COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP615 **Cir. Ct. No. 2008CV14026**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

RICHARD M. STAMM,

PLAINTIFF-APPELLANT,

V.

STEVE H. HOLTER, INDIVIDUALLY AND D/B/A HOLTER FINANCIAL GROUP, AND HOLTER AGENCY, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 LUNDSTEN, J. Richard Stamm and Steve Holter entered into a contract under which Stamm, an independent contractor, worked as an insurance agent for Holter, also an independent contractor, to sell policies issued by

Northwestern Mutual Life Insurance Company. Shortly after entering into the contract, Holter terminated it. Stamm sued, alleging, among other things, that Holter breached the contract by terminating it improperly. The circuit court granted summary judgment in favor of Holter. On appeal, Stamm asserts that summary judgment was improper because factual issues remain that require a trial. We disagree and affirm.

Background

¶2 Pursuant to an October 2007 written contract between Stamm and Holter, Stamm worked as an independent contractor to solicit applications for insurance policies issued by Northwestern Mutual Life Insurance Company. In this capacity, Stamm was a "district agent" and operated under a contract with a "general agent," Holter. Stamm agreed to collect initial premiums on insurance policies and then remit these amounts to Holter, and Holter agreed to pay commissions to Stamm. Holter, as a general agent, also operated under a separate contract with Northwestern Mutual.

¶3 The contract contains provisions addressing automatic termination, termination for cause, and termination without cause. Termination is automatic if a specified event occurs. Significant here, the contract "shall terminate upon … [t]he end of the month in which District Agent [Stamm] attains age 65." The for-cause provision specifies reasons that permit immediate termination. For example, the contract "may be terminated by General Agent ... [because of the] [f]ailure of District Agent to comply with any of the terms." Finally, the without-cause

provision permits termination "by either party at any time, without cause, upon 30 days' written notice."[1]

¶4 In December 2007, Holter informed Stamm that he was terminating their contract. Still, Stamm continued working for Holter. On February 26, 2008, Holter gave Stamm a written thirty-days' termination notice. Thirty days later,

[1] More specifically, the contract's termination options are as follows:

> **20. Term of Agreement** – This agreement shall terminate upon the first to occur of the following:
>
> (a) The death of District Agent;
>
> (b) Termination of the present contract between General Agent and the Company (except as such contract may be extended through an Endorsement by the Company, in which case this agreement shall terminate upon expiration of the extension); or
>
> (c) The end of the month in which District Agent attains age 65.
>
> It may be terminated by General Agent upon written notice to District Agent, by reason of:
>
> (i) Legislation, court decision or insurance department or other governmental ruling or requirement which in the opinion of the Company either contravenes any provision of this agreement or renders it expedient for the Company to withdraw from the whole or any part of the Territory; or
>
> (ii) Failure of District Agent to comply with any of the terms hereof; or
>
> (iii) District Agent's becoming, in the opinion of General Agent and the Company (of which they shall be the sole judges) incapacitated for any reason so that he cannot fully perform this agreement.
>
> It may be terminated by either party at any time, without cause, upon 30 days' written notice.

Stamm stopped working under the contract and signed a contract with a different general agent.

¶5 Stamm sued Holter, alleging, as pertinent here, that Holter's termination was a breach of their contract and that the termination tortiously interfered with Stamm's "prospective economic advantage." Among other relief, Stamm sought $2,000,000 in damages for "the loss of his investments in and development of" his business and "past, present and future revenues that would have accrued to him."

¶6 Holter moved for summary judgment, and the circuit court granted the motion, dismissing Stamm's claims. Stamm appeals.

Discussion

¶7 Stamm contends that the circuit court improperly granted summary judgment in favor of Holter. We review summary judgment decisions *de novo*, applying the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment "shall be rendered 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." WIS. STAT. § 802.08(2) (2009-10).

¶8 To the extent Stamm's arguments involve issues of contract interpretation, we apply the following principles:

> "[T]he cornerstone of contract construction is to ascertain the true intentions of the parties as expressed by the contractual language." We "determine what the parties contracted to do as evidenced by the language they saw fit to use." "Contract language is considered ambiguous if it

> is susceptible to more than one reasonable interpretation." Whether a contract is ambiguous is a question of law we decide independently of the circuit court.
>
> "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." If the terms of a contract are ambiguous, we must consider extrinsic evidence to arrive at the parties' intent.

Tang v. C.A.R.S. Prot. Plus, Inc., 2007 WI App 134, ¶¶28-29, 301 Wis. 2d 752, 734 N.W.2d 169 (citations omitted).

A. Termination Based On Age

¶9 For reasons we need not discuss here, Stamm does not pursue an age discrimination claim under state or federal law. He contends, however, that he had *contractual* protection against age discrimination. Stamm presents three theories as to why he enjoyed this contractual protection. We address and reject each below.

1. Implicit Agreement

¶10 Stamm points to the contract provision that states: "This agreement shall terminate upon … [t]he end of the month in which District Agent attains age 65." Stamm asserts that this provision implicitly prohibits terminating him prior to age sixty-five based on his age. The circuit court properly rejected this argument.

¶11 The automatic age-65 termination provision does not state or imply an age discrimination prohibition. Rather, the only implication is that there is no self-executing termination based on any age other than sixty-five.

2. Northwestern Mutual's Diversity Policy

¶12 Stamm next argues that one of the contract's provisions should be read as incorporating Northwestern Mutual's age discrimination policy. Stamm points to contract language under the heading "Authority of District Agent." It states:

> District Agent shall be free to exercise his own judgment as to the persons from whom he will solicit Applications and the time, place and manner of solicitation, *but [Northwestern Mutual] from time to time may adopt regulations respecting the conduct of the business covered hereby*, not interfering with such freedom of action of District Agent.

(Emphasis added.) Stamm seemingly argues that this contract language effectively incorporates by reference all policies that Northwestern Mutual had or would adopt. Stamm then refers us to a policy document issued by Northwestern Mutual's president and CEO that states: "The Company prohibits discrimination based upon an individual's race, color, religion, creed, age, [etc.]." The president further states in this document that he expects "all executive officers, department heads, officers, managers, and all employees of the Company to adhere to these principles and to further the goals of the Policy." There are at least three flaws in Stamm's reliance on Northwestern Mutual's diversity policy.

¶13 First, the Northwestern Mutual statement is, on its face, directed at Northwestern Mutual's personnel.

¶14 Second, it is plainly unreasonable to read the contract language in the block quote above as incorporating all the policies that Northwestern Mutual had or would adopt. The language merely advises district agents that their

business practices may be affected by a certain category of Northwestern Mutual's "regulations"—those respecting the conduct of the district agent's business.

¶15 Third, in a closely related flaw, Stamm fails to show how the block-quoted language relates to Holter's obligations under the contract. This appears under the heading "Authority of District Agent." Thus, the particular sentence Stamm relies on appears to be directed at what district agents may or may not do. Stamm, not Holter, is a district agent.

¶16 Before moving on, we note that Stamm may be raising a slightly different argument—that, regardless of the contract's terms, the parties intended a modification based on the Northwestern Mutual policy. If Stamm means to make this argument, it would also fail because he does not direct us to evidence on which a fact finder could reasonably conclude that the parties intended such a modification. *See* ***Clay v. Horton Mfg. Co.***, 172 Wis. 2d 349, 353-56, 493 N.W.2d 379 (Ct. App. 1992) (concluding that an employer-issued handbook and policy statement may modify an employment contract if the parties so intend, and remanding after summary judgment where the employee pointed to evidence that could support a reasonable jury finding of intent to modify). At most, Stamm points to evidence that he abided by a different policy document—a general agent handbook. We address this document next.

3. General Agent Handbook

¶17 Stamm directs us to a policy in a handbook provided by Holter's predecessor, and asserts that the parties intended that this policy be incorporated into the contract. A missing link in this argument is Stamm's failure to explain why, even if this document's contents were contractual, it would matter.

¶18 The document provided by Holter's predecessor is called the "Financial Representative Policy and Procedure Handbook." Stamm relies on a section in it titled "Workplace Harassment," which states, in pertinent part:

> It is the policy of this Network Office to offer a fair and equal employment opportunity to every person regardless of race, color, religion, creed, age, [etc.]. *Accordingly, any and all intimidation or harassment based on any of the above characteristics is strictly prohibited.*
>
> ….
>
> Any employee who is subject to harassment or intimidation should immediately contact the Director of Operations or Managing Partner to report the complaint. All complaints will be promptly and confidentially investigated. Any employee who violates this policy will be subject to appropriate disciplinary action, up to and including termination.

(Emphasis added.)

¶19 Thus, this "workplace harassment" policy forbids "intimidation or harassment" based on age and, in turn, instructs that someone who intimidates or harasses based on age faces disciplinary action. It does not, however, state a general prohibition on age discrimination.

B. Minimum Production Requirements

¶20 Stamm argues that a trial is necessary to resolve whether a "minimum production requirements" document was part of the contract. Stamm argues that this document limited termination to circumstances where the stated minimums were not met. We will assume, for the sake of argument only, that this document was part of the contract. Nonetheless, we reject Stamm's argument.

¶21 The document at issue is a single page titled "Holter Financial Group Minimum Production Requirements For 2008." It is undisputed that this document sets forth minimum production requirements for a three-year period, from 2008 to 2010, and that it applied to Stamm. Subject to certain exceptions, the document states: "If a representative misses these minimums," then "your contract will be terminated."

¶22 Once again, Stamm asserts that a provision authorizing termination in a particular circumstance carries with it the inference that termination is not permitted in the absence of the circumstance. Once again, we reject the argument. The minimum production document permits termination if minimum requirements are not met. It does not, expressly or by implication, say that this is the only avenue to termination.

¶23 Stamm asserts that this document creates a "fixed-term personal services contract," but he does not back up that assertion. For example, he does not point to language in either the contract or this document suggesting that employment will continue "so long as" minimums are met. For that matter, he does not point to any evidence other than those documents supporting the view that the parties intended that Stamm not be terminated if he met the minimums. And, Stamm's citation to cases addressing different contract language is not helpful. For example, he relies on ***Klug v. Flambeau Plastics Corp.***, 62 Wis. 2d 141, 214 N.W.2d 281 (1974), but that case addresses an agreement "[t]hat defendant corporation would not terminate by notice as long as a certain sales level was reached and maintained." *See* ***id.*** at 148, 151-52.

C. Arguments Relating To When Stamm Was Terminated

¶24 Stamm contends that Holter breached their contract in December 2007 by terminating Stamm without written notice stating the reason. Before directly addressing this argument, we first explain that Stamm's termination in March 2008 complied with the contract.

1. March 2008 Termination

¶25 It is undisputed that, on February 26, 2008, Holter gave Stamm written notice that the contract would be terminated in thirty days. It is also undisputed that Stamm continued working under the contract for thirty days—until late March 2008.

¶26 Holter argues that this March 2008 termination was proper because all that was needed to properly terminate was the thirty days' written notice. Stamm disagrees, arguing that the without-cause provision is ambiguous and should be read to require a stated reason for termination. The circuit court agreed with Holter, as do we.

¶27 Stamm suggests that without-cause termination must require a reason because, otherwise, it would "swallow" the for-cause termination option. This is plainly not true. The for-cause option permits immediate termination, whereas Stamm is entitled to thirty-days' notice under the without-cause option.

¶28 Stamm also provides case law authority, but to no avail. For example, he cites to ***Kernz v. J.L. French Corp.***, 2003 WI App 140, 266 Wis. 2d 124, 667 N.W.2d 751, noting that in that case we deemed a "just cause" provision ambiguous. *See* ***id.***, ¶16. It does not follow, however, that, because the term "just cause" is ambiguous, the term "without cause" is ambiguous.

¶29 Thus, in the end, Stamm is left with the untenable position that the "without-cause" provision really means with-cause. It follows that we agree with Holter and the circuit court that Stamm was properly terminated in March 2008.

2. Alleged December 2007 Termination

¶30 Stamm makes three arguments supporting his view that Holter breached the contract or committed a tort when he terminated Stamm in December 2007. First, Stamm asserts that Holter breached an express contract term because Holter failed to give the required written notice with reasons when terminating Stamm in December 2007. Second, in a closely related argument, Stamm contends that Holter breached an implied covenant of good faith and fair dealing when "Holter terminated [him] without the written notice" and "with self-serving motivation."[2] Third, Stamm contends that, by terminating him, Holter tortiously interfered with Stamm's future participation in a Northwestern Mutual incentive program related to job performance.

¶31 These arguments all assume that Stamm was terminated, within the meaning of the contract, in December 2007. That threshold assumption is a disputed issue. But, as we explain below, it is a dispute we need not resolve. We do note, however, that it is difficult to reconcile Stamm's assertion that he was terminated in December 2007 with his concession that he continued working under the contract until late-March 2008.

[2] Stamm also argues that the March 2008 termination breached the implied covenant, but his argument is premised on that termination being improper under the contract, and we have already rejected that argument. *See* ***Wausau Med. Ctr., S.C. v. Asplund***, 182 Wis. 2d 274, 294, 514 N.W.2d 34 (Ct. App. 1994) (stating that a party "could not have breached the implied covenant of good faith by terminating his contract because the contract contemplates that he could do so at any time, as long as he gave sixty days' notice, which he did").

¶32 We need not address whether Stamm was terminated, much less whether he was improperly terminated, in December 2007. We agree with Holter that Stamm does not identify any damages resulting from the allegedly improper December 2007 termination, given that Stamm was properly terminated in March 2008.

¶33 Holter states that, after the December 2007 events, "Stamm was not removed from his office, the locks were not changed, he was not denied compensation, and he was not prevented from exercising any right that he had under the contract." Stamm, for his part, does not deny this. Rather, his reply is limited. He merely asserts that this period was "about the execution of the termination through transitional windup." Stamm does not contend that he was denied any benefit he was entitled to under the contract.

¶34 Rather than point to evidence of damages relating to this time period, Stamm's damages argument, insofar as he makes one, points to losses he would have sustained regardless what happened in December 2007. For example, Stamm states that he "had over $300,000.00 invested in his district agency" and that Holter's breach cost him "his business and over $2,000,000.00 in career losses." Stamm also states that the Northwestern Mutual incentive program "would have resulted in large increases in [his] income had he not been terminated." Stamm summarizes these losses as "the loss of [his] local agency, his investments in it, and his prospective profits."

¶35 Thus, we conclude that Stamm's arguments premised on the December 2007 events fail because there is no indication that these events matter. That is, Stamm does not point to losses stemming from the time period between December 2007 and the proper March 2008 termination. Given this, he fails to

provide a basis for the damage elements of his claims. *See* ***Black v. St. Bernadette Congregation of Appleton***, 121 Wis. 2d 560, 566, 360 N.W.2d 550 (Ct. App. 1984) (noting that "damages are an essential element of a contract action"); ***Briesemeister v. Lehner***, 2006 WI App 140, ¶¶48, 50 & n.8, 295 Wis. 2d 429, 720 N.W.2d 531 (a tortious interference claim requires "improper" interference and "a causal connection between the interference and damages").

Conclusion

¶36 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.