COURT OF APPEALS DECISION DATED AND FILED

August 5, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1040

Cir. Ct. No. 00CV001893

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

JEAN STEWART,

PLAINTIFF-APPELLANT,

V.

THE DOUGLAS STEWART COMPANY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Jean Stewart appeals a judgment of the circuit court granting summary judgment to her former employer, The Douglas Stewart Company. Stewart argues that the Company failed to pay her deferred compensation in accordance with an employment contract she entered into with the Company in 1982. We reject Stewart's arguments and affirm the circuit court.

Background

¶2 Stewart and her husband founded the Company in 1950. In 1979, they sold the Company to their son and his family. In 1982, Stewart entered into a written employment agreement with the Company. The agreement specified Stewart's duties and compensation. The agreement specified that the term of employment was ten years, commencing September 1, 1982, and gave Stewart the right to deferred compensation payments commencing the month after "termination" of the agreement. The pertinent agreement language is as follows:

> WHEREAS, [the Company] desires to enter into a contractual agreement to retain Stewart's services and to provide for payment for those services in the form of compensation during the years of continuing service and in the form of deferred compensation payable after Stewart's active employment has terminated, all such compensation payable as set forth herein ….
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> ….
>
> Deferred Compensation. As an additional incentive to retain Stewart's continued services, [the Company] shall pay to Stewart additional compensation as hereinafter set forth, such deferred compensation to be paid to Stewart in equal monthly installments commencing on the first day of the month following the termination of this agreement or Stewart's earlier retirement. Stewart may retire prior to the termination of this agreement if [the Company] and Stewart mutually agree to such a retirement earlier than September 1, 1987, or if Stewart unilaterally decides to retire at any time after September 1, 1987 which said retirement [the Company] does hereby agree that Stewart may so do.… The deferred compensation payable hereunder shall continue to be paid to Stewart throughout her life, and if her husband, Douglas Stewart, shall survive her, then such deferred compensation shall continue to be paid to Douglas Stewart throughout his life.

¶3 After the ten-year period expired at the end of August 1992, Stewart continued working for the Company without a new or expressly extended

agreement. There were negotiations, but those negotiations did not produce a new agreement. Stewart continued to work and be paid in accordance with the 1982 agreement.

¶4 Stewart stopped working for the Company in January 2000. Thereafter, a dispute arose over her right to deferred compensation. Stewart sued the Company, claiming breach of contract. She alleged that, under the 1982 agreement, the Company was required to commence paying her deferred compensation in 1992 when the agreement "terminated" and failed to do so. Both parties moved for summary judgment.

¶5 The circuit court granted summary judgment in favor of the Company. The circuit court concluded that the agreement was ambiguous with respect to Stewart's right to deferred compensation payments and that a factual dispute precluded summary judgment on the basis of contract interpretation. However, the circuit court determined that Stewart's claim was barred in its entirety by the doctrine of laches and barred with respect to the time prior to July 10, 1994, by the applicable statute of limitations. Stewart appeals.

Discussion

¶6 We review summary judgment *de novo*, applying the same method as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

¶7 We conclude that the circuit court correctly granted summary judgment in favor of the Company, but we employ different reasoning. We focus our attention on the particular deferred compensation language in the employment agreement on which Stewart herself relies. The deferred compensation clause states that the Company "shall pay to Stewart … deferred compensation … in equal monthly installments commencing on the first day of the month following the *termination* of this agreement" (emphasis added). It is undisputed that the stated term of the agreement is ten years and that this ten-year period ended on August 31, 1992. The dispositive issue is whether the employment agreement "terminated" at the end of August 1992, or instead survived and "terminated" when Stewart stopped working for the Company in January 2000.

¶8 The Company argues that, when Stewart continued working past the ten-year agreement term, the agreement did not terminate because it was extended by operation of law. It follows, according to the Company, that it complied with the agreement by commencing deferred compensation payments to Stewart after her employment terminated in 2000. Stewart responds that her employment agreement was not "extended" when she continued working past the original agreement term. Stewart apparently hangs her hat on the distinction between being an employee with a fixed contract term (her status under the original agreement) and being an employee "at will" (her alleged status after the original agreement expired). Stewart notes that the Company itself concedes that in 1992 the parties exchanged various proposals, but reached no new agreement. She further points out that the Company president averred that he refused to agree to employment proposals made by Stewart and that Stewart "continued to work for [the Company] after 1992 as an at-will employee."

¶9 We agree with the Company and conclude that Stewart's employment agreement did not terminate in 1992, but instead was extended by operation of law until she stopped working in 2000. Further, we conclude that it does not matter whether Stewart became an "at will" employee or had a right to an extended agreement in time increments. In either case, all provisions of the agreement, except its stated ten-year duration, were extended by operation of law. Thus, "termination" occurred in 2000 and Stewart's right to deferred compensation payments commenced that same year.

¶10 We glean from a series of cases, beginning at least with ***Kellogg v. Citizens Insurance Co. of Pittsburgh***, 94 Wis. 554, 557, 69 N.W. 362 (1896), the general rule that when an employee under contract continues employment past the contract term without a new agreement, there is a presumption that employment continues on the same terms. For example, in ***Meyers v. Wells***, 252 Wis. 352, 353-54, 31 N.W.2d 512 (1948), an employee with a contract for a three-year term worked several years past the three-year term without a new agreement. In resolving the parties' dispute, the ***Meyers*** court employed the presumption that employment continued on the same terms. *See* ***id.*** at 357 ("It is a general rule of law that if an employee continues working after his term expires and no new contract is made it will be presumed the parties intended he should be paid the same wages he received under the original contract."); *see also* ***Borg-Warner Corp. v. Ostertag***, 18 Wis. 2d 484, 489, 118 N.W.2d 900 (1963) ("Where an employee is hired by the year and continues in employment after the end of a particular year, there is a presumption that he is again employed for the new year on the same terms as before."); ***Dickinson v. Norwegian Plow Co.***, 101 Wis. 157, 160, 76 N.W. 1108 (1898) (contract provisions continue to apply "unless there be

a new agreement shown, or at least facts which are sufficient to rebut the legal presumption and show that a different hiring was in fact intended by the parties").

¶11 Stewart might respond that the above cases do not address her argument that her term-certain contract "terminated" in 1992 and she continued on as an "at will" employee. Assuming, for the sake of argument, that Stewart went from having a ten-year contract to being an "at will" employee, we nonetheless conclude that her employment agreement did not terminate. All that changed was the efficacy of the ten-year-term provision.

¶12 "At will" employees often work pursuant to employment contracts. *See*, *e.g.*, ***Holloway v. K-Mart Corp.***, 113 Wis. 2d 143, 145, 334 N.W.2d 570 (Ct. App. 1983) ("Employment contracts which specify no term of duration and which fix compensation at a certain amount per day, week or month are terminable at the will of either party. Discharge of an employee hired under such a contract does not constitute a breach of the contract justifying the recovery of [wages or benefits after the discharge]." (citation omitted)). It is undisputed that Stewart continued to work under the terms of her contract after the ten-year term and, as we have explained, she had a legal right to the benefits of that contract so long as she continued in the Company's employment without entering into a new contract.

¶13 In sum, Stewart's employment agreement did not terminate in 1992. Because Stewart continued working for the Company beyond the termination date contemplated by the agreement, the agreement was extended by operation of law and all of the provisions in that agreement, except of course, the ten-year term provision itself, continued in effect. It is illogical to say that Stewart's employment agreement automatically extended for purposes of Stewart's

obligations and Stewart's rights, such as compensation, but terminated for purposes of Stewart's right to deferred compensation.

¶14 Further, because of our conclusion that the agreement terminated in 2000, there is no dispute that the Company abided by the agreement when calculating and paying Stewart deferred compensation. Therefore, the circuit court correctly granted summary judgment in favor of the Company, thereby rejecting all of Stewart's claims.

¶15 Our resolution of the termination issue makes it unnecessary to resolve Stewart's argument that the introductory "recital clause" is trumped by the "operative" language in the agreement and her argument that the circuit court erred in applying the doctrine of laches.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 03-1040(D)

¶16 DYKMAN, J. (*dissenting*). Employers and employees with deferred compensation plans should take a hard look at the majority's opinion to see whether legislative repair is in order. The parties agree that Jean Stewart's contract with The Douglas Stewart Company, Inc., was for the period September 1, 1982, to August 31, 1992. Part of the contract obligated the company to pay Jean Stewart deferred compensation "commencing on the first day of the month following the termination of this agreement." The contract acknowledged that the deferred compensation, using an agreed formula, would be paid to Jean Stewart for life. She was to be paid sixty-five percent of the weighted average of her previous salary, with cost-of-living increases. In overall money terms, this was a very significant benefit to Jean Stewart. She had earned this deferred compensation when her contract ended on August 31, 1992.

¶17 The majority does not tell us whether it deems the parties' contract ambiguous. I conclude that it is unambiguous. Had Jean Stewart retired on August 31, 1992, I do not read the company's brief as arguing that she would not have been entitled to the deferred compensation she earned during the ten years she worked pursuant to the terms of her contract. But somehow, because Stewart didn't retire, and instead continued working for the company for an additional seven years, her deferred compensation, which was to be paid after her contract ended, disappeared. Poof! She didn't receive larger deferred compensation payments when she eventually retired. She received nothing for ten years' work except the salary that both parties agree she earned and was paid. That's what the majority concludes.

¶18 To me, this is a startling conclusion. I have always believed that courts enforce contracts. The majority opinion deviates from this accepted principle. As I see it, the majority's reasoning goes like this: Stewart's deferred compensation was not payable during the term of her contract. Therefore, if the contract was really for seventeen years, no deferred compensation would be payable. We will pretend that the contract was for seventeen years. Therefore, no deferred compensation is due.

¶19 By depriving Stewart of her deferred compensation, the majority has violated Article I, Section 10 of the United States Constitution and article I, section 12 of the Wisconsin Constitution, both of which prohibit government from impairing the obligation of contracts. *See* ***Havemeyer v. Iowa County***, 70 U.S. 294, 303 (1866) (holding that a contract valid by the constitution and laws of a state cannot be impaired by subsequent action of the legislature or judiciary). *See also* ***State ex rel. Cannon v. Moran***, 111 Wis. 2d 544, 559, 331 N.W.2d 369 (1983) (stating that if a contract clause is to retain meaning, it must impose some limits on the power of the State to abridge existing contractual relationships). The majority is *required* to uphold Stewart's contract, not destroy it.

¶20 The majority repeats three times that the contract was extended to seventeen years "by operation of law." But it does not explain which law does this, or what the "operation" was that made a ten-year contract into a seventeen-year contract. The only "operation of law" that I can see is the fact that a majority of this court has concluded that Stewart doesn't get what she worked for and what the company agreed to pay her. Saying "operation of law" three times works no magic for me.

¶21 The authority the majority relies upon has nothing to do with whether fringe benefits an employee earns under a contract vanish if the employee doesn't quit at the end of the contract. Instead the cases cited pertain to a common situation in which the parties dispute the present pay for present services when an employee continues to work after the expiration of an employment contract. The results in these cases are unremarkable. The cases hold that where an employee continues working after a contract ends, the employee will be paid present compensation equal to the compensation paid under the contract.

¶22 This is a different case. Deferred compensation is a contractual benefit earned along with present compensation, but paid at a future time. Deferred compensation is in part an artifact of a progressive income tax, and in part government's recognition that retirees will probably need more income for their support than social security benefits provide. It was largely unknown in 1896, 1898, 1948 and 1963, the dates of cases the majority relies upon for its conclusion.

¶23 The majority throws a monkey wrench into the workings of deferred compensation plans by effectively valuing the plans at zero if an employee works after the time the deferred compensation is payable. The lesson to be learned is to quit at the end of a contract that includes deferred compensation, but this lesson carries a price for employers and employees. While a secondary contract near the end of an employment contract would solve the problem the majority creates, many may not know of this possible solution.

¶24 Had I been able to attract the vote of one of my colleagues, I would have concluded that Stewart was entitled to the deferred compensation she earned. I do not accept the company's view that the recital clauses of the contract trump

the language of the contract itself. The contract provides that Stewart is entitled to her deferred compensation "to be paid to Stewart in equal monthly installments commencing on the first day of the month *following the termination of this agreement.*" (Emphasis added.) The agreement unambiguously terminated on August 31, 1992. To me, this settles the matter. I would have concluded that the equitable defense of laches was inapplicable where a statute of limitations specifically applicable to contracts governed Stewart's claim. *See* WIS. STAT. § 893.43 (2001-02). For me, no material facts are in dispute. I would therefore grant summary judgment in Stewart's favor. I therefore respectfully dissent.