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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5003-08T3

MARYLYNN SCHIAVI,

Plaintiff-Appellant/
Cross-Respondent,

v.

AT&T CORPORATION,

Defendant-Respondent/
Cross-Appellant.

Argued September 27, 2010 – Decided April 29, 2011

Before Judges Rodríguez, Grall and Miniman.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3467-06.

Noel C. Crowley argued the cause for appellant/cross-respondent (Crowley & Crowley, attorneys; Mr. Crowley, on the brief).

Kristine J. Feher argued the cause for respondent/cross-appellant (Day Pitney, attorneys; Ms. Feher and Rachel A. Gonzalez, on the brief).

PER CURIAM

Plaintiff Marylynn Schiavi appeals from the summary judgment in favor of her former employer, defendant AT&T

Corporation (AT&T), dismissing her complaint. AT&T cross-appeals from the partial denial of its claim for $19,948 in damages, attorney fees and costs. We conclude that there are several contested issues of material fact that preclude summary judgment. Thus, we reverse and remand to the Law Division for trial. The cross-appeal is dismissed as moot.

These are the material facts, viewed in the light most favorable to Schiavi. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). In August 1995, AT&T hired Schiavi as a manager in the public relations department. In June 2000, AT&T transferred Schiavi to work on a revenue recovery project. Schiavi did not like her new assignment. On August 13, 2000, Schiavi sent an e-mail to her supervisors and AT&T senior executives complaining about employee morale:

> Hopefully, the morale of [co-workers] will change over time, but I must tell you many of the faces of my colleagues have been filled with sadness and despair, and several people even mentioned the only option being suicide. And they didn't say this in a joking manner.

AT&T Human Resources Manager, Maureen Brennan, met with Schiavi to determine which employees were at risk. Schiavi refused to identify them. Eventually, she recanted her statement, stating that her e-mail did not refer to anyone in particular. AT&T terminated Schiavi on August 21, 2000.

After numerous e-mails, Schiavi and Brennan agreed on the terms of a separation agreement (Agreement):

> 1. Employee understands and agrees that her employment with [AT&T] ended at the close of business on August 21, 2000 . . . and that she will not apply for or seek employment with the Company at any time thereafter.
>
> . . . .
>
> 4. Employee affirms her obligation to keep all proprietary Company information confidential and not to disclose it to any third-party. . . .
>
> 5. Employee and the Company each agree to refrain from disparagement of the other. This includes but is not limited to the following: Employee should direct inquiries from her prospective employers to Maureen Brennan. Ms. Brennan will relay to those prospective employers only that Employee resigned, the dates of Employee's employment, the position(s) held and her salary. . . .
>
> 6. Employee agrees to keep this Agreement confidential and not to disclose its contents to anyone except to her lawyer, her immediate family, her financial consultant or as otherwise required by law.

The Agreement also provides that AT&T would pay fifteen weeks of severance pay in the amount of $19,948 and distribute a notice regarding the resignation to Schiavi's former co-workers. Schiavi agreed to release AT&T from any claims arising out of her employment or termination and to return her severance pay,

minus $1000, plus attorney fees and costs, if she violated the Agreement.

In May 2003, Schiavi contacted AT&T to ascertain whether she could accept employment with an independent contractor performing work for AT&T. She spoke to C. Michelle Kirk, who replied in writing:

> I am writing to follow up on our conversation of May 27, 2003 in which you inquired whether your Separation Agreement precluded you from working for a contractor that might perform work for AT&T. I have reviewed your Agreement and it is AT&T's position that while the Separation Agreement precludes you from working for AT&T as either an employee or contractor, it would not preclude you from working for a contractor that happens to perform work for AT&T. Should you accept such a position and be assigned work involving AT&T, I must remind you that you agreed to refrain from disparaging AT&T.

Two years later, Schiavi began a temporary work assignment with Logistics Solutions (Logistics), as an at-will employee. She was assigned to work on-site at AT&T's facility in Bedminster. Her supervisors were AT&T employees, Barbara Laing and Dan Rubin.

Three weeks later, on October 25, 2005, Brennan saw Schiavi in the Bedminster cafeteria and notified human resources personnel that Schiavi should not be working on AT&T's premises. On December 16, 2005, Linda Stoynoff, a human resources manager,

advised human resources employee Susan Greschler that Schiavi had been terminated "for cause" and should be added to the "Do Not Hire" list. Laing was told only that Schiavi was "not eligible to work" at AT&T's locations or projects and that "her assignment must be concluded." Laing and Rubin terminated Schiavi on February 22, 2006, without explanation.

In a July 12, 2006, response to an e-mail from Schiavi asking to be reinstated, a Senior AT&T Attorney, Judith R. Kramer, responded that:

> Under AT&T's employment practices, employees who are terminated for cause are ineligible for future employment at AT&T as an employee or contractor in a position in which they would be assigned to AT&T premises or have access to AT&T systems.

After a discussion with Schiavi, Kramer ordered Greschler to change the code for Schiavi's termination to reflect a resignation and delete Schiavi's "name and social security number from any lists pertaining to a no rehire policy based upon termination for cause."

Schiavi sued AT&T, alleging breach of the Agreement, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, intentional infliction of emotional distress, fraud and defamation. Schiavi attached a copy of the confidential Agreement to her complaint.

AT&T answered and counterclaimed. They alleged that Schiavi violated the Agreement and sought damages, costs and attorney fees pursuant to its terms.

Both parties moved for summary judgment. The judge granted AT&T's motion; dismissed Schiavi's complaint; awarded attorney fees to AT&T; and ordered Schiavi to return $19,948 to AT&T. In reaching his decision, the judge refused to consider correspondence from Brennan, Kirk and Kramer relating to the Agreement. Relying on Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 269-70 (2006), the judge found that "[a] party to a contract may not rely on extrinsic evidence to vary or alter the terms of an integrated contract." Therefore, because the Agreement was fully integrated and did not address AT&T's internal characterization of Schiavi's termination, Schiavi could not introduce extrinsic evidence to vary its terms. The judge also found that the "no rehire" clause in the Agreement also "made plain AT&T's intention that Ms. Schiavi not work for the Company in the future."

The judge also found that Schiavi failed to establish a breach of the Agreement because she did not show that she "suffered any loss due to any action to her by AT&T," given that the assignment with Logistics was temporary and at-will. As an at-will employee, Schiavi could have been terminated at any time

for any or no reason. Lastly, the judge found that Schiavi had breached the Agreement by disclosing the terms to Laing and Rubin, and ultimately attaching the Agreement to her complaint.

Schiavi moved for reconsideration. AT&T cross-moved, arguing that the motion was frivolous and seeking attorney fees, sanctions and costs pursuant to N.J.S.A. 2A:15-59.1(a)(1). The judge denied AT&T's motion for sanctions; decreased the amount of damages to $18,948, pursuant to the Agreement; and reversed the award of attorney fees.

On appeal, Schiavi contends that extrinsic evidence of the events surrounding the formation of the Agreement was admissible with or without a finding of ambiguity. Thus, the Agreement was improperly construed, and the undisputed evidence proved that AT&T was in breach of the Agreement. We agree.

In order to establish breach of contract, a claimant must prove a valid contract; defective performance by the other party; and resulting damages. Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985). Although parol evidence is not admissible to "vary the terms of the contract," its introduction is permitted to "achieve the ultimate goal of discovering the intent of the parties." Conway, supra, 187 N.J. at 270. Therefore, extrinsic evidence could not be introduced to contradict an unambiguous term in a contract, e.g., price.

Ibid. By the same rule, however, extrinsic evidence would be admissible to show that although the contract did not specify the method of payment, the parties intended payment to be in cash based on industry custom or their prior contracts. See Kearny PBA Local #21 v. Kearny, 81 N.J. 208, 221 (1979) (explaining that the "circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct," are all "interpretive devices . . . used to discover the parties' intent").

Here, the terms of the Agreement are ambiguous as to whether it was the parties' intent to prohibit Schiavi's future employment by a third party at an AT&T facility. The Agrement provided that Schiavi would "not apply for or seek employment with the Company at any time." Extrinsic evidence should have been permitted here as an interpretative aid to determine whether this provision was intended to address Schiavi's employment by Logistics and AT&T's internal coding of Schiavi's termination. The correspondence from Brennan, Kirk and Kramer could have established that the parties understood that Schiavi's termination would be recorded as a resignation rather than a termination for cause, and that she was permitted to work for an independent contractor working for AT&T. This

interpretation is even supported by the Agreement which provides that AT&T would report Schiavi's termination as a resignation to other prospective employers.

Therefore, the judge misinterpreted the Conway holding, as the extrinsic evidence Schiavi offered was not intended to contradict or enlarge the terms of the writing. Rather, the parol evidence was offered to shed light on the intent of the parties to determine the meaning of the words of the Agreement. See Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-02 (1953).

Schiavi also contends that there was sufficient evidence that AT&T breached the Agreement and the implied contractual covenant of good faith and fair dealing. She argues that AT&T, both through its actions and the actions of its employee, Brennan, tortiously interfered with her employment relationship with Logistics. After a review of the proofs, we conclude that there are material issues of fact that preclude summary judgment as to these claims. Brill, supra, 142 N.J. at 540; R. 4:40-2.

Whether AT&T breached the Agreement by requiring that Logistics terminate Schiavi, and disclosing that Schiavi was terminated for cause and was on the Do Not Hire list depends on a jury's resolution of disputed facts. The covenant of good faith and fair dealing is implied in every contract in New Jersey, and it requires that neither party shall do anything

which interferes with the ability of the other party to enjoy the fruits of the contract. Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001). In order to show that the implied covenant of good faith and fair dealing has been breached, a party must establish bad motive. Id. at 251. Summary judgment is inappropriate when parties dispute subjective elements such as intent or motivation. Carmichael v. Bryan, 310 N.J. Super. 34, 47 (App. Div. 1998).

Here, Schiavi alleged that Kirk had interpreted the contract as permitting Schiavi to work for Logistics. Assuming this to be true, Brennan's actions to have Schiavi terminated, included on the Do Not Hire list and coded as terminated for cause, would conflict with AT&T's interpretation of the Agreement. We hold that the veracity of these allegations must be resolved by a jury.

The judge found that Schiavi could not establish that AT&T did not tortiously interfere with Schiavi's contractual rights because Schiavi did not show any evidence that AT&T's conduct was intentional. This finding is based on the judge's conclusion, not on the record, which reveals a dispute on this point. To succeed on a claim for tortious interference, a claimant must have some reasonable expectation of economic advantage and the interference must be malicious and

intentional. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989). An action against a company may be maintained pursuant to the doctrine of respondeat superior for the actions of an employee who was acting within the scope of his or her employment when she tortiously interfered with a contract. Id. at 745-46.

Schiavi argues that she presented proof that she was told by Logistics that her assignment might last for a year or two. Therefore, according to Schiavi, she had a reasonable expectation of economic gain through her employment with Logistics which AT&T, through Brennan, intentionally interfered with when it forced Logistics to terminate her after only six months. According to Schiavi, the termination was malicious because AT&T, through Kirk, had explained that her employment with Logistics was permissible. Thus, the judge's resolution of the issue of AT&T's intent on summary judgment was improper.

There is also a factual dispute as to whether Brennan had acted individually or as an employee of AT&T. If the jury finds that Brennan's conduct constituted tortious interference, it will have to determine whether Brennan was acting for herself or within the scope of her employment with AT&T.

Because we reverse the summary judgment, we decline to address Schiavi's contention that even if she had breached the

Agreement, "the court should have invalidated the Clawback provision as an unlawful penalty clause." However, for the guidance of the judge at trial, we note the following. There is an important distinction between permissible "liquidated damages" clauses and impermissible "penalty" clauses. Liquidated damages are the amount a party agrees to pay for a breach of contract, based on a good faith estimate of actual damages. Wasserman's, Inc. v. Twp. of Middletown, 137 N.J. 238, 248-49 (1994). Where the amount of liquidated damages is not based on a good faith estimate and acts as a threat of punishment designed to prevent breach, the clause is an unenforceable penalty clause. Ibid. If the damages attributable to a future breach are difficult to accurately estimate, a judge should employ a reasonableness standard to determine whether the damage clause reasonably reflects the harm caused by the breach. Id. at 250. Because a stipulated damages clause is presumptively reasonable, the "party challenging the clause bears the burden of proving its unreasonableness." MetLife Capital Fin. Corp. v. Washington Ave. Assocs., 159 N.J. 484, 496 (1999).

We also note that the judge's conclusion that Schiavi had breached the Agreement's confidentiality provision by making disclosures to Rubin and Laing and by attaching the Agreement to

her complaint is incorrect. First, the record does not establish that Schiavi showed the agreement or disclosed its contents to Laing and Rubin. Rather, Schiavi stated that she had signed an agreement, and disclosed the circumstances of her leaving AT&T in 2000. The confidentiality provision did not preclude Schiavi from discussing the circumstances of her departure from AT&T. Rather, the confidentiality provision related to disclosure of the contents of the Agreement itself.

Second, based on the motion record, a jury could find that AT&T had already breached the Agreement by disparaging her to Logistics and interfering with her employment with Logistics. When a breach of contract is material, the non-breaching party may treat the contract as terminated and refuse to continue to perform. Ross Sys. v. Linden Dari-Delite, Inc., 35 N.J. 329, 341 (App. Div. 1961). Therefore, assuming a finding that AT&T was in breach when Schiavi attached the Agreement to the complaint, she was free to treat the contract as no longer in effect.

AT&T cross-appeals contending that it is entitled to $19,948 plus attorney fees and costs attributable to Schiavi's breach of the Agreement; the judge improperly awarded damages only under paragraph 8 of the Agreement; AT&T is entitled to sanctions against Schiavi; and the judge misapplied Rule 1:4-

8(a) and N.J.S.A. 2A:15-59(a)(1). Because there are material issues of fact that preclude summary judgment, AT&T was not entitled to damages pursuant to the Agreement and Schiavi's motion for reconsideration was not frivolous. Therefore, AT&T's arguments on appeal are moot.

Reversed on the appeal and remanded to the Law Division for trial. The cross-appeal is dismissed as moot.