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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2130-21**

**BARBARA LEE, f/k/a
BARBARA STOEBER,**

Plaintiff-Appellant,

v.

**KEPNER-TREGOE, INC.,
a Delaware corporation,**

Defendant-Respondent.

Argued April 19, 2023 – Decided June 1, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Docket No. L-3154-20.

Alexander Firsichbaum argued the cause for appellant
(Orloff, Lowenbach, Stifelman & Siegel, PA, attorneys;
Laurence B. Orloff, of counsel and on the briefs;
Alexander Firsichbaum, on the briefs).

Timothy P. McKeown argued the cause for respondent
(Norris McLaughlin, PA, attorneys; Timothy P.
McKeown, on the brief).

PER CURIAM

Plaintiff Barbara Lee, f/k/a Barbara Stroeber, appeals from a February 3, 2022 order denying her motion for summary judgment and granting a cross-motion for summary judgment filed by defendant Kepner-Tregoe, Inc. (KT or company). We affirm.

KT is a privately owned company, providing consulting services to various industries. The company has facilities in the United States, Canada, Europe, Japan, and Southeast Asia. In March 2020, KT employed approximately ninety individuals worldwide. At issue in this case are the following company documents: the Second Amended and Restated Stockholder's Agreement–Principal Stockholders (Agreement) and the Amended and Restated Restricted Stock Plan (Plan).

The Plan governed the sale of shares of KT stock. KT's employees were permitted to purchase stock in the company.

The Agreement governed the relationship between Principal Stockholders and the company. A Principal Stockholder was defined as "an individual who holds at least [two percent] of the total outstanding shares of Common Stock and that is or shall hereafter become a party to the Agreement."

Article 3.5 of the Agreement obligated KT to issue a promissory note for redemption of stock shares held by any employee who resigned. The promissory note was (i) payable in one year if the resignation was for Good Reason, or (ii) payable in four years if the resignation was not for Good Reason.

Article 3.6 of the Agreement governed KT's right to repurchase stock from a Principal Shareholder. Under this provision, repurchase of an employee's shares, in KT's discretion, would be paid over a period of time not to exceed ten percent of the company's invested capital (Invested Capital provision). This provision was intended to protect KT's cash flow and ensure that its stockholders received payouts with interest. The Invested Capital provision also took into consideration the company's financial health at the time of the contemplated stock repurchase.

The term "Good Reason" was defined in Article 4.2 of the Agreement. To satisfy "Good Reason," an employee was required to demonstrate:

- (i) a significant diminution in the Principal Stockholder's duties or title as an employee of the Company; (ii) substantial reduction in the Principal Stockholder's compensation or benefits as an employee of the Company; or (iii) a material breach by the Company of any written employment agreement with the Principal Stockholder, which breach is not cured within thirty (30) days written notice of such breach from the Principal Stockholder.

Article 4.2 provided that if a Principal Stockholder resigned for Good Reason, KT "shall . . . award . . . severance benefits in an amount equal to fifty-two week's salary."

Article 6.3 of the Agreement, governing the rights of the company's Board of Directors, provided:

Notwithstanding any other provisions in this Agreement to the contrary, the Board may, at any time and from time to time, modify, change, terminate or void any of the provisions of this Agreement relating to (1) severance payments or benefits to any Principal Stockholder resulting from any termination of employment

The Agreement and the Plan gave KT significant flexibility regarding the payment of benefits and the redemption of stock. KT also had the right to "revise, alter, change or amend the terms of [the] Plan at any time, with or without prior notice to any individual having an interest herein."

Plaintiff was employed by KT as an information technologies specialist for over thirty years. During her employment, plaintiff acquired sufficient shares of KT stock to be deemed a Principal Stockholder. To be a Principal Stockholder, plaintiff was required to sign the Agreement and she did so voluntarily. Plaintiff did not dispute being bound by the terms of the Agreement and Plan.

In March 2020, KT suffered a significant decline in revenue due to the COVID-19 pandemic. On April 1, 2020, KT announced company-wide temporary salary reductions. It notified plaintiff that her salary would be reduced by twelve percent and matching contributions to the company's 401(k) plan would be paused.

On April 30, 2020, KT announced another round of temporary salary reductions. The company notified plaintiff that her salary would be reduced an additional forty percent effective May 1, 2020.¹ At that time, KT made no representations to its employees when, or if, full salaries and matching 401(k) contributions would be restored.

Based on her substantial reduction in salary, plaintiff resigned from KT on May 1, 2020, invoking the Good Reason provision. Plaintiff demanded payment of one year of severance benefits and the right to have KT redeem her stock shares under a promissory note payable within one year.

On May 5, 2020, KT's Chief Executive Officer, William Baldwin, told plaintiff that her resignation did not constitute Good Reason under the Agreement. He also informed plaintiff that KT's Board suspended severance payments under Article 6.3 that same day and denied her request for severance.

¹ As a result of KT's two salary reductions, plaintiff's salary was cut in half.

On May 26, 2020, KT notified plaintiff that her stock shares would be repurchased by way of a ten-year promissory note rather than a one-year promissory note. Baldwin told plaintiff that the Board orally modified the Plan's stock redemption policy in 2019.² According to Baldwin, KT amended the Plan due to concerns about the company's cash flow and financial health.

On September 1, 2020, KT restored employees' salaries to the levels immediately prior to the second phase of the temporary salary reductions. In April 2021, KT rescinded the first phase of its temporary salary reductions and restored salaries to pre-pandemic levels for all employees.

On May 27, 2020, plaintiff filed a complaint against KT for breach of contract and breach of the implied covenant of good faith and fair dealing. KT filed an answer and counterclaim. After completing discovery, plaintiff moved for summary judgment and KT filed a cross-motion for summary judgment. The judge heard counsel's arguments on January 31, 2022, and issued an oral decision denying plaintiff's motion and granting KT's cross-motion.

² On March 30, 2021, KT issued a written memorialization of the Board's 2019 decision amending the Plan. The amendment provided for the redemption of shares valued in excess of \$25,000 over ten years or, at the option of the stockholder, over eight years at eighty percent of the total value of the shares, or over five years at sixty percent of the total value of shares.

The judge rejected plaintiff's claim that she resigned for Good Reason, finding that plaintiff's salary reduction was not substantial and therefore she was not entitled to severance benefits. In addition, the judge found Article 6.3 of the Agreement allowed KT to "at any time and from time to time, modify, change, terminate or void any provision of th[e] Agreement relating to (1) severance payments or benefits to any Principal Stockholder resulting from termination of employment." The judge concluded Article 6.3 was unambiguous, clear, and mutually agreed to by plaintiff and KT. Based on Article 6.3, the judge found plaintiff was not entitled to severance benefits.³

The judge also rejected plaintiff's entitlement to redemption of her shares under a one-year promissory note. The judge found the Plan granted KT the right to revise, alter, change, or amend the terms "at any time, and with or without prior notice" to any shareholder. However, the judge allowed plaintiff "to request annual discovery from [KT] regarding its present financial condition," explaining that plaintiff should be allowed, "if circumstances

³ We review a trial court's order on appeal and not the trial judge's statement of reasons. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001). Here, plaintiff appeals the judge's granting summary judgment to KT and dismissing her claim.

warrant, to petition the [c]ourt to accelerate the note for repayment of [her] shares."⁴

In addition, the judge determined the Invested Capital provision under Article 3.6 was not unconscionable. The judge found Article 3.6 gave KT discretion to defer payment on repurchased shares of stock over a ten-year period, rather than a one-year period, to manage cash flow for the benefit of the company and its stockholders.

On appeal, plaintiff argues the following: the judge erred in finding she did not resign for "Good Reason"; the Board's May 5, 2020 suspension of severance benefits did not apply to her because her right to severance vested when she resigned on May 1, 2020; the judge erred in finding KT could redeem her shares over ten years because the Board's 2019 amendment to the Plan was ineffective; and the Invested Capital provision was unconscionable. We reject plaintiff's arguments.

We "review a grant of summary judgment de novo, applying the same standard as the trial court." Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)). Thus, we consider "whether the competent evidential materials

⁴ KT did not cross-appeal from this provision in the February 3, 2022 order.

presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Summary judgment must be granted "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted).

Because KT is a Delaware corporation, Delaware law applies to the issues on appeal. Vasquez v. Franz, 123 N.J. 498, 528 (1991). ("[W]hen the suit involves the internal affairs of a foreign corporation, a state court will usually apply the law of the state of incorporation."). Delaware law regarding the interpretation of a contract is the same as New Jersey law. See Fletcher v. Feutz, 246 A.3d 540, 555 (Del. 2021) (holding principles of contract interpretation are grounded on the parties' objective intent at the time of the contract as expressed

by the plain language contained in the four corners of the agreement); see also Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199, 1208 (Del. 2021) ("When interpreting a contract, Delaware courts read the agreement as a whole and enforce the plain meaning of clear and unambiguous language.").

Under Delaware law, courts ensure the freedom to contract. See James Nat'l Financial, LLC, 132 A.3d 799, 812 (Del. Ch. 2016). "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom to contract." Ibid. (quoting Libeau v. Fox, 880 A.2d 1049, 1056-57 (Del. Ch. 2005) (Strine, V.C.), aff'd in pertinent part, 892 A.2d 1068 (Del. 2006)). "As a matter of ordinary course, parties who sign contracts and other binding documents, . . . are bound by the obligations that those documents contain." Official Comm. of Unsecured Creditors of Motors Liquid. Co. v. JP Morgan Chase Bank, N.A., 103 A.3d 1010, 1015 (Del. 2014).

Here, the judge found the plain and unambiguous language of Article 6.3 allowed KT to terminate the payment of severance benefits to Principal Stockholders at any time. There was no strong public policy interest advanced by plaintiff to overcome well-settled Delaware law enforcing binding contracts

executed voluntarily by the parties. Because Article 6.3 allowed KT to terminate benefits for Principal Stockholders "at any time," we need not address whether plaintiff resigned for Good Reason.⁵

Consistent with Delaware law, the parties voluntarily agreed to be bound by the terms of the Agreement. Article 6.3 provided KT with the absolute right "at any time and from time to time" to terminate or void the payment of benefits. Nowhere in the Agreement is plaintiff vested with the right to receive benefits. Upon becoming a Principal Stockholder and signing the Agreement, plaintiff was bound by the terms in the Agreement, including Article 6.3. While invoking Article 6.3 to terminate plaintiff's benefits may be viewed as unfair, under Delaware law, plaintiff voluntarily agreed to be bound by the terms of the Agreement.

Nor do we read Article 4.2 as requiring KT's payment of severance benefits to plaintiff. Plaintiff claimed Article 4.2 stated when a Principal

⁵ KT's hindsight argument regarding the Good Reason provision, claiming plaintiff's reduction in salary was not substantial, is specious. Plaintiff's fifty percent reduction in salary and the company's cessation of 401(k) matching contributions constituted a "substantial reduction" in plaintiff's benefits. KT's retrospective contention that plaintiff's salary was ultimately reduced only fifteen percent and therefore not substantial ignores the reality that no one could predict when the business world might return, if ever, to pre-pandemic status.

Stockholder's employment is terminated under the Good Reason provision, KT "shall . . . award . . . severance benefits." Plaintiff argued that applying Article 6.3, allowing KT to terminate severance benefits "at any time and from time to time," rendered Article 4.2 "totally ineffectual." However, nothing in the language of Article 6.3 supports plaintiff's contention that the provision applied only to prospective termination of severance benefits and not to someone like herself who already resigned. The Agreement does not use the terms "vest" or "vested" to nullify KT's ability to terminate severance benefits "at any time" under Article 6.3. We cannot rewrite the terms of an agreement voluntarily entered into between plaintiff and KT. See Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 872 A.2d 611, 624 (Del. Ch. 2005), rev'd in part on other grounds, 901 A.2d 106 (Del. 2006) ("It is not the court's role to rewrite the contract . . . [or] allocat[e] the risk of an agreement after the fact . . .").

We agree with the trial judge that Article 6.3 of the Agreement is controlling, and plaintiff had no absolute right to benefits. A plain reading of the entire Agreement, including Articles 4.2 and 6.3, demonstrates KT clearly and unambiguously reserved the right to reject a Principal Stockholder's severance claim at any time.

We also reject plaintiff's claim that KT violated the implied covenant of good faith and fair dealing by modifying provisions in the Agreement and Plan after she resigned for Good Reason. Under Delaware law, a claim for breach of the implied duty of good faith and fair dealing requires a plaintiff to show (1) a specific implied contractual obligation, (2) a breach of that obligation by the defendant, and (3) resulting damages. See Baldwin v. New Wood Res. LLC, 283 A.3d 1099, 1117-18 (Del. 2022) (quoting Sheehan v. Assuredpartners, Inc., C.A. No. 2019-0033 (Del. Ch. May 29, 2020) (slip op. at 11)).⁶ However, the breach of an implied covenant is inapplicable where the contract or agreement addresses the conduct at issue. See Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC, 112 A.3d 878, 896 (Del. 2015).

Here, the Agreement addressed the termination of benefits for Principal Stockholders under Article 6.3. The Agreement sought to protect the mutual interests of KT and its stockholders by imposing financial restraints to ensure the company's financial health and the ability to pay stockholders in the future. There is no evidence in the record demonstrating KT invoked Article 6.3 in bad

⁶ Unreported decisions issued by Delaware courts are considered precedential. See Crystallex Int'l Corp. v. Petróleos de Venez, S.A., 879 F.3d 79, 85 n.8 (3d Cir. 2018) ("Delaware courts give [unreported] opinions substantial precedential weight.").

faith or as a punitive measure directed at plaintiff. Article 6.3 of the Agreement explicitly authorized KT's termination of benefits at any time. Plaintiff agreed to be bound by the terms of the Agreement when she voluntarily signed the document. Under the circumstances, plaintiff failed to demonstrate KT violated the implied covenant of good faith and fair dealing.

We next consider plaintiff's argument that the judge erred in allowing KT to redeem her shares over a ten-year period. According to plaintiff, there was no support in the record to find KT possessed the right to reduce installment payments and extend the payout period for promissory notes issued to its Principal Stockholders. She further claims KT lacked authority to orally modify the Plan and subsequently ratify that oral modification in a written authorization. We reject these arguments.

Article 6.1 of the Agreement provided that plaintiff's shares were subject to the Plan. The Plan clearly and unequivocally gave KT the right to "revise, alter, change, or amend the terms of [the] Plan at any time with or without prior notice to any individual having an interest [t]herein." Additionally, the Plan granted KT the right to control the timing of the redemption of shares held by a Principal Stockholder based on the company's financial health and cash flow.

KT orally modified the Plan in 2019 because two Principal Stockholders, holding a significant percentage of KT shares, left the company at that time.⁷ As a result, KT exercised its right under the Plan to alter the redemption period for promissory notes issued to Principal Stockholders, believing the one-year redemption option had "the potential for cash flow to go negative." KT modified the Plan in 2019 to redeem shares over a longer time period to address its cash flow concerns.

Nor are we persuaded that the Board's 2019 oral modification to the Plan was invalid because the Plan required amendments to be in writing and the written amendment occurred several years later. Under Delaware law, a party may ratify an earlier act to bestow legality to that act. See Essential Enterprises Corp. v. Automatic Steel Products, Inc., 164 A.2d 437, 438 (Del. Ch. 1960).

Consistent with Delaware law, the ratification of a prior corporate act depends on whether the act was void or voidable. Merely voidable acts "are those which may be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from [void] acts which are ultra vires, fraudulent or gifts or waste of corporate assets."

⁷ In 2019, the two departing Principal Stockholders owned a combined total of 75,675 shares valued at \$1.5 million.

Michelson v. Duncan, 407 A.2d 211, 218-19 (Del. 1979). "[V]oidable acts are susceptible to cure . . . while void acts are not." Id. at 219. "It is the law of Delaware, . . . that a validly accomplished shareholder ratification relates back to cure otherwise unauthorized acts of officers and directors." Id. at 219. "Notwithstanding a contractual provision stating that a contract cannot be modified except in writing, a court may find that the parties modified their obligations orally, by conduct, or through waiver." XRI Investment Holdings LLC v. Holifield, 283 A.3d 581, 659 (Del. Ch. 2022).

Here, KT's oral modification to the Plan in 2019, extending the time period for redemption payouts to stockholders, was a voidable act and therefore subject to cure. KT reduced the 2019 oral modification of the Plan to writing in March 2021. In doing so, KT ratified its 2019 course of conduct implemented to address the company's cash flow concerns at that time. Because the oral modification to the Plan was performed in the interests of KT and its stockholders, the oral modification was a voidable act and subject to subsequent written ratification.

We are further satisfied that plaintiff had no right to a specific time period for redemption of her shares when she resigned on May 1, 2020. In support of her claimed entitlement to redemption of her shares within one year, plaintiff

relied on Depenbrock v. Cigna Corp., 389 F.3d 78, 79-80 (3d Cir. 2004). However, the Depenbrock case addressed the validity of an amendment to an ERISA plan and the impact of the amendment on an employee's ERISA benefits. On appeal, plaintiff abandoned the argument that her severance benefits were governed by ERISA.

However, the judge recognized plaintiff's redemption of her shares was impacted by KT's modification of the Plan because her monetary recoupment for the shares would occur "over a much longer time period than originally contemplated." As a result, the judge permitted plaintiff to request an annual review of KT's financial status as part of post-judgment discovery. The judge provided that if KT's financial information revealed the company's financial circumstances improved in the future, plaintiff would be allowed to file a post-judgment application to accelerate KT's repayment of her shares. Because the judge allowed for an exchange of KT's financial information going forward, we are satisfied plaintiff is protected regarding redemption of her shares and may be able to recoup payment in less than ten years depending on KT's financial circumstances.

We next consider plaintiff's claim that the Invested Capital provision governing payment for her redeemed shares is unconscionable. Plaintiff

contends KT was required to advise all Principal Stockholders that it could refuse to make payments, reduce payments, or extend the payments over a longer time period. We reject her argument.

Under Delaware law, the concept of unconscionability "is used sparingly." Ketler v. PFPA, LLC, 132 A.3d 746, 748 (Del. 2016). The concept requires that "the party with superior bargaining power used it to take unfair advantage of his weaker counterpart." Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908, 912 (Del. 1989).

Here, the Invested Capital provision in the Agreement advanced the mutual interests of KT and its stockholders and was not unconscionable. The provision allowed KT the flexibility to extend or temporarily freeze redemption payments to Principal Stockholders while considering the company's fiscal health and ensuring stockholders would receive payouts with interest. In 2011, KT disclosed these restrictions on stock ownership to all potential stock plan participants, including plaintiff. Plaintiff admitted she read and understood the Agreement and freely and voluntarily signed the document. KT also gave all stockholders annual financial information by which to calculate Invested Capital. There is no evidence KT sought to use the Invested Capital provision to take advantage of its stockholders. Rather, the Invested Capital provision


ensured KT maintained its fiduciary duty to protect the company's cash flow and that stockholders received payouts.

We next consider the use of the term "notwithstanding" as used in Article 6.3. Under Delaware law, "[t]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." In re Estate of Crist, 863 A.2d 255, 258 (Del. Ch. 2004), aff'd, 876 A.2d 602 (Del. 2005) (citing Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993)). We are satisfied the judge correctly applied Article 6.3 in dismissing plaintiff's claims because KT unequivocally had the right to terminate benefits at any time "notwithstanding" any other provisions in the Agreement and the Plan.

To the extent we have not addressed any of plaintiff's remaining arguments, we are satisfied they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION