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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I



No. 70554-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

3MD, INC., d/b/a DENALI ADVANCED INTEGRATION,

Appellant

v.

SHAWN OLSEN,

Respondent

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in granting partial summary judgment in favor of Respondent, Shawn Olson (“Respondent” or “Mr. Olson”) where it determined that valid consideration existed for his restrictive covenant obligations but nevertheless determined that those obligations expired by the terms of Mr. Olson’s contract when his job title changed on January 1, 2012. (Conclusion of Law No. 2).

2. The trial court erred by determining that Mr. Olson’s job title change in January 2012 triggered the beginning of his restrictive covenant obligations to Denali when such change was expressly permitted by Mr. Olson’s contract and he did not terminate from employment at Denali at that time. (Conclusion of Law No. 2).

3. The trial court erred by concluding that the March 1, 2010 Employment Agreement was limited by its own terms to Mr. Olson’s employment with Denali as “VP Network Business” (Conclusion of Law No. 2).

STATEMENT OF THE CASE

A. *Procedural Posture*

Respondent Shawn Olsen sought declaratory relief that his previous employment agreement with 3MD contained non-competition

and non-solicitation clauses that were unenforceable because (a) those clauses were part of an agreement that lacked valid consideration; and (b) the restrictions set forth in such clauses had already expired. CP 1-6.

By way of answer and counterclaim, 3MD, Inc. (“Denali”) sought declaratory relief that Respondent’s non-competition and non-solicitation obligations in the subject employment agreement were valid and therefore enforceable. CP 7-15.

Each party cross-moved for summary judgment with respect to its respective position. CP 21-91. The trial court heard oral arguments of the parties on June 21, 2013. CP 92-95. The trial court subsequently entered an order on June 25, 2013 partially granting and partially denying each party’s respective summary judgment position, ruling that (a) valid consideration existed for the non-competition and non-solicitation obligations, and (b) that such obligations had expired because Mr. Olson’s employment agreement obligations were limited to his employment as the Vice President, Network Business, which he terminated when he became Vice President of Solutions Architects on January 1, 2012. *Id.*

On June 27, 2013, Denali timely appealed the trial court’s partial grant of summary judgment to Respondent. CP 96-102.

B. Case Facts

1. Denali And Its Business

Denali is a Redmond, Washington-based company that provides Information Technology (“IT”) products fulfillment, integration, removal, management and refreshment to large enterprise and small and medium size businesses in the greater Northwest as well as nationally. CP 46-47. Denali also engages in the development, sale, and marketing of IT consulting, design and support services that it provides to customers in Washington and nationally. *Id.* Denali has devoted, and continues to devote, substantial time and expense to develop its services and systems and to maintain and expand its customer base in addition to the time, effort and money it expends toward the proper training of its employees, and in the development and maintenance of its customer relationships and goodwill. *Id.*

2. Respondent’s Employment With Denali

Respondent Shawn Olson is a former employee of Denali who began work at Denali as a Network Manager in 2007 but later entered a new Employment Agreement effective March 1, 2010 in exchange for a promotion to Vice President, Network Business and in further exchange for greater duties and benefits provided to Respondent. CP 46-64. For example, in his previous role as a Network Manager before his March 1,

2010 Employment Agreement, Respondent's compensation was \$13,750 per month with some bonus opportunity. CP 47.

Under his March 1, 2010 Employment Agreement, Respondent's compensation increased to \$14,583.33 starting March 1, 2010 and Respondent was provided with additional bonus opportunities to which he was not entitled as a Network Manager because of his increased responsibilities as a VP of Network Business. CP 51-66. Respondent's March 1, 2010 Employment Agreement contained an "Exhibit A" that contained Respondent's 2010 compensation plan, which was a guideline to Respondent's compensation at Denali for that year, which Denali reserved the right to change at any time at its own discretion, which it did effective January 1, 2012. CP 62-63, 65-66.

3. The Restrictive Covenants Applicable To Respondent.

The March 1, 2010 Employment Agreement further provided that during Respondent's employment and:

... for a period of one (1) year thereafter, [Respondent will not] directly or indirectly, solicit, accept business from, transact business with, or pursue any actual or prospective customer of Denali for the sale of any products or services for Employee or any third party.

CP 55-57.

Respondent's March 1, 2010 Employment Agreement further restricted Respondent from diverting or attempting to divert or take

advantage of or attempt to take advantage of any of Denali's actual business opportunities that Respondent became aware of during his employment with Denali. CP 55-56.

And through the March 1, 2010 Employment Agreement that provided him greater compensation and responsibilities than he had in his former role at Denali as a Network Manager, Respondent agreed to not "directly or indirectly, on his own behalf or in the service or on behalf of others as a shareholder, investor, lender, director, officer, trustee, consultant, independent contractor, employee or agent engage in, or by employed to, solicit business, market or develop services that are similar to or competitive with those provided by Denali" for a period of one calendar year from the date of his voluntary termination at Denali. CP 56.

4. Respondent's Job Change

Pursuant to its right to change Respondent's compensation under his March 1, 2010 Employment Agreement and the compensation plan terms applicable to him, effective January 1, 2012, Denali changed Respondent's compensation under his March 1, 2010 Employment Agreement such that he was entitled to .5% of networking revenue. CP 46-47, 65. Denali further changed Respondent's job title to Vice President of Solution Architects and decreased his duties from his prior position. *Id.* At the time Denali reduced Respondent's duties, it presented a new

employment contract to Respondent to reflect those revised duties but Respondent refused to sign it. CP 46-47. Accordingly, Respondent's March 1, 2010 Employment Agreement remained in full force and effect. *See* CP 46-64.

5. Respondent's Voluntary Resignation

Respondent voluntarily resigned his employment on February 8, 2013 after receiving a bonus of \$48,582.08 from Denali. CP 46-47. One of the reasons for his resignation is believed to be because he wants to compete with Denali with another former employee of Denali. *Id.*

SUMMARY OF ARGUMENT

The trial court improperly entered partial summary judgment in favor of Mr. Olson on his declaratory action regarding the enforceability of his restrictive covenant obligations owed to Denali under his March 1, 2010 Employment Agreement when it determined that the terms of such obligations expired on January 1, 2013 because Mr. Olson's contractual obligations were limited to his position as Vice President Network Business, which Denali changed to Vice President of Solution Architects on January 1, 2012.

Mr. Olson was an employee of Denali as a company when he voluntarily resigned his *employment* with Denali in February 2013 and accordingly, under the plain language of his contract, his restrictive

covenant obligations naturally expire in February 2014. Because there is no issue of material fact regarding the definition of what it means to be employed by Denali in these circumstances, summary judgment for Denali should have been entered and by apparently misreading the plain language of Mr. Olson's contract, the trial court erred in ruling granting summary judgment for Mr. Olson.

ARGUMENT

A. Summary Judgment

Summary judgment is proper if, viewing the facts and reasonable inferences most favorably to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Clarke v. Office of the Attorney General*, 133 Wn. App. 767, 784, 138 P.3d 144 (2006).

A defendant moving for summary judgment must first show that there are no genuine issues of material fact and may do so by "pointing out to the court that there is an absence of evidence to support the nonmoving party's case." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1, 770 P.2d 182 (1989) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts

immaterial. *Young, supra*, at 225 (quoting *Celotex*, 477 U.S. at 322-23) (citation omitted).

A court may interpret a contract as a question of law subject to summary judgment “when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Dice v. City of Montsanto*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006) (quoting *Tanner Elec. Corp. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)), *rev. denied*, 2006 Wash. LEXIS 955, 149 P.3d 377 (2006).

B. *The Trial Court Erred By Finding That Mr. Olson’s Restrictive Covenants Expired Because Interpretation of Mr. Olson’s March 1, 2010 Employment Agreement Does Not Depend On Use of Extrinsic Evidence*

Paragraph 1 of Mr. Olson’s 2010 Employment Agreement specifically provides:

Denali employs Employee and Employee hereby accepts employment with Denali as VP Network Business. Employee will perform all duties necessary and appropriate to the proper discharge of his duties, including . . . *such other duties, as may be assigned by Denali or his supervisor from time to time at Denali’s sole discretion.*

CP 51(emphasis added).

Under the foregoing language, Denali had the undisputed right to change Mr. Olson’s duties, including his job title, in its sole discretion, which it did when it changed his duties and accompanying job title on January 1, 2012. While it attempted to enter a new contract with him,

because he chose not to sign it, he continued *employment with Denali* under the terms of his 2010 Employment Agreement, and he does not dispute that his job duties changed according to Denali's wishes on January 1, 2012, at Denali's sole discretion as provided in the 2010 Employment Agreement.

Despite the foregoing plain language, Mr. Olson erroneously argued below, and the trial court agreed, that his job duty and title change on January 1, 2012 ended his "employment" at Denali and thereby triggered the beginning of his one-year restrictive covenant obligation, which the trial court ruled expired effective January 1, 2013. CP 92-95.

But under the plain language of his agreement, Mr. Olson's restrictive covenant obligation became triggered only as follows:

If Employee Voluntarily Terminates *his employment* or is terminated for Cause, Employee's Competitive Restriction shall be during the term of this Agreement and for one (1) calendar year after the date of Employee's termination.

CP 56 (emphasis added).

Read in context, the foregoing paragraph's restrictive covenant obligations began only upon "Employee's termination" after he voluntarily terminates his *employment*. *See id.* ("Voluntary Termination means Employee's voluntary termination of *employment at Denali*.").

Under Washington law, the "words of a contract are to be given their ordinary, usual and popular meaning, unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst*

Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-504, 115 P.2d 262 (2005) (stating that Washington follows the objective manifestation of contracts theory, imputing intention corresponding to the reasonable meaning of the words used).

In construing a written employment contract, “the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.” *Dice v. City of Montesano*, *supra* at 683-4 (determining contract unambiguous and that trial court could grant summary judgment without resort to extrinsic evidence).

A written employment contract is ambiguous “if its terms are uncertain or they are subject to more than one meaning.” *Id.* The mere fact that parties suggest opposing meanings, however, does not render a contract ambiguous and “ambiguity will not be read into a contract where it can be reasonably avoided.” *Mayer*, 80 Wn. App. at 416. Moreover, where an agreement is fully integrated, as the March 1, 2010 Employment Agreement is here, extrinsic “parole” evidence may *not be used* to “add to, subtract from, vary or contradict written instruments that are contractual in nature and which are valid, complete unambiguous and not affected by accident, fraud or mistake.” *Berg v. Hudesman*, 115 Wn.2d 657, 669-70, 801 P.2d 222 (1990) (rejecting theory that parole evidence may only be considered upon a showing of ambiguity in a contract and holding when a writing is not a complete expression of all terms agreed terms not included

in writing may be proved by extrinsic evidence provided that additional terms are not inconsistent with written terms).

Here, neither party argued below that any terms of the March 1, 2010 Employment Agreement were ambiguous, not integrated or procured by accident, fraud, mistake. Mr. Olson merely disagreed with what was meant by the term “employment”, which unlike all the other capitalized defined “terms” of Mr. Olson’s fully integrated March 1, 2010 Employment Agreement, is not capitalized and therefore undefined. *See* CP 51-63, 69-70. Nevertheless, at hearing below, the trial court questioned counsel regarding the application of *Berg* and whether a look to parole evidence of Respondent’s job change in 2012 made any difference to the analysis of whether his non-competition and non-solicitation obligations under his 2010 agreement remained enforceable.

Whether the trial court considered *Berg* or not is unclear from its order, but the trial court apparently did erroneously interpret the parole evidence of Denali seeking to enter a new contract with Respondent on January 1, 2012, as a basis for inferring that Denali wanted to terminate the March 1, 2010 Employment Agreement with Respondent. CP 92-95. But the trial court had no basis to consider parole evidence because there was no ambiguity in any of the plain language of the March 1, 2010 Employment Agreement and it was fully integrated under its terms. CP 60-61.

The March 1, 2010 Employment Agreement had two separate provisions with respect to Mr. Olson’s “employment”, neither of which

render his contract ambiguous or subject to the parole evidence construction the trial court imposed on it. The first relates to the definition of the term “Employee”: under March 1, 2010 Employment Agreement, Mr. Olson is not defined as an “Employee” as the Vice President of Network Business. CP 51. Rather, the term “Employee” is defined as “Shawn Olson”. *Id.* Thus, the second “employment” provision of the contract relates to Mr. Olson’s job title as Vice President of Network Business, which Denali had pure discretion to change at any time. *Id.*

Thus, the two provisions of employment are Mr. Olson’s status as Vice President Network Business—(1) his job title and corresponding duties, and (2) his status as himself as the “Employee” of Denali under the March 1, 2010 Employment Agreement. Under this latter provision, he is subject to the terms and conditions of his status as the “Employee”, rather than his status as the “Vice President of Network Business”. Had the term “Employee” defined Mr. Olson as the Vice President of Network Business, Mr. Olson’s arguments might make more sense, but the contract unambiguously did not. And Mr. Olson’s status as “Employee”, not Mr. Olson’s status as Vice President Network Business, subjects him to the restrictive covenants of his contract Denali seeks to declare valid under the plain language of those covenants. CP 55-57.

The two provisions of Mr. Olson’s definition of “employment”, i.e., with himself as an employee and with himself in the job title of Vice President Network Business, are no different from the provisions of the contract at issue ruled unambiguous in *Yves v. Md. State Bank*, 111 Wn.2d

374, 378, 757 P.2d 1384 (1988), *overruled on other grounds, Berg v. Hudesman*, 115 Wn.2d 657 (1990). There, an employee terminated by a bank alleged breach of contract on the basis the bank violated the duration clause of his contract, which called for employment year to year with automatic renewal. The contract also gave the right to either party to terminate within 30 days upon notice. Determining that the duration clause did not conflict with the termination provision to render the contract ambiguous and subject to parole evidence, the court affirmed summary judgment for the bank. *Yves*, 111 Wn.2d at 379-380. *See also, Mayer, supra*, 80 Wn. App. at 421-22 (determining that the wording and placement of contested provisions in a disputed contract were two separate issues within the contract that did not render a resort to extrinsic evidence necessary).

Like the contractual provisions in *Yves*, the restrictive covenants applicable to Mr. Olson as an employee applied to him as “the Employee”, rather than the Vice President Network Business, under his fully integrated March 1, 2010 Employment Agreement. And like the termination clause in *Yves*, Denali’s restrictive covenants applicable to Mr. Olson were not rendered ambiguous or non-integrated by his job title as Vice President Network Business necessitating any look at parole evidence. Accordingly, the trial court erred in considering the parole evidence it did to conclude that the terms of Mr. Olson’s restrictive covenants expired a year after he changed job titles and duties on January 1, 2012.

C. *Summary Judgment For Respondent Was Improper Because Only One Reasonable Inference Can Be Drawn From The Extrinsic Evidence Considered*

Even considering parole evidence of the parties' intent and viewing that evidence in a light most favorable to Mr. Olson as the non-moving party in this appeal context, in the absence of Mr. Olson's acceptance of the terms of that new contract in 2012, the contract offered to Mr. Olson by Denali for Mr. Olson's new job in 2012 was simply that: an offer, which was not accepted by Mr. Olson.

The parties' intent on January 1, 2012 was Denali seeking to continue to employ Mr. Olson in a different capacity with a different compensation plan and Mr. Olson continuing to want to be employed by Denali as an at-will employee in that new role, given that he took the new assignment and Denali continued to employ him, even without signing the new 2012 contract presented to him. *See* CP 31.

The fact that Denali provided Mr. Olson a new contract to sign in 2012, which he refused, does not mean that Mr. Olson's "employment" ended when his job title and duties changed. To wit, the parties continued to operate under the terms of the March 2010 Employment Agreement after Mr. Olson's rejection of Denali's 2012 contract until he voluntarily terminated in February 2013. For example, as of January 1, 2012, Respondent (1) remained *employed* with Denali consistent with the terms of Paragraph 27 of his March 10 Employment Agreement; (2) continued to not compete with Denali under Paragraph 10; (3) did not solicit under Paragraph 9; and (4) maintained the confidentiality required by Paragraph

7. CP 51-63.

Moreover, Mr. Olson did not return any company property as he was required to do under Paragraph 15, continued to exercise his good faith effort at all times under Paragraph 2 after his job title change, and still abided by the terms of the company's email and internet usage policy under Paragraph 14. Most importantly, Mr. Olson voluntarily quit as an "at-will" employee of Denali, which he was defined as under his March 2010 Employment Agreement. CP 52.

Under *Berg*, Respondent's subsequent conduct illustrates the parties' intent and agreement to continue be bound by the 2010 Employment Agreement terms rather than a new contract, subject to the exception of a new compensation plan and job title that Denali had discretion to implement and which Mr. Olson worked under for 14 months before quitting. *See Berg*, 115 Wn. 2d at 677-8 ("It is well-established that subsequent acts and conduct of the parties to the contract are admissible to assist in ascertaining their intent.").

When coupled with the plain meaning of the term "employment" by virtue of how Mr. Olson was defined as an "Employee" there is thus only one conclusion one can draw from the refusal of Mr. Olson to sign a new contract but continue working according to the terms of the March 1, 2010 Employment Agreement: that agreement remained valid except for Mr. Olson's job title, duties and compensation and the restrictive covenants triggered by his February 2012 voluntary termination remain in full effect as of the date of this writing. The trial court's order granting

Mr. Olson partial summary judgment was therefore in error, must be reversed and summary judgment entered in favor of Denali on its declaratory action counterclaim.

CONCLUSION

The trial court's entry of partial summary judgment in favor of Mr. Olson and conclusion that his restrictive covenant obligations to Denali expired by their terms when he changed jobs at Denali lacks legal or factual basis and must be reversed. The trial court improperly considered parol evidence and did not consider the plain language of the March 1, 2010 Employment Agreement, which undisputedly remained in effect despite Denali's offer of a new contract to Mr. Olson that he did not accept. For these reasons and those above, Denali respectfully requests that this court reverse the trial court's partial summary judgment order and enter summary judgment in favor of Denali.

RESPECTFULLY SUBMITTED this 28th day of October, 2013.

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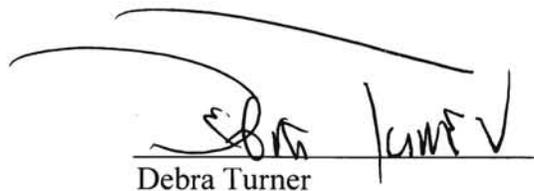
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this Declaration is affixed was deposited with the United States Postal Service, first class postage prepaid at Seattle, Washington, as well as a true and accurate copy being sent via electronic mail, addressed to:

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DATED this 28th day of October, 2013.


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