TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00799-CV

Mike Morath, Texas Commissioner of Education;[1] and Robstown Independent School District, Appellants

v.

Leobardo Cano, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT NO. D-1-GN-15-000086, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The pivotal question in this appeal is whether an "Early Termination" provision in a school superintendent's term-employment contract, enabling the school district to terminate the contract "with or without cause" and obtain a mutual release of claims in return for severance pay, supplants the common-law right the district would possess to terminate the contract upon the superintendent's material breach. We conclude it does not.

BACKGROUND

The superintendent in question, appellee Leobardo Cano, contracted with appellant Robstown Independent School District (RISD or the District) to serve as its interim superintendent

[1] We have substituted the current officeholder. *See* Tex. R. App. P. 7.2(a).

for the term November 3, 2012, to June 30, 2013, at a salary of $10,000 per month.[2] The contract obligated Cano to "faithfully perform the duties of the Superintendent of Schools of the District as provided by the laws of the State of Texas, including but not limited to the rules and regulations of the Texas Education Agency and the policies of the Board now in force or adopted during the term of this contract." The contract also contained the following provision:

> **Early Termination.** This Contract may be terminated by the District at any time prior to its expiration, with or without cause, upon written notice to Superintendent and the payment by the District of an amount equal to six (6) months' salary [i.e., $60,000 at Cano's agreed-upon monthly salary], or an amount equivalent to the salary for the months remaining in the Contract term at the time of notice, whichever is less. In the event of any such early termination and payment, the provisions of Chapter 21 of the Texas Education Code concerning non-renewal and termination shall not apply, and the District and Superintendent agree to execute a mutual release relinquishing any and all claims that each party may have against the other for and in consideration of the payment made by the District in connection with such early termination and such mutual release.

The contract provided elsewhere that "[n]othing in this shall constitute any right to continued employment pursuant to the Term Contract Non-Renewal Act[3] or any other provisions of the Texas Education Code."

Following a November 6, 2012, election that impacted the Board's composition, RISD placed Cano on paid administrative leave. Thereafter, the Board by letter of December 5

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[2] Cano and RISD had previously agreed to an interim contract, dated June 2012, "for an indefinite period until the District selects another . . . Superintendent." The subsequent contract discussed above, which is the contract at issue in this proceeding, explicitly "supersede[d] and replace[d] any existing contract . . . between the Interim Superintendent and the District" (including the June 2012 contract) and "set[] forth the entire agreement between the parties."

[3] *See* Tex. Educ. Code §§ 21.201–.213. Absent material intervening substantive change, we cite current versions of statutes and rules for convenience.

notified Cano that it intended to terminate his contract (though he denies receiving the letter until December 11) and voted to approve his termination on December 11. On the following day, RISD notified Cano by letter that his contract had been terminated based on the District's determination that Cano had engaged in the following misconduct:

1. Cano violated RISD Board Policy by committing the District to two contracts without obtaining required Board approvals.[4]

2. Cano granted a maintenance worker a stipend representing a $5 per-hour wage increase made retroactive to an earlier date, even though the work was not to be performed until a later date. Cano had granted this stipend, the District further determined, as a means of obtaining the Board's previous approval of his contract, which the District termed "not a legal justification."

3. Cano approved a bid from a corporation "that was not submitted according to the District's bidding procedures," and further approved an "advance payment on the proposal prior to any work being done even though the proposal specified that payment would be upon completion of the work."[5]

The December 12 letter further stated that Cano's termination was based on his violation of the contract terms, state law, applicable regulations, and Board policies, and also the "invalidity" of Cano's contract. The letter also asserted RISD's position that its grounds for termination were distinct and independent from its rights under the contract's "Early Termination" provision to

[4] Namely, RISD determined that Cano had "signed a contract with Jesus Alejandro . . . that . . . was allowed by [Cano] to exceed the $10,000 maximum in violation of Board Policy . . . in effect at that time" and had "signed another contract to continue . . . Alejandro's services purporting to commit the District to pay . . . Alejandro an additional $28,500.00 . . . , thus totaling $70,000.00[,] without Board approval which exceeded the $50,000 maximum in violation of Board Policy . . . in effect at that time."

[5] Elsewhere, RISD has elaborated, without apparent dispute from Cano, that this favored corporation was owned by one of the Board members who had approved Cano's contract. It adds that this member was among those who departed after the November election.

terminate "with or without cause" and obtain mutual releases in return for paying Cano severance pay, emphasizing that "the Board did not exercise the right of 'early termination' in the . . . Contract that would provide for a payment equal to six (6) months' salary."

Cano filed a grievance with the Board regarding his termination, pursuant to District Policy.[6] After a hearing, the Board denied the grievance by a 4–2 vote (with one member absent), thereby affirming Cano's termination. Cano then appealed the Board's decision by filing a petition for review with the Commissioner of Education.[7] The matter was assigned to an administrative law judge, who issued a proposal for decision recommending that the Commissioner deny Cano's petition for review. The Commissioner agreed.

As reflected in the Commissioner's order and confirmed on appeal, the pivotal issue framed by the administrative proceedings was whether the "Early Termination" provision of Cano's contract (also termed "paragraph 5" in the proceedings) prescribed the sole means by which RISD could terminate the contract before its end date. In that regard, the Commissioner noted that Cano had not denied through either pleading or argument that he had committed a material breach of his contract, but had relied solely on the contention that "under paragraph 5 of the contract, . . . if the contract is terminated early, . . . he is entitled to six months' salary." Similarly, on appeal, Cano

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[6] RISD's letter terminating Cano noted that his contract "specifically provided that no rights were created under Chapter 21 of the Texas Education Code and none of the procedures for the termination of term contracts under the Code applied," but that Cano could nonetheless request a hearing on the matter before the Board.

[7] *See* Tex. Educ. Code § 7.057 (a)(2)(B); 19 Tex. Admin. Code § 157.1073 (Texas Educ. Agency, Hearings Brought Under Texas Educ. Code, § 7.057) (governing hearings brought under section 7.057 of Texas Education Code, including providing for review under the Administrative Procedure Act's substantial-evidence standard).

concedes that he "did not challenge [the] issue of materiality because it would be futile given the disputed evidence and the 'substantial evidence' standard of review" (though he emphasizes that he does not factually admit "the allegations underlying the District's findings of materiality"[8]). "[T]he focus of his grievance and appeals," Cano explains, "is that, regardless of whether these allegations are true, he was legally entitled under his contract to work until June 30, 2013, or be released under the 'early termination' provision," and in the latter case receive severance pay. Rejecting that premise, the Commissioner concluded that "[p]aragraph 5 does not establish the exclusive way that [RISD] can terminate the contract before the expiration of the contract."

Cano appealed the Commissioner's decision by filing suit against the Commissioner and RISD in district court.[9] Relying on the same premise regarding the "Early Termination" provision, Cano asserted that RISD had violated his employment contract and that the Commissioner had erred in his decision. The district court agreed with Cano and reversed the Commissioner's decision. Its judgment further declared that (i) "Cano has an enforceable contract with [RISD] which was not properly terminated"; (ii) "Cano suffered pecuniary harm by virtue of the improper termination of his employment contract"; and (iii) "the Commissioner failed to properly assess the extent of . . . Cano's pecuniary harm due to his erroneous decision on the merits of . . . Cano's appeal." The judgment also proceeded to award Cano "$60,000 as the sum owed for his early termination . . . , as required by [paragraph] 5." This appeal followed.

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[8] Cano attributes his termination to the "improper political motivations" of the post-election Board.

[9] *See* Tex. Educ. Code § 7.057(d) (granting right to judicial review to person aggrieved by decision of Commissioner of Education).

ANALYSIS

RISD and the Commissioner filed separate appeal briefs, the thrusts of which are that the "Early Termination" provision in Cano's employment contract did not supplant or eliminate RISD's common-law right to terminate the contract based on Cano's material breach (which, again, is conceded for purposes of this appeal), nor did the provision compel the District to pay Cano severance pay in that event. While judicial review of Commissioner decisions is governed by an overarching substantial-evidence standard,[10] our inquiry here turns entirely on the proper construction of the parties' contract, which as in other contexts entails questions of law that we review de novo.[11] Our primary objective is to ascertain and give effect to the intent of the parties as

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[10] *See* Tex. Gov't Code § 2001.174; 19 Tex. Admin. Code § 157.1073(h) ("Standard of review in hearings against a school district. If no findings of fact are made by the board of trustees, the commissioner shall determine whether the decision is supported by substantial evidence by judging whether any permissible findings of fact support the board's decision."); *Poole v. Karnack Indep. Sch. Dist.*, 344 S.W.3d 440, 443 (Tex. App.—Austin 2011, no pet.) (concluding that substantial-evidence standard of review applies to scope of judicial review of Commissioner decisions); *see also Jenkins v. Crosby Indep. Sch. Dist.*, ___ S.W.3d ___, No. 03-15-00313-CV, 2017 Tex. App. LEXIS 5428, at *8–11 (Tex. App.—Austin June 15, 2017, no pet. h.) (describing application of "substantial evidence" rule in context of review of Commissioner's decision to affirm decision of school board and observing that "[w]e apply this analysis without deference to the district court's judgment" (citing *Texas Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006) (per curiam))).

[11] *See CCE, Ltd. f/k/a CCE, Inc. v. Texas Dep't of Transp.*, No. 03-10-00072-CV, 2011 Tex. App. LEXIS 1587, at *8–9 (Tex. App.—Austin Mar. 2, 2011, no pet.) (mem. op.) ("Although the formal posture of this case is an appeal of a TxDOT order determining that its engineer did not commit 'gross error' in denying CCE additional compensation, to which we apply the APA's 'substantial evidence' standard, these inquiries here turn in the first instance on pure questions of law that we review de novo—namely, the proper construction and application of the parties' contract to undisputed facts.").

objectively manifested in the written instrument.[12] Contract terms are given their plain, ordinary, and generally accepted meanings, and we construe the contract as a whole in an effort to harmonize and give effect to all of its provisions so that none will be rendered meaningless.[13] An unambiguous contract—i.e., one that can be given a certain or definite legal meaning or interpretation—is construed as a matter of law.[14]

Appellants contend that the contract's "Early Termination" provision was not the "sole" or "exclusive" right or "remedy" RISD possessed upon Cano's material breach. They point to the contract provision expressly incorporating Texas law, which in their view served to incorporate the common-law principle that would excuse the District from performing its contractual obligations upon Cano's material breach.[15] Consequently, appellants urge, the District had the option

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[12] *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 311–12 (Tex. 2005) (per curiam); *CCE, Ltd.*, 2011 Tex. App. LEXIS 1587, at *9.

[13] *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005); *CCE, Ltd.*, 2011 Tex. App. LEXIS 1587, at *9.

[14] *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *CCE, Ltd.*, 2011 Tex. App. LEXIS 1587, at *9.

[15] *See Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436–37 (Tex. 2017) (per curiam) (noting that "'[i]t is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance,'" *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam), and that "a material breach excuses *future* performance, not *past* performance").

of invoking and being subject to the contract's "Early Termination" provision, as it could always do, or invoking the independent right to terminate that arose under Texas common law upon Cano's material breach.[16] Further elaborating on this reasoning, RISD points out that the "Early Termination" provided benefits to both parties that neither would enjoy in the event of its independent termination for material breach—a mutual release of claims in consideration for the severance pay. By foregoing its rights to terminate under the "Early Termination" provision, RISD continues, it "assume[d] the legal risks of terminating the contract for material breach."[17] Appellants also rely on cases holding that a contractual remedy is not exclusive absent express language in the

[16] *See, e.g.*, *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 653 (Tex. App.—Dallas 2015, no pet.) ("It is well-settled that upon breach of contract, a party may pursue any remedy which the law affords in addition to the remedy provided in the contract."). The Cano contract was "subject to all applicable federal and state laws, rules and regulations," which in appellants' view necessarily includes Texas common law.

[17] RISD also compares Cano's contract (which it claims was a "non-Chapter 21" contract) with a "Chapter 21" contract. *See generally* Tex. Educ. Code §§ 21.001–.806 (Chapter 21). It represents that both types of form contracts contain a similar "Early Termination" provision that provides the District with a permissive remedy, whether in the context of a termination "for cause" (in the case of a Chapter 21 form contract), or in the context of a termination due to an employee's material breach (in the case of a non-Chapter 21 form contract). With respect to a Chapter 21 contract, the District contends that it "ha[s] the option of either going through the statutory termination procedures or exercising the 'early termination' option providing for the payment of a lump sum."

contract indicating it as such,[18] and they observe that Cano's contract nowhere states that the "Early Termination" provision is the exclusive means for terminating his contract early.[19]

In contrast, Cano points out that the "Early Termination" provision referred to termination "with or without cause," deducing that this reference to for-cause termination served to encompass termination for material breach and made the provision RISD's "exclusive remedy." Cano further emphasizes the public policy favoring freedom of contract,[20] and portrays his view of the contract as a bargain in which he obligated himself to work to the end of his term, foregoing other opportunities or his own right to terminate early, in exchange for a guaranteed severance payment if the District chose to exercise its early-termination right, whether with or without cause.[21]

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[18] *See, e.g.*, *Burrus v. Tornillo DTP VI, L.L.C.*, No. 08-13-00333-CV, 2015 Tex. App. LEXIS 12598, at *5 (Tex. App.—El Paso Dec. 11, 2015, pet. denied) (mem. op.) ("In general, a contract must specify that a remedy is the 'sole and exclusive remedy' in order to limit recovery for breach."); *Pelto Oil Co. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583, 586 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("Remedies provided in a contract may be permissive or exclusive, and the mere fact that the contract provides a party with a particular remedy does not necessarily mean that such a remedy is exclusive."); *Vandergriff Chevrolet Co. v. Forum Bank*, 613 S.W.2d 68, 70 (Tex. Civ. App.—Fort Worth 1981, no writ) ("A construction which renders the specified remedy exclusive should not be made unless the intent of the parties that it be exclusive is clearly indicated or declared.").

[19] In the proceedings before the district court, Cano argued that Paragraph 5's exclusivity "can be *inferred* from interpretation of the contract as a whole" and is "*intuitive*," which in appellants' view directly contradicts the common-law requirement that exclusivity must be clearly indicated. (Emphases added.)

[20] *See, e.g.*, *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 (Tex. 2004) (orig. proceeding) ("As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.").

[21] In this regard, Cano observes that the parties' prior June contract gave Cano the right to "resign at any time . . . upon fifteen (15) days' written notice," whereas the subsequent November contract did not afford Cano any such right.

Cano urges that appellants' interpretation of the contract would render the "Early Termination" provision meaningless and that this provision (in his view, a specific provision) must prevail over the contract's incorporation of Texas law (in his view, a general provision).[22]

We conclude that the "Early Termination" provision does not control under the circumstances of this case. Under Texas common law, a material breach by Cano would excuse RISD from further performance of its contractual obligations,[23] and it is uncontested that a material breach occurred here and would have entitled the District under common law to cease performance and terminate the contract.[24] The "Early Termination" provision contains no limitation on this common-law right. While a material breach by Cano would seemingly constitute "good cause" for his termination,[25] it does not follow, as Cano suggests, that the "Early Termination" provision is

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[22] *See, e.g.*, *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994) ("[W]hen a contract provision makes a general statement of coverage, and another provision specifically states the time limit for such coverage, the more specific provision will control." (citing 3 Arthur L. Corbin, *Contracts* §§ 545–54 (1960))).

[23] *See Bartush-Schnitzius Foods Co.*, 518 S.W.3d at 436–37; *Mustang Pipeline Co.*, 134 S.W.3d at 196.

[24] *See Eco Built, Inc. v. Lulfs*, No. 03-08-00427-CV, 2010 Tex. App. LEXIS 7719, at *18 (Tex. App.—Austin Sept. 17, 2010, no pet.) (mem. op.) ("When a contracting party commits a material breach, the non-breaching party must elect between two courses of action, either continuing performance under the contract *or ceasing performance and terminating the contract*." (emphasis added)).

[25] *See Black's Law Dictionary* 266 (10th ed. 2014) ("good cause. (16c) A legally sufficient reason. . . . Good cause is often the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused. The term is often used in employment-termination cases. . . . 'Issues of 'just cause,' or 'good cause,' or simply 'cause' arise when an employee claims breach of the terms of an employment contract providing that discharge will be only for just cause. Thus, just cause is a creature of contract. By operation of law, an employment contract for a definite term may not be terminated without cause before the expiration of the term, unless the contract provides otherwise.'" (quoting Mark A. Rothstein et al., *Employment Law* § 9.7,

rendered meaningless if RISD has an independent right to terminate for material breach. As RISD points out, the choice between the two alternatives has material consequences for its rights, not simply Cano's, because by foregoing the "Early Termination" provision, with its attendant severance-pay obligation, the District correspondingly forfeits the release of claims, leaving it exposed to the risk of future litigation with Cano. In sum, the District's common-law right to terminate the contract for material breach was not superseded by the "Early Termination" provision, nor was that provision rendered meaningless by RISD's exercise of its common-law right.[26]

Cano additionally contends that RISD could not "unilaterally" terminate his contract without also filing suit against him for breach of contract, which it did not do. We disagree. Upon terminating the contract, RISD was entitled either to assert its own claim against Cano for breach,[27] or to wait and assert his prior material breach as an affirmative defense in the event he filed suit

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at 539 (1994))).

[26] In its reply brief, the Commissioner raises an alternative issue that it acknowledges "[it] did not reach" in Cano's administrative appeal—namely, "the record contains substantial evidence that the . . . contract was void and unenforceable" based on "Cano improperly obtain[ing] a Board member's *quid pro quo* vote for his November 3, 2012 contract." We need not reach this alternative issue given our resolution of this appeal based on the legal question that the Commissioner did reach in its decision, i.e., the proper interpretation of the "Early Termination" provision.

[27] *See, e.g., Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006) (per curiam) (noting that non-breaching parties were "entitled to terminate the agreement and sue for breach").

against the District.[28] Although RISD did not assert material breach as an affirmative defense in its original answer, Cano waived this omission by failing to object to it.[29]

CONCLUSION

Because Cano's material breach gave rise to a right of RISD to terminate the contract that was independent of the rights conferred in the contract's "Early Termination" provision, it follows that the district court's judgment, which rests on the contrary premise, must be reversed. We reverse the district court's judgment and render judgment affirming the Commissioner's decision.[30]

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Reversed and Rendered

Filed: August 17, 2017

[28] *See Blackstone Med., Inc.*, 470 S.W.3d at 646 ("The contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense that must be affirmatively pleaded.").

[29] *Cf. Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex. 1993) ("[A]lthough it was not pled by either party, the trial court appropriately submitted this [contractual] ambiguity to the jury because it was tried by consent of the parties." (citing Tex. R. Civ. P. 67)); *Roark v. Stallworth Oil & Gas., Inc.*, 813 S.W.2d 492, 494–95 (Tex. 1991) (recognizing that summary judgment ground can be founded on unpleaded affirmative defense if opposing party fails to object to absence of pleading).

[30] *See* Tex. Gov't Code § 2001.174(1).