

FILED

DEC 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 307921

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

KATHLEEN G. KILCULLEN, RESPONDENT,

v.

CALBOM & SCHWAB, P.S.C., APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT OF DOUGLAS
COUNTY, STATE OF WASHINGTON
Superior Court Case No. 10-2-00359-0
The Honorable John Hotchkiss, Judge of the Superior Court

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Respondent Plaintiff Kathleen Kilcullen ("Kilcullen") is a former shareholder and employee of Appellant Defendant Calbom & Schwab, P.S.C., a Washington law firm ("C&S"). After she was terminated *for cause*, she brought a lawsuit against C&S, asserting two breach of contract claims for wrongful discharge and failure to repay loans. Kilcullen moved for summary judgment on her claim for the loan repayment, and the trial court granted the motion and ordered C&S to pay \$69,650.83 to Kilcullen within four months of the date of the order.

The trial court's ruling and order was in error because there are issues of fact regarding the terms of the loan agreement, whether such loan agreement was conditioned on Kilcullen's continued employment, and the timing of the loan repayment. In fact, the trial court admitted that the parties had not agreed to the timing of the loan repayment when the court arbitrarily ordered that C&S pay the loan within four months of the court's order. Therefore, C&S respectfully requests the Court reverse the trial court's granting of Kilcullen's motion for partial summary judgment, which resulted in an order of C&S to pay \$69,650.83 to Kilcullen.

II. ASSIGNMENTS OF ERROR

No. 1: The trial court erred when it granted plaintiff's motion for partial summary judgment on plaintiff's claim for breach of contract,

despite the existence of genuine issues of material fact regarding the terms of the parties' loan agreement and whether continued employment was a condition of the loan repayment terms.

No. 2: The trial court erred when it granted plaintiff's motion for summary judgment on plaintiff's claim for breach of contract based on the trial court's finding that the contract was void for lack of consideration.

No. 3: The trial court erred when it granted plaintiff's motion for summary judgment on plaintiff's claim for breach of contract based on the trial court's finding that defendant was unjustly enriched.

No. 4: The trial court erred when it granted plaintiff's motion for summary judgment on plaintiff's claim for breach of contract on the ground that the trial court imposed payment terms which the court admitted "are not part of the agreement between the parties."

III. STATEMENT OF THE CASE

A. The Parties.

C&S is a professional services corporation that provides legal services in Grant, Douglas, and Chelan Counties, with its home office in Moses Lake, Washington. (CP 2, 8-9). Kilcullen joined C&S in January 1987. (CP 3). In 1992, Kilcullen became a shareholder of C&S. (CP 22). Consistent with the firm's standard operating procedure, C&S shareholders, including Kilcullen, routinely loaned money to the firm for

operating capital. (CP 28-30). Kilcullen's employment with C&S was terminated *for cause* on January 27, 2010. (CP 35). At the time, Kilcullen, as well as the other shareholders, had outstanding loans to C&S. (CP 28). The parties dispute the current outstanding balance of the loans, and the timing as to when the loans must be repaid. (CP 24-26, 27-35).

Issues of fact exist as to the terms of the repayment agreed upon by the parties, which were oral and not incorporated into a written agreement.

B. Shareholder Loan Overview and Repayment Terms.

C&S operates as a C corporation. Therefore, to avoid paying income tax at both the corporate and again at the individual level (i.e., double taxation), C&S distributes all corporate net income to its shareholders each year by issuing dividends. (CP 28-30). Because certain corporate expenses (such as advancing costs to clients) are not tax deductible at the corporate level, but require significant cash outlays, C&S's profits typically exceeded its operating cash reserves. (*Id.*) C&S would therefore issue dividends to shareholders for their respective share of the profits and then the shareholders would immediately contribute a portion of the proceeds from the dividends back to the corporation as loans to cover future operating expenses. (*Id.*) These loans were the standard operating procedure for C&S. (*Id.*)

The shareholders of C&S received promissory notes from the corporation in exchange for the money advanced.¹ (CP 30). The promissory notes, however, were silent as to the timing for loan repayment. (CP 30-31). It is undisputed that each shareholder understood and agreed that the loans were not demand loans, and that at no time had any shareholder of C&S ever asserted that the loans were payable upon demand. (*Id.*) It is further undisputed that the shareholders had an oral agreement with respect to the repayment terms of the note. As Kilcullen admits, “the operating loans were to be repaid upon the condition that C&S had \$300,000 in its accounts comprising the following: (1) a minimum of \$200,000 available as a reserve for salaries and expenses, and (2) \$100,000 available to distribute to shareholders in accordance with ownership.” (CP 25). Kilcullen’s understanding of the loan repayment terms is consistent with the understanding of the other shareholders and consistent with how C&S had repaid the loans in the past. (CP 30-35). Thus, the overwhelming evidence in the record establishes that the parties intended repayment to be tied to certain financial benchmarks.

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¹ The record does not include copies of the notes and Kilcullen does not claim that the promissory notes themselves govern the terms of repayment.

C. Facts Regarding Plaintiff Kilcullen's Motion for Partial Summary Judgment and the Order Granting Same.

Kilcullen filed a motion for partial summary judgment with regard to the repayment of the loans. As is pertinent here, the parties dispute the current outstanding balance of the loans, and the timing as to when the loans were to be repaid. (CP 24-26, 27-35). In her motion, Kilcullen admits that the loans were subject to certain repayment terms which were not in writing. (CP 24-26, 17). However, material issues of fact exist as to the terms of repayment agreed upon by the parties. Specifically, Kilcullen asserted in her motion for partial summary judgment that the agreed upon repayment terms do not apply because she is no longer employed by C&S – in essence, she argues that the loans were conditioned on her employment and became due and owing immediately upon her termination. (CP15-18). In contrast, C&S asserts that the parties' oral agreement for repayment was conditioned on meeting specific financial benchmarks, irrespective of employment. (CP 31-35). An issue of material fact exists as to whether the parties intended the agreed upon loan repayment terms to be conditioned upon continued employment.

C&S disputes that Kilcullen has a current right to repayment under the terms of the loan repayment. The record includes no evidence that Kilcullen is entitled to immediate repayment of her loans or that the loans are in default.

Following a March 6, 2012 summary judgment hearing (RP 1-22), the Douglas County Superior Court granted Kilcullen's motion with respect to her claim for money owed and entered an order, which the Court later revised on March 27, 2012 ("Revised Order"), requiring C&S to repay \$69,650.83 plus interest to Kilcullen within four months. (CP 92-94). The trial court admitted that the payment obligations "are not part of the agreement between the parties," yet nevertheless imposed them. (CP 93-94) Further, in determining the timing of the payment, the trial court stated:

I also think that as a result of [Kilcullen] being terminated from the corporation . . . I think that that gave the Court the ability to impose a reasonable time on the repayment of the loan. I suspect that a reasonable time is a question of fact. I guess I don't actually know that for a fact, but I think at this particular time I think the Court can take the bull by the horns and make a legal decision that it's a reasonable time. . . . It seems to me that a reasonable time should incorporate the Court's decision today, meaning I don't think they should have to pay it tomorrow, but I think they should have to pay it within the next three to six months. You, you got any thought on that Mr. Lacy? I know [Kilcullen] want[s] three, [C&S] wants six. How about four? (RP 17-18).

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Acknowledging that the ruling affected C&S's rights and required it to act before the final resolution of the case,² the trial court specifically ordered that,

There is no just reason for delay to appeal this order because the Defendant is ordered to pay over \$69,650.83 to the Plaintiff prior to the resolution of the remaining cause of action (wrongful discharge). The Defendant has no other avenue to seek review of this order unless it is appealed to the Court of Appeals pursuant to CR 54(b). (CP 93-94).

C&S timely filed its Notice of Appeal (CP 96-97) and its Motion for Discretionary Review of the trial court's Revised Order. On June 14, 2012, the Commissioner denied the motion. C&S then filed a Motion to Modify Commissioner's Ruling and, on September 26, 2012, this Court granted the motion.

IV. ARGUMENT

- A. **This Court should reverse the trial court's error when it granted plaintiff's motion for partial summary judgment on plaintiff's claim for breach of contract, despite the existence of genuine issues of material fact regarding the terms of the parties' loan agreement and whether continued employment was a condition of the loan repayment terms.**

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² Moreover, the trial court granted Kilcullen's Motion for a Stay of Proceedings, based on Kilcullen's pending investigation by the Washington State Bar Association, Office of Disciplinary Counsel, for embezzlement and failure to properly and diligently represent clients. Kilcullen alleges that she cannot cope with the stress of the civil case – that she initiated – while the WSBA proceedings are ongoing.

1. Legal Standard.

The appropriate standard of review for an order granting or denying summary judgment is de novo, and appellate court performs the same inquiry as the trial court. *Automotive United Trades Organization v. State*, __ Wash.2d __, 286 P.3d 377, 379 (October 4, 2012), *en banc*. Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Moreover, the trial court was required to consider the evidence in the light most favorable to the nonmoving party. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001). The motion should be granted "only if reasonable persons could reach but one conclusion from all the evidence." *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wash.2d 282, 294-95, 745 P.2d 1 (1987). Contrary to these legal standards, the trial court erred by ignoring the material disputed facts and instead adopted Plaintiff's (the moving party's) disputed interpretation of the oral contract. Thus, the Revised Order granting summary judgment was an error because genuine issues of material fact exist.

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2. Material questions of fact exist as to the parties' intent with respect to repayment of the loans.

Although the parties agree that oral loan repayment terms were agreed upon when the loans were made, Kilcullen asserts the repayment terms do not apply anymore because she is no longer an employee of C&S. A question of fact remains as to whether the parties intended the loan repayment terms to be conditioned upon continued employment with C&S. Reasonable persons could reach more than one conclusion as to this issue, because (1) Kilcullen admits that she was aware of the loan repayment terms and she made the loans on such terms, (2) the record includes no evidence that would establish Kilcullen's current right to repayment of loans under the admitted terms, and (3) the record includes no evidence to suggest that the loan repayment terms did not apply if an employee ceased employment with C&S.

Once a contract has been established, the terms of the contract must be interpreted. Contract interpretation normally is a question of fact for the fact-finder. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (distinguishing contract interpretation, a question of fact, from contract construction, a question of law); *In re Estate of Richardson*, 11 Wn. App. 758, 761, 525 P.2d 816 (1974) ("The existence of a contractual intention is ordinarily a fact question to be resolved by the trier of the facts.").

The interpretation of an oral contract generally is not appropriate for summary judgment because the existence of an oral contract and its terms usually depends on the credibility of witnesses testifying to specific fact-based dealings which, if believed, would establish a contract and the contract's terms. Instead, the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement. *See, e.g., Duckworth v. Langland*, 95 Wn. App. 1, 6–8, 988 P.2d 967 (1998); *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 87 Wn. App. 495, 501, 962 P.2d 824 (1997). Here, the parties do not dispute that the loan repayment terms were oral and they agree that the repayment terms were tied to certain financial benchmarks. (CP 31-35, 25). There is no evidence – except for Kilcullen's subjective belief – that the loan repayments become due at the time of termination. Therefore, when viewed in the light most favorable to C&S, a material fact remains as to whether continued employment was a condition of the loan repayment terms, which precludes summary judgment. *Van Noy*, 142 Wn.2d at 790; *Renfro v. Kaur*, 156 Wn. App. 655, 661, 235 P.3d 800 (2010) (“In the contract interpretation context, [s]ummary judgment is not proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two “or more” reasonable but competing meanings.”) (internal quotes and cites omitted).

In addition, the parties' understanding as to the repayment terms as presented in their declarations, provide additional evidence of the parties' past course of dealings and past practices. As defined in the UCC, a "course of dealing" is "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." RCW 62A.1-20591. A course of dealing does not override express terms in a contract or add additional obligations; rather, it is a tool for interpreting the provisions of a contract. *Badgett v. Sec. State Bank*, 116 Wash.2d 563, 572, 807 P.2d 356 (1991). Courts apply the UCC "course of dealing" principles by analogy to non UCC contracts. *Id.* at 572; *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 205-06, 26 P.3d 981 (2001). The express terms of the written agreement do not cover the parties' intent with respect to loan repayment terms. Therefore, the fact-finder should consider the parties' prior course of dealings when determining the parties' intent with respect to note repayment terms.

As explained by Joe Schwab, the President of C&S, the promissory notes were not considered to be demand notes. (CP 30). Instead, the notes were executed as part of the corporate tax planning, and the shareholders (including Kilcullen) agreed that the notes would be paid based upon a formula involving the year-end available cash reserves. (*Id.*)

This repayment agreement also is reflected in the minutes of the annual meetings of the Board of Directors. (CP 31-33, CP 43-51 (Exs. A-H)).

It is reasonable to believe that Kilcullen, and other similarly situated shareholders, would have made the operating loans to C&S without an intent that the repayment terms would be tied to continued employment. For example, aside from her employment, Kilcullen received separate and distinct consideration for her loan in the form of fair-market value interest, which interest continues to accrue. In addition, it is reasonable that the parties intended that C&S's capital account be maintained at a sufficient level to run the business and protect creditors. As Kilcullen admits, the loans were not payable on demand as this could consequently lead the firm to being underfunded and harm its creditors. For the same reason, it is also reasonable that the loans would not be paid upon a non-economic factor, such as ceasing employment.

In summary, both the past course of dealings and the course of performance evidence an intention by the parties to repay the loans only upon certain financial benchmarks – and there is no evidence in the record that the loan repayment terms have been satisfied. Moreover, the record contains no evidence of any intent to condition the agreed upon loan repayment on continued employment. Therefore, when viewed in the light most favorable to C&S, a material fact remains as to whether continued

employment was a condition of the loan repayment terms, which precludes summary judgment on Plaintiff's claim. *Van Noy*, 142 Wn.2d at 790; *Renfro v. Kaur*, 156 Wn. App. 655, 661, 235 P.3d 800 (2010); *Chelan County*, 109 Wash.2d at 294-96 (“Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper.”).

B. The trial court erred when it granted plaintiff's motion for summary judgment on plaintiff's claim for breach of contract based on the trial court's finding that the contract was void for lack of consideration.

In addition, the trial court's Revised Order was entered in error to the extent it was based on Kilcullen's argument that she is entitled to immediate repayment because the consideration for making the loans was based in part on the benefit of continued employment at C&S (e.g., the loss of employment results in the loss of consideration).

Kilcullen's "loss of consideration" argument is legally flawed, as it confuses the principle of consideration, which is a necessary element to contract formation, with the principle of breach of contract. Valid mutual consideration for the loan existed at the time Kilcullen made the loans to C&S, and Kilcullen does not challenge the contract validity. As an analogy, if a noncompetition agreement were supported by sufficient consideration – such as bona fide job advancement – the noncompetition agreement would still be enforceable if the employee were later demoted.

Accordingly, the noncompetition agreement would still be valid and enforceable because it had adequate consideration at its formation. In contrast, the noncompetition agreement would not be enforceable if continuance in the particular promoted position was a *condition* of the contract. That the noncompetition agreement is supported by the *consideration* of a promotion is separate and distinct from the issue of whether the agreement is *conditioned* on the promotion. Applying the analogy to the case at bar, Kilcullen has provided no evidence whatsoever that the parties *conditioned* continued employment on the loan repayment.

There was valid consideration for the loans. Kilcullen gave up the right to use the money by loaning it to C&S in exchange for the right to earn interest on the loan (i.e., a benefit to the Promisor), and C&S promised to pay interest on the money borrowed (i.e., a detriment to the Promisee). Clearly, this is sufficient consideration to create an enforceable contract. *See, e.g., Merchants' Bank of Canada v. Sims*, 122 Wash. 106, 114, 209 P.1113 (1922) ("Courts will not ask whether the thing that forms the consideration does, in fact, benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom

the promise is made, as consideration for the promise made to him.")
(internal quotes and cites omitted).

With the benefit of hindsight, Kilcullen now wishes that continued employment had been an expressed part of the consideration, but it was not, and the loss of employment does not, in and of itself, call into question the validity of the contract. Nevertheless, Kilcullen asserts that C&S is in breach of contract because Kilcullen lost a portion of her consideration for the loans when she ceased employment, making the loans payments become immediately due. Kilcullen has provided no legal support for this theory, and C&S is not aware of any authority that supports this argument. Accordingly, the trial court should not have determined, as a matter of law, that C&S is in breach because of the legal flaws and factual disputes as to whether Kilcullen received the benefit of the bargain.

C. **The trial court erred when it granted plaintiff's motion for summary judgment on plaintiff's claim for breach of contract based on the trial court's finding that defendant was unjustly enriched.**

The trial court erred in granting summary judgment to Kilcullen on her unjust enrichment theory because the parties had an "express contract." "A party to a valid express contract is bound by the provisions of that contract; she cannot bring an action on an implied contract relating to the same subject matter, in contravention of the express contract." *Peterson v.*

Kitsap Community Federal Credit Union, __ Wn. App. __, 278 P.3d 27 (October 23, 2012).

For the sake of argument, even if the loan agreement were not an express contract – which it is – C&S is not being unjustly enriched by the use of Kilcullen’s funds unless Kilcullen establishes, as a matter of law, that she has a present right to repayment of the loans. As noted above, there is no evidence that the loan repayments become due at the end of employment or, at a minimum, material issues of fact exist as to the terms of repayment of the loans that must be decided by a jury. Thus, Kilcullen is not entitled to relief under an unjust enrichment theory as a matter of law, and summary judgment was granted in error.

D. The trial court erred when it granted plaintiff's motion for summary judgment on plaintiff's claim for breach of contract on the ground that the trial court imposed payment terms which the court admitted "are not part of the agreement between the parties."

The trial court’s Revised Order, requiring C&S to make payment to Kilcullen on the loans *within four months*, is reversible error. The trial court’s imposition of payment terms, which the trial court admits “are not part of the agreement between the parties,” on a summary judgment proceeding was, as a matter of law, an abuse of discretion. (CP 93-94). There is no basis in the record for the Court to order, as a matter of law, that C&S is required to make payment on the loans to Kilcullen within

four months from the date of the Revised Order; rather, the trial court determined, as a matter of law, that four months was a reasonable time period for repayment. (CP 93-94). The determination of a reasonable time period for repayment is an issue for the fact-finder, after receiving testimony from lay and expert witnesses at trial as to the intent of the parties, course of dealing, course of performance, and industry standards. The determination necessarily involves issues of fact and the trial court's decision to impose payment terms that the parties did not agree to on a summary judgment basis was an abuse of discretion and a departure from the usual course of judicial proceedings.

V. CONCLUSION

The purpose of summary judgment is to avoid useless trial; however, trial is not useless, but absolutely necessary, where there is genuine issue as to any material fact. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Here, a trial is absolutely necessary to resolve the disputed material facts as to the terms of the loan and repayment, whether Kilcullen received the benefit of the bargain, and whether C&S is being unjustly enriched. The trial court's Revised Order and judgment should be reversed accordingly.

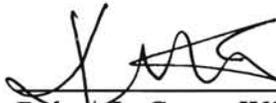
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DATED this 21st day of December, 2012.

Respectfully Submitted,

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