STATE OF MICHIGAN

COURT OF APPEALS

PARLOVECCHIO BUILDING, INC.,

Plaintiff-Appellant,

v

CHARTER COUNTY OF WAYNE BUILDING AUTHORITY,

Defendant-Appellee.

UNPUBLISHED
February 13, 2014

No. 313257
Wayne Circuit Court
LC No. 12-007425-CK

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Wayne County's Building Authority (Building Authority) hired plaintiff Parlovecchio Building, Inc. (Parlovecchio), to serve as the "owner's representative" on a project to construct a new Wayne County jail. The parties' agreement permitted the Building Authority as the "Owner" to "terminate the contract whenever he/she determines in his/her sole discretion that such termination is in the best interest of the Owner." To effectuate termination, the contract required "delivery to the [owner's representative] of a written notice of termination."

Six months after ratifying the contract, the Building Authority terminated it. Parlovecchio sued, claiming that the Building Authority breached the contract by failing to provide written notice of the termination, and by discontinuing it in bad faith. The circuit court granted summary disposition to the Building Authority without detailing its reasoning.

We affirm the circuit court's summary disposition ruling. The Building Authority sent Parlovecchio a "Satisfaction and Release Agreement" that informed it of the contract's termination. This document met the contract's notice provision. And while Michigan law generally recognizes that commercial contracts include a background covenant of good faith and fair dealing, the covenant cannot override a clear and unambiguous contractual provision.

I. BACKGROUND FACTS AND PROCEEDINGS

Anthony Parlovecchio served as Deputy Director of Economic and Neighborhood Development for Wayne County from 2006 until early 2011. During that time, Anthony Parlovecchio acted as Wayne County's "owner's representative," otherwise known as a project manager, for several construction projects. In 2010, Wayne County decided to hire an outside contractor to act as its owner's representative for the construction of a new county jail. Anthony

Parlovecchio advised the County that he was interested in the job and willing to leave the County's employment to apply for the position.

In January 2011, Anthony Parlovecchio incorporated plaintiff Parlovecchio Building, Inc., and a month later, defendant Wayne County Building Authority approved a subcontract between Parlovecchio and AECOM, the "program manager" for the jail project. In May 2011, Parlovecchio and the Building Authority nullified Parlovecchio's role as a subcontractor to AECOM by entering into the "owner's representative contract" at the heart of this case. The contractual provision at issue provides:

> 8. TERMINATION OF CONTRACT
>
> A. Notwithstanding any provisions or language in this contract to the contrary, the Owner may terminate the contract whenever he/she determines in his/her sole discretion that such termination is in the best interest of the Owner. Any such termination shall be effected by delivery to the OR [owner's representative] of a written notice of termination.

In the fall of 2011, the Building Authority terminated Parlovecchio's contract.[1] Parlovecchio alleges that the Building Authority took this action for "political" reasons involving Turkia Mullin, the former CEO of the Wayne County Airport Authority. "Because Mr. Parlovecchio had worked under Ms. Mullin," Parlovecchio's complaint avers, "various media outlets began requesting information from the County regarding Mr. Parlovecchio and Plaintiff's contract regarding the jail project." According to Parlovecchio, a "drumbeat of questions" and "thinly-disguised allegations" that Parlovecchio's contract was a "secret, insider deal" precipitated its termination. The record evidence substantiates that on January 11, 2012, the Building Authority provided Parlovecchio with a satisfaction and release agreement reciting that the contract had been terminated. Parlovecchio refused to sign the release.

Parlovecchio then filed a one-count complaint alleging breach of contract. According to the complaint, the Building Authority violated the contract's notice provision and "acted in bad faith and abused its discretion" by terminating the agreement. Parlovecchio averred that the contract's "best interests" clause mandated that a "material change in circumstances" exist to justify termination, and that no such change had occurred.

The Building Authority moved for summary disposition under MCR 2.116(C)(8) and (C)(10). In response, Parlovecchio filed an affidavit signed by Anthony Parlovecchio stating that he never received a written notice of termination of the contract, while acknowledging receipt of the satisfaction and release agreement.

---

[1] The record provides conflicting information concerning the actual date that the Building Authority terminated the contract. According to the Building Authority's brief, the termination occurred "[i]n early December 2011." Other record sources identify the termination date as "November 2011."

Following oral argument and the submission of supplementary briefs, the circuit court granted the Building Authority's summary disposition motion. Parlovecchio now appeals.

II. ANALYSIS

"We review a trial court's decision on a motion for summary disposition de novo." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery.
>
> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." [*Id.* at 139-140 (citations omitted).]

Because the circuit court considered evidence outside the pleadings, subrule (C)(10) governs our analysis. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659 n 15; 822 NW2d 190 (2012).

Contract interpretation also presents legal questions subject to de novo review. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008).

A. The Notice Provision

The contract's notice provision is short and simple. It states that termination "shall be effected by delivery to [Parlovecchio] of a written notice of termination." We interpret contracts according to their plain and ordinary meaning. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). The release and satisfaction agreement plainly satisfied the notice requirement by providing in paragraph B that "[u]nder the terms of the Owner's Representative Agreement the Authority terminated the current agreement in November of 2011."

Parlovecchio contends that the release and satisfaction agreement cannot substitute "written notice of termination" because it constitutes an inadmissible offer to settle rather than formal notice of the contract's termination. We reject that the release was inadmissible. While MRE 408 precludes the introduction of settlement offers to prove liability or damages, it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a

criminal investigation or prosecution." MRE 408. The Building Authority proffered the release for the purpose of demonstrating notice. Because this was not a prohibited purpose under the rule, we find no merit in Parlovecchio's claim that the Building Authority breached the contract by failing to provide him with written notice of the contract's termination.

B. The "Sole Discretion" Clause

Parlovecchio next asserts that the Building Authority was obligated to exercise good faith when terminating a contract under a "sole discretion" clause, and that material fact questions concerning the Building Authority's motivation for terminating the contract precluded summary disposition. According to Parlovecchio, an implied covenant of good faith and fair dealing limited the Building Authority's ability to terminate the contract in its "sole discretion," particularly because public sector parties may not dishonor contractual obligations without cause.

"A provision in a contract for termination at the option of a party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith." *JR Watkins Co v Rich*, 254 Mich 82, 84-85; 235 NW 845 (1931). This Court, too, has recognized that a covenant of good faith and fair dealing attends contracts that make the manner of one party's performance "a matter of its own discretion." *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). In a federal case applying Michigan law, the Fifth Circuit Court of Appeals explained that "[t]he implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms." *Hubbard Chevrolet Co v Gen Motors Corp*, 873 F2d 873, 876-877 (CA 5, 1989). Only when the contract leaves open the manner of performance to a party's discretion does the implied covenant come into play. The Fifth Circuit elaborated:

> "Discretion in performance arises in two ways. The parties may find it to their mutual advantage at formation to defer decision on a particular term and to confer decisionmaking authority as to that term on one of them. Discretion also may arise, with similar effect, from a lack of clarity or from an omission in the express contract. In either case, the dependent party must rely on the good faith of the party in control. Only in such cases do the courts raise explicitly the implied covenant of good faith and fair dealing, or interpret a contract in light of good faith performance." [*Id.* at 877 fn 2 (citation omitted).]

Here, the parties neither deferred decision-making on an important term nor omitted details regarding the manner of Parlovecchio's performance. Rather, the contract clearly and unambiguously granted to the Building Authority the "sole discretion" to terminate the contract "whenever he/she determines . . . that such termination is in the best interest of the Owner." The contract is susceptible of only one meaning: the Building Authority retained the right to unilaterally decide to bring the contract to an end, based on its own interests.

"The obligation of good faith cannot be employed, in interpreting a contract, to override express contract terms." *Cook v Little Caesar Enterprises, Inc*, 210 F3d 653, 657 (CA 6, 2000). Moreover, "[t]his Court has been unwilling to recognize a cause of action for breach of an

implied covenant of good faith and fair dealing in cases involving at-will employment relationships." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992). Although strictly speaking the arrangement at issue falls somewhere between an employment contract and a commercial agreement, the unqualified nature of the termination clause leaves nothing to insinuate. Where, as here, the parties agree that one of them may terminate the contract at its sole discretion, exercised for its benefit alone, we need look no further to define the parties' rights. We decline Parlovecchio's invitation to rewrite the parties' contract.

Nor do we find any merit in Parlovecchio's claim that the Building Authority's status as a public entity changes this equation. While federal law places some limitations on the government's right to terminate a contract, no similar rule has been adopted in Michigan.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Karen M. Fort Hood