[Cite as *Laikos v. Marquis Mgt. Group, L.L.C.* , 2009-Ohio-3574.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PETER LAIKOS

Plaintiff-Appellant

-vs-

MARQUIS MANAGEMENT GROUP, LLC.

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 2008CA00166

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2007CV03659
JUDGMENT:	Affirmed, in part; Reversed, in part; and Remanded
DATE OF JUDGMENT ENTRY:	July 20, 2009

APPEARANCES:

For Defendant-Appellee

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Hoffman, P.J.

{¶1} Plaintiff–appellant Peter Laikos appeals the July 2, 2008 Judgment Entry entered by the Stark County Court of Common Pleas, which granted partial summary judgment in favor of defendant-appellee Marquis Management Group, LLC, and denied Appellant's second motion for summary judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 26, 2004, Appellant and Marquis entered into an employment agreement. Section 6 of the Employment Agreement, provides, in pertinent part:

{¶3} "Duration and Termination. This Agreement shall be for a term of two (2) years, unless sooner terminated in accordance with the provisions of this Agreement, with such term to commence on May 26th, 2004, and end on May 25th, 2006 ("Initial Term"). Unless this Agreement has previously been terminated pursuant to the provisions hereof, at the expiration of the Initial Term and each annual anniversary thereafter, this Agreement will automatically renew for an additional one (1) year period (each, a "Renewal Term," and, collectively, the "Renewal Terms") unless either party notifies the other party in writing of its or his intention not to renew this Agreement not less than three (3) months prior to the expiration of the Initial Term or any Renewal Term (the Initial Term and the Renewal Terms are collectively referred to as the "Term of Employment"). However, the Employee's Term of Employment shall immediately terminate upon the following:

{¶4} "a. The death of the Employee.

{¶5} "b. The sale of the Company, the Company ceasing to do business, or dissolution of the Company.

{¶6} "c. The disability of Employee * * *

{¶7} "d. The Company may terminate the employment of the Employee at any time for cause * * *"

{¶8} Sometime in 2005, OrthoRX, a Texas-based company, expressed an interest in purchasing certain assets of Marquis. OrthoRX and Marquis were business competitors, and OrthoRX wanted the exclusive right to use Marquis's proprietary business plan. Marquis accepted OrthoRX's offer, and negotiations began in September/October, 2005. The terms of the sale were set forth in a written asset purchase agreement. The Marquis assets purchased by OrthoRX were Marquis's accounts or, in other words, customers. OrthoRX did not buy Marquis's receivables. OrthoRX did not buy Marquis in its entirety. Marquis continued to do business following the execution of the December 5, 2005 asset purchase agreement.

{¶9} On September 6, 2007, Appellant filed a Complaint in the Stark County Court of Common Pleas, alleging, inter alia, Marquis had breached the May 26, 2004 Employment Agreement between the parties by failing to pay bonuses to Appellant. After Marquis filed its answer, the matter proceeded through discovery. Appellant filed two separate motions for partial summary judgment on March 10, 2008. Thereafter, Marquis filed a motion for summary judgment. The trial court conducted an oral hearing on Appellant's second motion for partial summary judgment and Marquis's motion for summary judgment on June 24, 2008.

{¶10} Via Judgment Entry filed July 2, 2008, the trial court granted Marquis's motion for summary judgment in part as to the issue of the denial of bonuses to Appellant for the years 2005, 2006, and 2007. The trial court also denied Appellant's

second motion for partial summary judgment. The trial court found OrthoRX's purchase of Marquis assets to be a "sale" as to result in the immediate termination of Appellant's employment with Marquis under Section 6 of the Employment Agreement. The trial court concluded Marquis did not have any further obligations to Appellant as to compensation, benefits, or any other payment.

{¶11} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶12} "I. THE TRIAL COURT ERRED BY GRANTING PARTIAL JUDGMENT TO MMG ON THE BONUS ISSUE.

{¶13} "II. THE TRIAL COURT ERRED BY DENYING PARTIAL SUMMARY JUDGMENT TO LAIKOS ON THE BONUS ISSUE."

Standard of Review

{¶14} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ. R. 56(C) provides, in pertinent part:

{¶15} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable

minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶16} Pursuant to the above rule, a trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St.2d 427. The court may not resolve ambiguities in the evidence presented. *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301.

{¶17} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

{¶18} It is based upon this standard we review Appellant's assignments of error.

I

{¶19} In his first assignment of error, Appellant maintains the trial court erred in granting partial summary judgment in favor of Marquis relative to the issue of bonuses.

{¶20} The general rule is contracts should be construed so as to give effect to the intention of the parties. *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus. Thus, it is a fundamental principle in contract construction contracts should "be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.,* 78 Ohio St.3d 353, 361, 1997-Ohio-202, 678 N.E.2d 519, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 132, 509 N.E.2d 411.

{¶21} Section 8 of the Employment Agreement, "Obligation of Employee Upon Sale of Company During Employment", defines "Sale" as follows:

{¶22} "For purposes of this subsection, a 'Sale' of the Company shall be defined as a "sale of all or substantially all of the assets or stock (defined as greater the seventy-five percent (75%) of the total value and number of the assets or stock) of the Company where such are disposed of pursuant to a sale transaction to an unrelated or unaffiliated third party, * * *"

{¶23} Section 9, "Net Sale Proceeds from Sale of the Company during Term of Employment", expressly references the definition of "Sale" set forth in Section 8.

Further, Section 7, which sets forth the rights of the employee upon termination, specifically excludes "a sale event described in Section 9." Section 6 of the Employment Agreement, which is set forth supra, does not define the word "sale".

{¶24} The trial court determined Sections 6, 7, 8, and 9 should be read in pari materia. In doing so, the trial court concluded a "sale" of Marquis occurred as a result of the asset purchase by OrthoRX. We respectfully disagree.

{¶25} Section 6 of the Employment Agreement neither defines the word "sale" nor incorporates the definition of "sale" set forth in Section 8, and specifically referenced in Sections 7 and 9.

{¶26} *Expressio unius est exclusio alterius* is an interpretative maxim meaning that if certain things are specified in a law, contract, or will, other things are impliedly excluded. *Harris v. Atlas Single Ply Sys., Inc.* (1992), 64 Ohio St.3d 171, 173, 593 N.E.2d 1376, 1378; *Vincent v. Zanesville Civ. Serv. Comm.* (1990), 54 Ohio St.3d 30, 33, 560 N.E.2d 226, 229, at fn. 2. We find the maxim applicable here. Having defined "Sale" in Sections 7, 8 and 9 to include something less than a sale of all its assets but having failed to do so in Section 6, we find "sale" in Section 6 means sale of all Marquis's assets.

{¶27} We find the sale of a portion of the Marquis assets to OrthoRX does not constitute a "sale of the company" as contemplated in Section 6 of the Employment Agreement. The account receivables are certainly assets of Marquis. Marquis continued to exist following the transaction with OrthoRX. The company was not dissolved. Accordingly, we find, as a matter of contract law, Appellant's employment

with Marquis was not terminated as a result of a "sale of the company" as provided in Section 6 of the Employment Agreement.

{¶28} Appellant's first assignment of error is sustained.

II

{¶29} In his second assignment of error, Appellant asserts the trial court erred in denying his motion for partial summary judgment on the bonus issue.

{¶30} It is well settled in Ohio a decision denying a motion for summary judgment does not constitute a final appealable order. Accordingly, this Court does not have jurisdiction to review Appellant's challenge to the trial court's denial of his second motion for partial summary judgment.

{¶31} We note there may be other grounds, which have been asserted by Marquis, to establish Appellant's employment was terminated prior to the end of the 2005 work year. Our ruling on Appellant's first assignment of error does not preclude Marquis from asserting other defenses to Appellant's right to the bonuses at issue.

{¶32} Appellant's second assignment is overruled.

{¶33} The judgment of the Stark County Court of Common Pleas is affirmed in part, and reversed in part and the case remanded for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J. and

Delaney, J. concur,

Edwards, J., dissents.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

EDWARDS, J., DISSENTING OPINION

{¶34} I respectfully dissent from the majority's disposition of the first assignment of error.

{¶35} As discussed in the majority opinion, the language of Section 6 of the agreement provides that the employee's term of employment shall immediately terminate upon the sale of the company, without defining "sale" and without incorporating or referencing the definition of "sale" set forth in Section 8, and specifically referenced in Sections 7 and 9.

{¶36} However, Section 8 of the agreement provides that "[u]pon termination of Employee's employment by the Company as a result of a Sale (as defined below) of the Company, the Employee shall be obligated to work for and be employed, by the purchaser of the Company for a minimum of two (2) years." The reference in Section 8 to termination of the employee's term of employment as a result of a sale references the definition of sale found later in Section 8, and at the same time presupposes that the employee has been terminated by a "sale" pursuant to the terms of Section 6. Reading the sections in pari materia, the termination of employment pursuant to Section 6 and referenced in Section 8 must employ the same definition of. "sale" as that employed in Section 8 regarding the employee's obligation to work for a new employer following a sale. I would overrule the first assignment of error.

{¶37} I concur in the majority's disposition of the second assignment of error and would accordingly affirm the judgment of the trial court.

s/ Julie A. Edwards

Judge Julie A. Edwards

JAE/rad/rmn

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PETER LAIKOS	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MARQUIS MANAGEMENT GROUP, LLC.	:	
Defendant-Appellee	:	Case No. 2008CA00166

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed, in part; reversed, in part; and the matter remanded to the trial court for further proceedings consistent with our opinion and the law. Costs assessed to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY