisely the date of the closing of the sale of assets and that, otherwise, the Contract was not satisfied. That interpretation

seems to craft an equally dubious, narrow window, without concomitantly precise or explicit Contract language.

CHC also argues that an employee's notice to terminate employment must connect with a particular transaction. It claims that, because Aunan's notice was received in connection with the Christus transaction and because the transaction between Wadley and Christus never closed, Aunan is not entitled to severance benefits. That is true, they claim, because (1) Aunan did not send notice of termination of employment with respect to the Brim transaction, and (2) he left employment before Brim and Wadley agreed to the preliminary asset purchase agreement. We find that the express language of paragraph eight does not establish CHC's position as a matter of law.

Instead, we see ambiguities in the relatively imprecise Contract language. CHC could be correct in its assertion that the Contract requires the effective date of Aunan's termination to be precisely the date the sale is closed, if the phrase "at such time" is read to link termination to the time of the sale, and if the time of the sale is understood to be the date the parties became contractually bound to sell or the date the sale is closed. But, without more explicit or precise contract language requiring Aunan's last day to coincide with closing the sale, we believe there are other reasonable interpretations.

While Aunan had to make his election before the closing of the sale to Brim, it is possible the Contract might be reasonably understood as linking the election generally to the season of the

sale, for example, to the time a sale or cessation of business became contemplated. Here, it seems at least possible that some sale or transfer of hospital assets, or the cessation of business, was within the contemplation of Wadley and its executive employees, including Aunan, when he gave notice of his election to terminate his employment, given that Aunan's affidavit states he attended a board meeting in which a sale to some entity was imminent to prevent cessation of operation within sixty days. If proven, would that be sufficient to qualify him for severance benefits?

Because of the peculiar structure of this agreement—if Wadley sells or closes, Aunan may resign "at such time" and qualify for severance benefits, but he must make his election before the sale closes or operations cease—the parties necessarily assumed that, at the time of Aunan's election, there would be some degree of anticipation of, or some degree of connection with, a sale or closure that ultimately occurs.[2] Otherwise, it would be impossible for Aunan to make any election before a closing or closure. The Contract is silent on what type of anticipation or connection Wadley and Aunan contemplated with this Contract, whether it be, for example, (1) Aunan's simple awareness of some sort of impending sale or closure that ultimately occurs, (2) an identification, with or without a letter of intent, of a particular potential buyer who ultimately buys, or (3) a binding contract to sell to a particular buyer who ultimately buys.

[2]Our conclusion that the parties intended some anticipation of, or some connection with, a sale or closure does not even consider the paragraph-four requirement that Aunan give a thirty-day notice of termination. The parties seem to have assumed that a thirty-day advance notice was required, even in a paragraph-eight termination, but that is not among the issues discussed on appeal.

This Contract was drafted by Wadley and was a letter agreement, which could have been considerably more formal or more explicit. While one might reasonably interpret this Contract to require that a particular sale to a particular buyer be contemplated at the time of Aunan's election to terminate and that the contemplated sale be ultimately closed, the Contract does not expressly say that. We are uncertain about what was intended. We, therefore, conclude that a contract ambiguity exists regarding the Contract's required degree of anticipation of, and/or required degree of connection with, a sale or closure that ultimately occurs. One or more fact issues also may exist concerning whether such required anticipation and/or connection existed when Aunan made his election to resign.

Therefore, we reverse the summary judgment and remand this matter to the trial court for further proceedings consistent with this opinion.

Josh R. Morriss, III
Chief Justice

Date Submitted: October 18, 2010
Date Decided: December 16, 2010