

STATE OF MICHIGAN
COURT OF APPEALS

NASIR ALI, MIR ASGHAR, and MID
MICHIGAN AMBULATORY PHYSICIAN, PLC
d/b/a ADVANCE URGENT CARE & WALK-IN
CLINIC,

UNPUBLISHED
March 18, 2014

Plaintiffs-Appellees,

v

HORA S. LOLOEE,

No. 313939
Ingham Circuit Court
LC No. 11-001326-CK

Defendant-Appellant.

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant, Hora S. Loloee, appeals as of right the trial court's judgment in favor of plaintiffs, Nasir Ali, Mir Asghar, and Mid Michigan Ambulatory Physician, PLC. Loloee contends that the trial court erred by improperly interpreting the terms of an unambiguous contract. We reverse and remand.

I. FACTS

A. BACKGROUND FACTS

Mid Michigan Ambulatory Physician is an urgent-care medical facility of which Ali and Asghar are members and owners. Loloee invested \$20,000 in Mid Michigan Ambulatory Physician pursuant to an employment agreement. Mid Michigan Ambulatory Physician eventually terminated Loloee's employment. In a previous case, Loloee sued Mid Michigan Ambulatory Physician, asserting breach of contract, among other claims.¹ In that case, this Court reversed the trial court's grant of summary disposition regarding Loloee's breach of contract claim and remanded on the basis that Loloee's entitlement to a 10 percent bonus was

¹ *Loloee v Ali*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2010 (Docket No, 284881).

independent from her right to employment.² The parties resolved the case through case evaluation.

Ali and Asghar subsequently filed a declaratory judgment claim, asking the trial court to determine whether (1) Mid Michigan Ambulatory Physician was a party to the contract, (2) the 10 percent bonus applied to the profits of Ali and Asghar individually, (3) a September 20, 2005 letter removed Loloee's contractual entitlement to the bonus, and (4) Loloee extinguished her entitlement to the bonus by retaining her investment when it was returned.

B. THE EMPLOYMENT AGREEMENT

The employment contract provides in pertinent part:

This Agreement made and entered into this 03 day of June 2005, by and between Dr. Nasir Ali MD. and Dr. Mir Asghir [sic] MD. of Mid Michigan Ambulatory Physician, PLC "employers", and Mrs. Hora S. Loloee "employee". The parties recite that:

A. Employers are engaged in Mid Michigan Ambulatory Physician medical Center and maintains [sic] business premises at 1021 Karl Greimel Drive, Brighton, MI 48116.

* * *

1. AGREEMENT TO EMPLOY AND BE EMPLOYED

Employers hereby employs employee as the Office Manager and Register Medical Assistant (RMA) at the above-mentioned premises, and employee hereby accepts and agrees to such employment.

* * *

6. BONUS

In addition to the foregoing, employers will guarantee employee 10% of the net profits earned yearly, as a "Bonus". Employee shall continues [sic] to receive this bonus annually irrespective of whether or not the employee continues her employment beyond the required minimum of 3 years of employment, unless she request repayment of the good faith loan she made to employers on May 2005.

² *Id.* at 18-19.

* * *

12. CONTRACT TERMS TO BE EXCLUSIVE:

This written agreement contains the sole and entire employment agreement between the parties, and supersedes any and all other employment agreements between them. . . .

13. WAIVER OR MODIFICATION INEFFECTIVE UNLESS IN WRITING

No waiver or modification of this employment agreement or of any covenant, condition, or limitation herein contained shall be valid unless in writing and duly executed by the party to be charged therewith. Furthermore, no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration, or litigation between the parties arising out of or affecting this agreement, or the rights or obligations of any party hereunder, unless such waiver or modification is in writing, duly executed as aforesaid. The provisions of this paragraph may not be waived except as herein set forth.

C. LOLOEE'S TERMINATION

On September 20, 2005, Mid Michigan Ambulatory Physician informed Loloee by letter that she was relieved of her duties as office manager (the demotion letter). The demotion letter, signed by Asghar acting on behalf of Mid Michigan Ambulatory Physician, stated in part:

We have evaluated for initial performance and have determined that as of this time you are not qualified for the position of Office Manager.

* * *

As you are still in your initial probationary stage of employment, we are willing to continue your employment as solely a Registered Medical Assistant under the following terms and conditions:

a. you will continue as an employee at will with an additional three month probationary period at which time you will receive a formal evaluation;

* * *

Further, as we have not been able to resolve the issues in negotiating the terms for your loan to the Mid Michigan, we hereby agree to return your loan of \$20,000 deposited by Mid Michigan on September 14, 2005. We have had a certified check cut for this amount and will forward it on the acknowledgement of this letter.

Please confirm receipt of this notice by signing and returning the enclosed duplicate to Mid Michigan Ambulatory Physician.

The letter also contained a check for \$20,000. Loloee signed and returned the letter.

On September 28, 2005, Loloee returned the \$20,000 check, stating in an accompanying letter that she had not requested the return of her investment. On October 5 or 6, 2005, Mid Michigan Ambulatory Physician informed Loloee that it was terminating her employment (the termination letter). The termination letter contained another check for \$20,000.

On October 17, 2005, Loloee sent Ali and Asghar another letter, stating in part that she had not requested return of her investment and that she remained entitled to the 10 percent bonus. However, Loloee stated that, rather than mailing the check back and forth, she would deposit the check and hold the funds until Mid Michigan Ambulatory Physician requested their return. Loloee subsequently spent the funds on personal bills.

D. THE TRIAL COURT'S OPINION AND ORDER

Following a bench trial, the trial court granted declaratory relief to Ali and Asghar. The trial court found that the "appropriate party" to the contract was Mid Michigan Ambulatory Physician. The trial court then found that the demotion letter modified the parties' prior agreement because Loloee signed and returned the letter and returned to work, Ali and Asghar did not immediately terminate Loloee, and Ali and Asghar returned Loloee's \$20,000 loan. Alternatively, the trial court found that Loloee constructively requested the return of her loan by depositing the check and spending the funds.

II. CONTRACTUAL INTERPRETATION

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court's findings of fact following a bench trial.³ The trial court's findings of fact are clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.⁴ We review de novo the trial court's conclusions of law.⁵

This Court reviews de novo whether a contract's language is ambiguous.⁶ This Court also reviews de novo the proper interpretation of a contract and the legal effect of a contractual clause.⁷

³ MCR 2.613(C); *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

⁴ *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995).

⁵ *Trader*, 293 Mich App at 215.

⁶ *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

⁷ *Id.*; *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372; 817 NW2d 504 (2012).

B. LEGAL STANDARDS

The goal of contractual interpretation is to honor the parties' intent.⁸ We discern the parties' intent from the contract's language.⁹ If the contract's language is unambiguous, courts must enforce the contract as written.¹⁰

A contract is not ambiguous simply because it is "inartfully worded or clumsily arranged[.]"¹¹ A contract is only ambiguous when its provisions are capable of conflicting interpretations.¹² Courts may not undermine the parties' freedom to contract by rewriting clear contractual language to comply with what the court perceives as the parties' intent.¹³

C. PARTIES TO THE CONTRACT

Loloe contends that the trial court erred by determining that Mid Michigan Ambulatory Physician was her employer for the purposes of the bonus provision, rather than the individual plaintiffs Ali and Asghar. We agree.

Here, the contract provides that

This Agreement made and entered into this 03 day of June 2005, by and between *Dr. Nasir Ali MD. and Dr. Mir Asghir [sic] MD. of Mid Michigan Ambulatory Physician, PLC "employers"*, and Mrs. Hora S. Loloe "employee". . . .

A. Employers are engaged in Mid Michigan Ambulatory Physician medical Center and maintains [sic] business premises at 1021 Karl Greimel Drive, Brighton, MI 48116.¹⁴

The contract later states that "*employers will guarantee employee 10% of the net profits earned yearly*"¹⁵

The contract's first paragraph clearly indicates that the individual doctors are Loloe's employer. It states that the doctors are "of" Mid Michigan Ambulatory Physician. In the context

⁸ *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 73; 719 NW2d 890 (2006).

⁹ *Id.*

¹⁰ *Klapp*, 468 Mich at 469; *DeFrain*, 491 Mich at 372.

¹¹ *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012).

¹² *Klapp*, 468 Mich at 467.

¹³ *DeFrain*, 491 Mich at 372; *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004).

¹⁴ Emphasis supplied.

¹⁵ Emphasis supplied.

of contractual construction, the word “of” is “used to indicate inclusion in a . . . class and used to indicate possession or association.”¹⁶ That Ali and Asghar are ‘of’ Mid Michigan Ambulatory Physician simply indicates that they are associated with it. It does not indicate that Mid Michigan Ambulatory Physician is an employer. Additionally, the second paragraph clearly distinguishes the employers from Mid Michigan Ambulatory Physician by indicating that it is a separate venture in which they are engaged. And finally, the bonus paragraph itself refers to employers, plural, further indicating that Mid Michigan Ambulatory Physician—a singular entity—was not the employer for the purposes of that provision.

We conclude that the contract is not capable of conflicting interpretations regarding who employed Loloee for the purposes of the bonus provision. Thus, the contract is not ambiguous, and the trial court should have enforced its terms as written.

III. CONTRACTUAL MODIFICATION

A. STANDARD OF REVIEW

This Court reviews for clear error the trial court’s findings of fact following a bench trial.¹⁷ The trial court’s findings of fact will be clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.¹⁸ We review de novo the trial court’s conclusions of law.¹⁹

This Court reviews de novo the proper interpretation of a contract and the legal effect of contractual provisions.²⁰ We review de novo the legal effect of a contractual clause.²¹

B. LEGAL STANDARDS

Because parties enjoy the freedom to contract, they may mutually agree to modify the terms of an agreement, regardless of any modification restrictions in their original agreement.²²

C. THE BONUS PROVISION

¹⁶ *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 113; 724 NW2d 485 (2006) (internal quotation marks and citation omitted) (2007).

¹⁷ MCR 2.613(C); *Trader*, 293 Mich App at 215.

¹⁸ *SSC Assoc Ltd Partnership*, 210 Mich App at 452.

¹⁹ *Trader*, 293 Mich App at 215.

²⁰ *DeFrain*, 491 Mich at 366-367.

²¹ *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003).

²² *Id.* at 364.

Loloe contends that the trial court erred when it concluded that the demotion letter modified the bonus provision of the employment agreement. We agree.

The trial court's conclusion was incorrect in several respects. First, the trial court erred when it determined that Mid Michigan Ambulatory Physician was a party to Loloe's employment contract. The demotion letter was from Mid Michigan Ambulatory Physician, who was not a party to Loloe's contract. A modification occurs when parties mutually agree to vary the terms of an existing contract.²³ There was no existing contract between Loloe and Mid Michigan Ambulatory Physician for the demotion letter to modify.

Second, the trial court relied on the fact that Loloe returned to work at a reduced pay after she received the demotion letter to support its conclusion. But this finding does not support the trial court's conclusion. This Court has previously concluded that employment provision of the parties' employment contract was separate and distinct from the bonus provision.²⁴ That Loloe may have modified her *employment* by a course of conduct would have no effect on whether she was still entitled to a bonus under a separate contractual provision.

Third, the trial court concluded that, by signing and returning the demotion letter, Loloe agreed to modify her employment contract. However, the demotion letter provides that Loloe should

[p]lease confirm receipt of this notice by signing and returning the enclosed duplicate to Mid Michigan Ambulatory Physician.

By the letter's plain language, signing and returning it merely acknowledged receipt of the letter. Thus, merely signing and returning the letter did not indicate that Loloe agreed to its terms.

For these reasons, we conclude that the trial court erred when it determined that the demotion letter modified Loloe's rights under the bonus provision of the parties' contract.

D. RETURN OF LOLOEE'S LOAN

Loloe contends that the trial court's alternative conclusion that she constructively requested return of her loan was also erroneous. We agree.

Parties may amend an existing contract through affirmative conduct.²⁵ The proponent of waiver and modification must show that clear and convincing evidence supports that "a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of

²³ *Id.* at 364-365.

²⁴ *Loloe v Ali*, unpublished opinion per curiam of the Court of Appeals, issued April 6, 2010 (Docket No, 284881), 8.

²⁵ *Quality Products & Concepts Co*, 469 Mich at 373.

those terms”²⁶ Additionally, when a contract provides that a waiver or modification must be in writing, the proponent of modification must also establish that the party intended to waive the written waiver and modification clause as well.²⁷

Here, the contract’s language provides that Loloee is no longer entitled to a bonus if she requests that Ali and Aghar return her \$20,000 loan:

[E]mployers will guarantee employee 10% of the net profits earned yearly, as a “Bonus”. Employee shall continues [sic] to receive this bonus annually irrespective of whether or not the employee continues her employment beyond the required minimum of 3 years of employment, unless she request [sic] repayment of the good faith loan she made to employers on May 2005.

The trial court found that Loloee did not request that Ali and Asghar return her loan. The trial court then determined that Loloee’s course of conduct—retaining the check, depositing it, and spending the funds—constituted a constructive request to return the loan.

We conclude that the trial court’s findings regarding Loloee’s subsequent course of conduct are insufficient. Because the trial court relied on Loloee’s subsequent conduct to conclude that she was not entitled to the bonus, it appears that the trial court concluded that Loloee modified the loan’s bonus provision by affirmative conduct. However, the trial court’s findings are not sufficient to support its conclusion for two reasons: (1) the trial court did not use a clear and convincing evidence standard to determine whether Loloee’s actions modified the bonus provision, and (2) the trial court did not determine whether Loloee’s actions indicated that she intended to waive the contractual clause requiring *written* waiver and modification.

IV. CONCLUSIONS

We conclude that the trial court erred when it determined that Mid Michigan Ambulatory Physician was a party to Loloee’s contract. We also conclude that the trial court erred when it determined that the demotion letter modified the bonus provision of her contract. The trial court’s findings supporting its alternative holding that Loloee constructively requested return of her loan are insufficient. Therefore, we remand for further proceedings.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Loloee may tax costs.²⁸

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

²⁶ *Id.*

²⁷ *Id.* at 373, 377.

²⁸ MCR 7.219.