

MAR 20 2006

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JANET W. TALLERINE

v.

ORLEANS CAPITAL
MANAGEMENT, ET AL.

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CIVIL ACTION NO. H-04-4240

ORDER

Pending before the Court is Counterclaim Plaintiff/Defendant Orleans Capital Management Corporation's Motion for Partial Summary Judgment (**Instrument No. 16**).

I.

On November 3, 2004, Plaintiff Janet W. Tallerine ("Plaintiff" or "Tallerine") brought this cause of action against Defendants Orleans Capital Management Corporation ("OCM"), Louis Crane ("Crane"), Farrell L. Crane, Jr. ("F. Crane"), John W. Gordon ("Gordon"), and Rodney J. Abele ("Abele") (collectively "Defendants") alleging tortious misconduct, illegal termination of her employment and taking of her stock without authority, and breach of her employment agreement. (Instrument No. 1, at 9-10). This Court has diversity jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332.

In 1991, OCM was formed as a corporation that manages institutional and individual investments. (*Id.*, at 2). One of the founding owners of OCM was a venture capital firm called Artfer, which contributed mostly all of the capital needed to fund the establishment and operations of OCM. (Instrument No. 24, at 1). Tallerine, along with the other owners, contributed nominal investment capital. (*Id.*). As a result of Artfer's large capital contribution, it received all of the Class A common

stock issued by OCM, and the remaining shareholders received Class B common stock. (*Id.*, at 1-2).

At the time OCM was founded, each of the Class B shareholders executed and signed an employment agreement that automatically renewed on an annual basis. (Instrument No. 1, at 3; *see also* Instrument No. 16, at 3). The agreement outlined the restrictions on the ability to transfer the Class B common stock, as well as provided OCM and the other Class B shareholders with the right to acquire common stock issued in the event of termination of employment. (Instrument No. 24, at 2). The redemption right outlined in the employment agreement was to prevent Class B shareholders from prematurely leaving the company with their stock and participating in the value of the company funded and created by Artfer and the other shareholders. (*Id.*).

On or about February 7, 1994, OCM's Class B shareholders agreed to buy out Artfer through a recapitalization of OCM. (*Id.*). To fund the recapitalization, the Class B shareholders borrowed \$750,000 from First Bank and Trust, which has since been paid. (*Id.*; *see also* Instrument No. 25, at 5). During this capital reorganization, new common stock was issued to replace the existing Class B common stock. (Instrument No. 24, at 2). Plaintiff maintains that it was her understanding that when she signed the commercial pledge agreements related to the new common stock, the restrictions to transfer the Class B common stock, outlined in the 1991 employment agreement, terminated with the surrender and cancellation of that stock, and that the restrictions were no longer applicable to the newly issued stock. (*Id.*, at 3). On the other hand, Defendant OCM believes that even though certain provisions in the employment agreement address the then-existing Class B common stock, section 9 of the employment agreement, which gives it the right to redeem stock upon termination, applies to all of the shares, including the newly issued common stock, of the Company owned by the Executive. (Instrument No. 16, at 5).

Also during the time of the recapitalization, OCM's shareholders executed and signed a Memorandum of Understanding ("MOU"), the purpose of which was to serve as an agreement that certain corporate documents would be revised in light of the reorganization. (Instrument No. 24, at 3; Instrument No. 16, at 4). The MOU stated that "appropriate revisions" would be made to the 1991 employment agreements, which all employees and shareholders had signed. (Instrument No. 16, at 4). The MOU also stated that a new shareholders' agreement governing the restrictions on transferability and options to purchase and sell the outstanding common and preferred shares of the company would be executed. (Instrument No. 1, at 5-6). Although the Class B common stock was cancelled and replaced by new common stock, no revisions were ever made to the employment agreements, and the shareholders never executed new shareholder agreements. (Instrument No. 16, at 5; Instrument No. 1, at 5).

Plaintiff Tallerine was a founding shareholder of OCM, held the title of Managing Director, and was a marketing executive for OCM. (Instrument No. 1, at 2-3). Tallerine's capital investment in OCM was \$857.50, which was payment at \$1.00 par value for her 857.5 shares of Class B common stock. (Instrument No. 25, at 6). OCM's primary place of business is in Louisiana. In 2003, however, Tallerine relocated to Houston, Texas, setup a satellite office in Houston with the consent of OCM, and continued her job with OCM as marketing executive. (Instrument No. 16, at 3; Instrument No. 1, at 5).

Defendant OCM alleges that once Tallerine relocated, she did not do her job. (Instrument No. 16, at 3). OCM further alleges that Tallerine was notified that her job performance during the time she moved to Houston was not satisfactory. (*Id.*). To the contrary, Tallerine alleges that after securing counsel in an effort to determine the value of her interests in OCM for estate planning

purposes and to become better informed and to play a more active role as a director of OCM, individual directors of OCM began acting in a hostile manner toward her. (Instrument No. 1, at 6). Specifically, Plaintiff states in her Complaint that in the summer of 2004, Crane, President of OCM and Gordon, an OCM shareholder, called her and stated that they had been discussing a possible acquisition of OCM by Trustmark National Bank ("Trustmark"). (*Id.*) She further alleges that both Crane and Gordon stated that her efforts to secure information from the company could potentially jeopardize the deal. (*Id.*) Despite this, Plaintiff states that she continued to insist on receiving more detailed information about the Trustmark acquisition, and was finally able to setup a board meeting with the other directors where she was accompanied by counsel. (*Id.*, at 7). During this board meeting, Plaintiff avers that Defendants were openly hostile toward her, and made attempts to intimidate her for asserting her rights as a shareholder and director. (*Id.*) On or about October 8, 2004, Crane disseminated a memorandum regarding his meetings with Trustmark. Plaintiff alleges that she made numerous demands for Crane to clarify the memo, but that Crane failed to do so. (*Id.*, at 8).

On or about October 28, 2004, OCM brought a lawsuit against Plaintiff in state court in Louisiana seeking a declaratory judgment which would have entitled the executives and shareholders of OCM to terminate Plaintiff and to redeem Plaintiff's stock. (Instrument No. 1, at 9). Venue was found to be improper, and the case was transferred to the United States District Court for the Eastern District of Louisiana. (Instrument No. 24, at 6). Plaintiff's motion to dismiss was granted in that case, but it is unclear from the record, as no order is attached as an exhibit, whether it was dismissed for lack of jurisdiction or on the merits. (*Id.*)

On October 29, 2004, OCM terminated Tallerine, citing both the with and without cause termination provisions, sections 6.1(a) and 6.2 respectively, in the employment agreement. (Instrument No. 16, at 3). At the time of Tallerine's termination from OCM, she owned 1400 shares of OCM stock. (*Id.*). Included in OCM's termination letter to Tallerine was notification that it was exercising its option to purchase Tallerine's stock, pursuant to Section 9 of the employment agreement. (*Id.*, at 4). Section 9 of the employment agreement reads as follows:

In the event this Agreement is terminated pursuant to Section 6 hereof and the other Class B Shareholders have not exercised their rights and/or fulfilled their obligations, if any, to purchase Executive's shares, Executive shall be required to promptly so notify the Company and the Company shall have an option, but shall not be obligated, to purchase, upon notice to Executive within thirty (30) days after such notification, all of the shares of the Company owned by Executive at a purchase price equal to the greater of (i) the number of shares multiplied by the "book value" per share as such term is defined in Schedule 8.2 attached hereto and made a part hereof, or (ii) an amount determined by the Board of Directors of the Company in its sole discretion. Such purchase price may be paid in cash or as otherwise provided in paragraph 8.3 of Section 8 of this Agreement. In the event the Company exercises its right to purchase under this Section 9, Executive must, and hereby agrees to, immediately sell all shares of the Company owned by him to the Company.

(Instrument No. 16, Exhibit 2, at 9). The letter also stated that the stock redemption purchase should be concluded on or before November 19, 2004. (Instrument No. 16, Exhibit F). The stock owned by Plaintiff has not been redeemed. (Instrument No. 24, Plaintiff's Affidavit, at 4). On January 5, 2005, Defendants' counsel sent Plaintiff's counsel a letter demanding that Plaintiff surrender her stock. (*Id.*). Plaintiff claims that she has not surrendered said stock because the letter contained neither a tender nor an offer regarding the purchase (*Id.*). Further, Plaintiff alleges that Defendants' efforts to redeem her shares of OCM stock are a result of an illegal termination done solely for the purpose of forcing

her to transfer her shares back to OCM at less than fair market value, and to allow Defendants to obtain her rightful share of the profits. (Instrument No. 1, at 9-10).

On June 28, 2005, Defendant/Counterclaim Plaintiff OCM filed this Motion for Partial Summary Judgment. (Instrument No. 16). Defendant asserts a counterclaim against Plaintiff for breach of contract and requests specific performance of the 1991 employment agreement signed by Plaintiff. (*Id.*, at 1). Specifically, OCM is seeking permission from this Court, pursuant to the 1991 employment agreement, to redeem Plaintiff's stock in OCM, as she is no longer an employee of the company because according to OCM, Plaintiff was terminated pursuant to provisions in the employment agreement. (*Id.*). Defendant maintains that its employment agreement is unambiguous, and that the express terms of the agreement allow for it to redeem Plaintiff's shares. (*Id.*, at 2). OCM refutes Plaintiff's argument that the MOU signed in 1994, which stated that "appropriate revisions" would be made to the employment agreement, cancelled the 1991 employment agreement. (*Id.*). Defendant further states that although the MOU was signed during the 1994 recapitalization of OCM, no revisions to the employment agreement were ever made. OCM contends that a discussion/memorandum of understanding regarding making revisions to an already existing agreement does not necessarily evidence an intent to terminate the pre-existing employment agreement. (*Id.*).

On August 8, 2005, Plaintiff Tallerine filed her Response to Defendant's Motion for Partial Summary Judgment. (Instrument No. 24). Plaintiff argues that the MOU executed in 1994, concurrently with the recapitalization of OCM, was meant to cancel the restrictions on the Class B common stock contained in the 1991 employment agreement. (*Id.*, at 4). She further contends that Defendant's motion for partial summary judgment is premature because certain conditions precedent

have not been met. (*Id.*, at 6). Specifically, Plaintiff states that although OCM said in its termination letter to her that it was exercising its option to redeem Plaintiff's shares, OCM neither stated a price nor tendered payment and OCM did not demand surrender of the stock. (*Id.*, at 7). Plaintiff also claims that it was not until the filing of her Response to Defendant's Motion for Partial Summary Judgment that Defendant OCM sent a letter to her counsel, dated January 5, 2005, which made a demand that she tender her stock to OCM. (*Id.*). Plaintiff maintains, however, that despite this letter, Defendant OCM has not taken the steps set forth in the employment agreement to redeem her stock. Namely, Plaintiff states that Defendant has still failed to determine the stock price and tender payment. (*Id.*).

In the alternative, Plaintiff argues that the 1991 employment agreement and the 1994 MOU are ambiguous, and therefore, a genuine issue of material fact exists as to whether the 1991 restrictions were intended to apply to the new common stock, and whether the 1994 MOU cancelled the former restrictions. (*Id.*, at 14-15). Further, Plaintiff avers that the 1994 MOU constitutes a novation of the stock repurchase obligations that had been previously set forth in the 1991 employment agreement. (*Id.*, at 17). Lastly, Plaintiff contends that the 1991 stock restrictions are unenforceable because although the instruments contemplated in the 1994 MOU were never executed, OCM is not now able to suggest the 1991 restrictions continue to exist because of its failure to structure the revised and new agreements that would have stemmed from the 1994 MOU. (*Id.*, at 18-20).

On September 8, 2005, Defendant OCM filed its Reply to Plaintiff's Response to its Motion for Partial Summary Judgment. (Instrument No. 25) Defendant argues that Plaintiff's argument regarding restrictions on transfer (section 8 of the employment agreement) is misplaced, as the issue

before this Court deals with OCM's right to redeem an employee/shareholder's stock upon his/her termination pursuant to section 9 of the employment agreement. (*Id.*, at 1). Defendant also contends that Plaintiff failed to prove in her Response that OCM's redemption right pursuant to section 9 was cancelled due to the recapitalization and the execution of the 1994 MOU. (*Id.*, at 1-2). OCM points out that it provided proof in its motion for partial summary judgment that the right to repurchase employee/shareholder stock existed after the 1994 recapitalization. (*Id.*, at 8) Specifically, OCM notes that two employees/shareholders left OCM after the recapitalization, and in both cases, the employees/shareholders tendered their stock to OCM as required under the 1991 employment agreement. (*Id.*, at 8-9; *see also* Instrument No. 16, at 5-6). Defendant further avers that in accordance with Louisiana law, the 1994 MOU did not act as a novation to the employment agreement because it only contemplated a "mere modification" of the employment agreement, not the extinguishment of the agreement. (Instrument No. 25, at 6-7). Lastly, Defendant argues that its motion for partial summary judgment is not premature because it has acted in accordance with the requirements of section 9 of the 1991 employment agreement. (*Id.*, at 9-11).

II.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is "material" if its resolution in favor of one party might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also United States v. Arron*, 954 F.2d 249, 251 (5th Cir. 1992). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson*, 477 U.S. at 248. If the evidence

rebutting the motion for summary judgment is only colorable or is not significantly probative, summary judgment should be granted. *See id.* at 2511; *see also Thomas v. Barton Lodge, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999). The summary judgment procedure, therefore, enables a party “who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of that [specific] fact before the lengthy process continues.” *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990).

Under Rule 56(c), the moving party bears the initial burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 576, 586-87 (1986); *see also Burge v. Parish of St. Tammany*, 187 F.3d 452, 464 (5th Cir. 1999)

Where the moving party has met its Rule 56(c) burden, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586-87 (quoting FED. R. CIV. P. 56(e)) (emphasis in original). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1462 (5th Cir. 1995). To sustain the burden, the nonmoving party must produce evidence admissible at trial. *See Anderson*, 477 U.S. at 242; *see also Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992) (“To avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue.”).

The Court reviews the facts in the light most favorable to the nonmovant and draws all reasonable inferences in favor of the nonmovant. *See Brown v. Bunge Corp.*, 207 F.3d 776, 781 (5th

Cir. 2000). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252.

III.

In interpreting a contract, the Court’s ultimate goal is to determine the parties’ intent. *Campbell v. Melton*, 817 So. 2d 69, 74-75 (La. 2002). Briefing by both parties indicate that Louisiana law governs the employment agreement, and therefore, this Court will use the Louisiana Civil Code to guide its interpretation of the agreement in this case. (Instrument No. 16, at 9; Instrument No. 24, at 8). “The interpretation of a contract is the determination of the common intent of the parties with courts giving the contractual words their generally prevailing meaning unless the words have acquired a technical meaning.” *Id.* (citing La. Civ. Code arts. 2045, 2047; *Louisiana Ins. Guar. Ass’n v. Interstate Fire & Casualty Co.*, 93-0911 (La. 1994), 630 So. 2d 759, 763). In an effort to ascertain the parties’ intent, the Court must first determine whether the contract is unambiguous. *Campbell*, 817 So. 2d at 75. “When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the intent of the parties.” *Id.* (citing La. Civ. Code art. 2046). To the contrary, parol or extrinsic evidence is admissible where the contract is ambiguous or in other words, the common intention of the parties is not discernable from the written agreement. *Id.* (citing *Ortego v. State, Through the Dep’t of Trans. & Develop.*, 96-1322 (La.2-25-97), 689 So. 2d 1358) “A contract is considered ambiguous on the issue of intent when either it lacks a provision bearing on that issue, the terms of a written contract are susceptible to more than one interpretation, there is uncertainty or ambiguity as to its provisions, or the intent of the

parties cannot be ascertained from the language employed.” *Id.* (citing La. Civ. Code art. 1848 (formerly La. Civ. Code art. 2276)) (citations omitted).

In this case, Plaintiff Tallerine contends that the 1991 employment agreement was modified and/or terminated by the 1994 Memorandum of Understanding (“MOU”), entered into during OCM’s recapitalization, which stated that the shareholders agreed to make “appropriate revisions” to the employment contracts of each of OCM’s employees/shareholders. (Instrument No. 24, at 4). Defendant OCM argues, however, that the 1991 employment agreement has neither been modified nor terminated by the 1994 MOU, as no revisions were ever made to the employment contracts. (Instrument No. 16, at 5; Instrument No. 1, at 16). Plaintiff’s contention is based on the fact that the MOU explicitly provides that the obligation to execute the contemplated future agreements was “of the essence of the overall agreement of the parties.” (Instrument No. 24, at 5). The MOU only states that the shareholders had contemplated making “appropriate revisions” to the employment agreement. The extent to which the shareholders intended to modify the 1991 employment agreement, however, is unclear. While the Court recognizes that the 1994 MOU does not explicitly terminate the 1991 employment agreement, “cancellation of a written contract is not required by state law to be in writing.” *Shackelford v. Leavengood*, 532 So. 2d 1194, 1198 (La. Ct. App. 1988). “It may be effected by the mutual consent of the parties, which may be orally evidenced.” *Id.* (citing *Frank v. Motwani*, 513 So. 2d 1170 (La. 1987)). Here, in order to determine the true intent of the parties, as expressed in the MOU, the Court would have to evaluate the circumstances surrounding the formation of the MOU. This would require the Court to consider extrinsic evidence concerning the formation of the MOU and testimony concerning the extent to which the shareholders intended the MOU to modify and/or terminate the 1991 employment agreement. The consideration of extrinsic

evidence in determining the intent of the parties is, in part, a question of fact. *Carter v. BRMAP*, 591 So. 2d 1184, 1188 (La. Ct. App. 1992). “[I]n motions for summary judgment where a contract is ambiguous and the intent of the parties becomes a question of fact, very often there are conflicting affidavits concerning the intent of the parties and granting a summary judgment is not appropriate.” *Id.* at 1189. Therefore, the Court finds that there is a genuine issue of material fact as to the extent to which the 1994 MOU was meant to modify and/or terminate the 1991 employment agreement.

Even assuming the 1994 MOU does not modify and/or terminate the 1991 employment agreement, a genuine issue of material fact still exists as to whether the 1991 employment agreement was meant to apply to the newly issued common stock. Provisions in the 1991 agreement reference only the previously issued Class B common stock. Plaintiff argues that because the 1991 agreement does not reference the newly issued common stock, the 1991 agreement is only applicable to the previously issued and cancelled Class B common stock. Defendant on the other hand, interprets the 1991 agreement to extend to “all shares.” Therefore, OCM argues that although section 9 of the employment agreement makes reference to the Class B common stock, OCM’s right to redeem can be extended to all shares. The 1991 employment agreement is susceptible to more than one interpretation, and therefore, the Court finds it ambiguous as to whether the parties intended for the agreement to apply to the newly issued common stock. *Campbell*, 817 So. 2d at 75. In order to determine the true intent of the parties, the Court would have to consider extrinsic evidence.

While consideration of extrinsic evidence is permissible to determine the true meaning of the agreement in the face of ambiguity, the Court finds that summary judgment would not be appropriate in this case. *Carter*, 591 So. 2d at 1192 (“ambiguity in a contract raises a question of intent, which

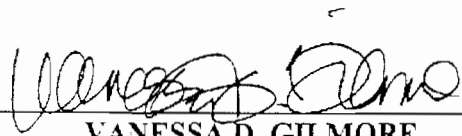
is a question of fact precluding summary judgment"). Accordingly, Defendant OCM's Motion for Partial Summary Judgment (Instrument No.16) is DENIED.

IV.

Based on the foregoing, IT IS HEREBY ORDERED that Counterclaim Plaintiff/Defendant Orleans Capital Management Corporation's Motion for Partial Summary Judgment (**Instrument No. 16**) is **DENIED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 16th day of March, 2006, at Houston, Texas.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE