

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD D. NEWSUM,

Plaintiff-Appellant,

v

WIRTZ MANUFACTURING COMPANY, INC.,  
CONBRO, INC., PRECISION PLASTIC SHEET  
COMPANY, and OXMASTER, INC.,

Defendants-Appellees.

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UNPUBLISHED

August 14, 2008

No. 277583

St. Clair Circuit Court

LC No. 06-000534-CZ

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants in this dispute over a written employment agreement. At issue is whether Wirtz Manufacturing Co., Inc. (Wirtz), fulfilled its promise, on the termination of Precision Plastic Sheet Company's (Precision's) business, to offer plaintiff a position with "substantially the same duties and responsibilities" as he had while working for Precision. We affirm.

In October 2002, plaintiff entered into an employment agreement, with defendant Precision as the employer. Precision is a unit of defendant ConBro, Inc. Under the agreement, plaintiff was to work for Precision for five years, under the title of vice president of business development, with duties that included sales, marketing, and managing customer accounts. Paragraph 5 of the agreement provided that the agreement would commence as of "the Effective Date," described in the preamble of the agreement as October 12, 2002, and continue for 5 years (the "Term"). Paragraph 5 also provided that after the first year of the agreement, "the employer" could terminate the agreement for just cause. Just cause was defined to include a material breach of the employee's duties or employee's voluntary termination of his employment. If plaintiff's "termination was for just cause, the Term shall be deemed to have concluded as of the effective date of such termination."

The nature of the work plaintiff did for Precision is undisputed, as it is set forth in the agreement:

During the term of this Agreement, the Employee shall act on Employer's behalf for purposes of development of its business operations, including, without limitation:

(a) Promoting the sale and soliciting orders for products manufactured, marketed, sold, and delivered by Employer.

(b) Establishing, maintaining, and servicing the accounts of Employer's customers.

(c) Providing such reports, market information, and forecasts to Employer as it may require from time to time.

(d) Such other tasks as may be assigned to Employee by Employer from time to time as are consistent with the development of the Employer's business.

Paragraph four of the agreement, regarding fringe benefits, provides, in relevant part:

Employer shall also provide Employee with the following fringe benefits during the term of his employment:

(i) An annual payment of \$16,000.00 paid to the Employee to commence at the Employee's 65th birthday which is September 22, 2009. Said payments to continue during the remainder of the Employee's lifetime and are in lieu of his previous retirement . . . .

As a party to the agreement, Wirtz provided, in paragraph six of the agreement, a "*Limited Guarantee of Employment*," in the event that Precision were to go out of business (emphasis added). Specifically, the agreement provides:

*Limited Guarantee of Employment.* The Employer is an affiliate of Wirtz and, Wirtz is providing a limited guarantee of employment to the Employee. In the event Employee's employment is terminated at any time during the Term as a result of business conditions which make it impractical or impossible for Employer to continue with Employee's employment, *Wirtz shall use its best efforts to place the Employee in a position with Wirtz or one of its affiliated companies under substantially the same duties and responsibilities* (compensation and benefits will remain unchanged) *as set forth in this Agreement.* In the event Employer or Wirtz cannot place the Employee with Wirtz or one of its affiliated companies, Employee shall be required to exercise his best, good faith efforts to obtain employment with another employer and, during such term, Employer or Wirtz shall continue to pay Employee his salary and provide his benefits. [Emphases added.]

Thus, Wirtz promised to find plaintiff employment, within Wirtz, with substantially (though not necessarily exactly) the same duties and responsibilities as stated in the agreement. If plaintiff were to find another job, the salary and benefits owed by defendants would be offset by the amount he received from the new position.

The material facts surrounding Wirtz's job offer, and plaintiff's refusal, are not substantially disputed. In 2005, Precision went out of business. In August 2005, Wirtz offered

plaintiff a position at its Port Huron location. The offered position was, in Wirtz's words, a "management position, which may include manufacturing, planning, purchasing, sales functions." Wirtz stated in its last email to plaintiff: "The position you were offered will involve sales, account management and working with the production side to coordinate the sales with production planning and quality. This is the type of work you performed for Combro/Precision [sic] Plastics."

Plaintiff rejected Wirtz's offered position, concluding that it was not substantially the same in its duties. Soon thereafter, defendants ceased paying plaintiff's salary and benefits.

Plaintiff commenced this action, claiming, inter alia, that Wirtz breached its promise because it offered him a substantially different position. Plaintiff and Wirtz filed cross-motions for summary disposition. The trial court found that Wirtz's job offer was substantially similar to his prior position, and granted defendants' motion for summary disposition. The parties agree that no trial of the facts is necessary, and the dispute may be decided by the court as a matter of law. Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition, and denying his. We disagree.

We review summary dispositions de novo on appeal. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006); *Willett v Waterford Charter Twp*, 271 Mich App 38; 718 NW2d 386 (2006). A written contract's interpretation is also reviewed de novo. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). While a motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, on the allegations of the pleadings alone, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), a motion under subrule (C)(10) tests the factual sufficiency of the claim. In reviewing a motion brought under subrule (C)(10), the reviewing court examines the factual support for a claim, drawing "all legitimate inferences in the light most favorable to the nonmoving party." *Coblentz, supra*, at 567-568.

The trial court concluded that Wirtz offered plaintiff a position with "substantially the same duties and responsibilities" as those in the agreement, and thus, did not breach the agreement. We agree.

Michigan courts enforce contracts. *Coates, supra* at 503-504. We enforce contracts according to their terms, as a corollary of the parties' liberty of contract. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). We examine contractual language, and give the words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). An unambiguous contractual provision reflects the parties intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Courts may not impose an ambiguity on clear contract language. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

Paragraph six of the agreement unambiguously establishes the promises that the parties made to each other (and the duties arising therefrom, after Precision ceased operations). Wirtz's "limited" guarantee (promise) was not to offer plaintiff an identical position, but only to offer one substantially the same as his position with Precision.

In interpreting a contract, an undefined term is given its “commonly understood meaning.” *City of Grosse Pointe Park, supra* at 199. Substantially, the adjectival form of substantially (an adverb), means, in relevant part, “pertaining to the essence of a thing.” *Random House Webster’s College Dictionary* (2<sup>nd</sup> revised & updated edition, 2000), p 1306.

The first three listed duties that plaintiff owed Precision under the agreement deal with sales. The fourth duty, “[s]uch other tasks as may be assigned to Employee by Employer from time to time as are consistent with the development of the Employer’s business,” is properly read as a catch-all that permits the employer to require plaintiff occasionally (from time to time) to perform sundry other functions.

Under the unambiguous meaning of the agreement, Wirtz only had a duty to give its “best efforts” to find a position for plaintiff that was “substantially the same” as the position described in the Agreement—one dealing with sales and marketing, but also with other duties. It had no duty to find a position that was exactly the same. *Substantially* the same differs from *exactly* the same. This Court lacks authority to rewrite the parties’ bargain. *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 59; 698 NW2d 900 (2005), citing *Wilkie, supra* at 51.

The position offered to plaintiff in fact involved all of the same duties he had in his previous position, and differed only because it added the responsibility that plaintiff work with “the production side to coordinate the sales with production planning and quality.” We conclude this is not a material difference from plaintiff’s prior responsibilities, in large measure because plaintiff agreed by signing the contract that his duties included assisting the development of the employer’s business, which the production planning and quality work was designed to accomplish. Accordingly, Wirtz did not breach the contract with its offer of continued employment to plaintiff.

Plaintiff’s affidavit, submitted below, does not create a genuine issue of material fact regarding whether the position offered by Wirtz involves substantially the same duties. The affidavit only addresses what would have been plaintiff’s intent, given the circumstances of his employment previous to Precision, in entering into the written agreement’s terms pertaining to retirement payments. Similarly, the fact that plaintiff was able to work from home while he was employed by Precision, but could not do so in the position offered by Wirtz, does not change the character of the position offered. Whether plaintiff could work from home relates to working conditions, not to the duties of the position. The trial court did not err in finding that Wirtz offered plaintiff a position that was “substantially the same” as the position described in the agreement.

The dissent argues that there is an issue of fact regarding whether Wirtz used its best efforts to place plaintiff in a position with substantially the same duties, on the basis that Wirtz never clarified either the name of the position being offered to plaintiff or what the duties of the position entailed. We disagree. First, Wirtz expressly named the position a “management position,” and nothing in the contract required Wirtz to name the position with more specificity. Second, Wirtz specified that the duties of the new position would “include manufacturing, planning, purchasing, [and] sales functions.” Later, Wirtz *further specified* that the position would “involve sales, account management and working with the production side to coordinate

the sales with production planning and quality.” To leave no doubt, Wirtz also stated: “This is the type of work you performed for Combro/Precision Plastics.”

Finally, counsel for plaintiff conceded during oral argument that plaintiff’s duties and circumstances of employment with Wirtz would have differed from the duties plaintiff performed with ConBro only in that he would have been required to do production work with Wirtz that he had not done for ConBro, and he would not have been able to work from home as frequently with Wirtz as he had with ConBro. We disagree that these differences render the Wirtz position one that was not substantially similar to the ConBro position, and conclude that as a matter of law, Wirtz fulfilled its promise under the contract.

Plaintiff next challenges the trial court’s conclusion that Wirtz was not required to pay plaintiff \$16,000 annually beginning on his 65th birthday, on the basis that plaintiff’s breach of the agreement prior to fully performing relieved defendant of this payment obligation. Stated differently, the trial court found that plaintiff’s performance under the contract was a condition precedent to their duty to perform the promise of lifetime retirement payments. We agree with the trial court’s conclusion, and find that summary disposition in favor of defendant on this claim was also warranted.

“A condition precedent is a fact or event that the parties intend must take place before there is a right to performance.” *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006) (internal quotations removed). Here, fringe benefits were to be provided during the *term* of the contract. The employment agreement, however, was subject to termination for just cause. Plaintiff’s failure to report to Wirtz constituted a voluntary termination of his employment, and constituted a just cause termination of the contract. Because the retirement benefits accrued during the *term* of the contract but were not payable until two years after the term of the contract had expired, it is plain that plaintiff’s performance during the term of the contract was a condition precedent to the duty to pay retirement benefits. This Court must construe stipulations of a contract as conditions precedent when the language of the contract compels that result. *Id.* Here, the order of performance, unambiguously specified in the agreement, compels the conclusion that plaintiff’s performance was a condition precedent to the duty to pay retirement benefits.

We disagree with the dissent’s view that the contract language concerning the benefits is ambiguous and subject to interpretation by this Court.<sup>1</sup> A contract is clear and unambiguous if, however inartfully worded or clumsily arranged, it fairly admits of but one interpretation. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich. 558, 567; 596 NW2d 915 (1999). We think the language of the contract is fairly clear that plaintiff was required to first earn his retirement benefits by working throughout the term of employment (“Employer shall also provide Employee with the following fringe benefits *during the term* of his employment”), before he was

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<sup>1</sup> Presumably the parties also disagree that the contract is ambiguous, having each filed motions for summary disposition in the lower court asserting that there was no genuine issue of material fact concerning the interpretation of the contract.

entitled to collect those benefits, and find nothing at odds with two separate provisions describing that plaintiff would first earn the benefits “during the term of employment” and then begin to receive payments of those benefits when he turned 65. Moreover, the language of the contract is plain that plaintiff’s voluntary termination of the employment relationship, constituting just cause termination under the contract and concluding the “Term” (i.e. term of employment) itself, vitiated Wirtz’ obligation to pay benefits under the contract.

Affirmed.

/s/ Jane E. Markey

/s/ Kurtis T. Wilder