

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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|-----------------------------|----------------------------|
| KOLD, LLC, |) |
| |) |
| Plaintiff/Counterdefendant, |) |
| |) |
| v. |) |
| |) C.A. No. N13C-05-249 MMJ |
| ANGELLE CROMAN, |) |
| |) |
| Defendant/Counterclaimant. |) |
| |) |
| |) |

Submitted: October 31, 2014
Decided: November 25, 2014

On Plaintiff/Counterdefendant's Motion for Summary Judgment
GRANTED

OPINION

Jennifer Gimler Brady, Esquire, Janine L. Hochberg, Esquire (Argued), Potter Anderson & Corroon LLP, Attorneys for Plaintiff/Counterdefendant

Laurence V. Cronin, Esquire (Argued), Smith Katzenstein & Jenkins LLP, Attorney for Defendant/Counterclaimant

JOHNSTON, J.

PROCEDURAL CONTEXT

Plaintiff/Counterdefendant KOLD, LLC, (“KOLD”) is a Tucson, Arizona television station. KOLD operates as an affiliate of Raycom Media, Inc. (“Raycom”), which owns or services more than fifty television stations nationwide.

Defendant/Counterclaimant Angelle Croman (“Croman”) is a former employee of KOLD. Croman began working at KOLD in 2008 as a local sales manager, and continued in that position until her resignation on May 8, 2013.

KOLD instituted this action on May 23, 2013. KOLD alleges that Croman breached her employment contract when she resigned from her local sales manager position in May 2013. KOLD seeks to recover \$35,000 in liquidated damages, as set forth in Croman’s employment contract.

Croman asserts that the liquidated damages provision is unenforceable for two reasons. First, Croman alleges the entire employment contract, which contains the liquidated damages provision, is unenforceable for lack of consideration. Second, Croman alleges the liquidated damages clause itself is unenforceable because it constitutes a penalty in violation of Delaware law. In addition, Croman counterclaims that she should not be liable for any liquidated damages because Croman was constructively discharged from her position at KOLD. However, counsel for Croman informed the Court that Croman is no longer pursuing the constructive discharge claim.

KOLD filed this Motion for Summary Judgment on September 30, 2014. Oral Argument was heard on October 31, 2014.

UNDISPUTED FACTS

For purposes of this motion, the facts will be viewed in the light most favorable to Croman, the non-moving party.

In early 2012, Raycom created a leadership development program (“Program”) for selected station sales managers. In March 2012, Croman was advised that she had been accepted into the Program. As a condition to participate in the Program, Croman was required to sign a two-year employment contract (“Employment Contract”).

Included in the Employment Contract, at Paragraph 10, was a provision titled “LIQUIDATED DAMAGES” (“Liquidated Damages Provision”).

Paragraph 10 provides:

Termination of this Agreement by Employee, for any reason, prior to the expiration date of this Agreement or any renewal thereof, will cause loss to the Employer, including but not limited to, lost productivity/revenues/ratings, increased operating costs, loss of training/promotion provided the Employee, as well as costs in advertising, interviewing and other associated costs related to replacing the employee. The parties acknowledge however, that such costs are difficult to ascertain, calculate and foresee. Therefore, the parties agree that, in the event of breach of this contract on the part of the Employee, the Employee shall pay to the Employer, the sum of \$35,000 dollars. Such payment

is not a penalty but is for liquidated damages sustained, it being mutually agreed and understood between the parties hereto that such amount is reasonable as liquidated damages.

Additionally, Paragraph 13 of the Employment Contract, titled “UTILIZATION OF SERVICES,” provides:

Nothing in this Agreement shall be deemed to require Employer to actually utilize Employee’s services. Employer reserves the right to assign, reassign, or place the Employee in other positions or duties in its sole discretion. Employer shall have fulfilled its entire obligation to Employee by paying Employee the compensation set forth in Paragraph 3 of this Agreement.

On March 19, 2012, Croman signed the Employment Contract. Croman subsequently completed the Program in early 2013, approximately one-year into the two-year Employment Contract.

On May 7, 2013, Croman accepted a Director of Sales position with KRIS Communications (“KRIS”). On May 8, 2013, Croman presented KOLD with a letter of resignation. Following Croman’s resignation, Croman did not pay KOLD the \$35,000 of liquidated damages contained in the Employment Contract.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a

matter of law.¹ All facts are viewed in a light most favorable to the non-moving party.² Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.³ When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.⁴ If the non-moving party bears the burden of proof at trial, yet “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” then summary judgment may be granted against that party.⁵

ANALYSIS

At oral argument, Croman’s counsel represented to the Court that the counterclaim for constructive discharge was no longer being pursued. Based on that representation, the Court will not discuss the counterclaim in its analysis. As a result, there is no choice of law dispute. The parties have stipulated that Delaware law applies to the contract issues that are the center of this lawsuit.

Parties’ Contentions

KOLD contends that Croman is required to pay \$35,000 in liquidated damages because the Employment Contract and Liquidated Damages Provision are

¹ Super. Ct. Civ. R. 56(c).

² *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991).

³ Super. Ct. Civ. R. 56(c).

⁴ *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

both enforceable under Delaware Law. First, KOLD asserts that the Employment Contract was adequately supported by consideration. KOLD argues that under Delaware law, Croman's selection and participation in the Program constituted adequate consideration for the Employment Contract to be enforceable. Second, KOLD contends the Liquidated Damages Provision is reasonable and enforceable. KOLD argues that at the time of contracting, KOLD's losses—if Croman resigned early from her position—were difficult to quantify. As a result, KOLD drafted the Liquidated Damages Provision, which acted as a reasonable forecast of the damages KOLD would suffer if Croman terminated her employment prior to the contract term of two years.

Croman contends that the Liquidated Damages Provision of the Employment Contract is unenforceable for two reasons. First, Croman contends that the entire Employment Contract is unenforceable because it lacks adequate consideration. Croman argues that KOLD did not make any binding promises to Croman in the Employment Contract, which under Delaware law constitutes a lack of adequate consideration. Second, Croman contends the Liquidated Damages Provision is unenforceable because it is a penalty. Such a provision is a penalty because it is not reflective of the parties' "best guess" as to the damages KOLD would have suffered if Croman ended her employment early.

The Employment Contract is Supported by Adequate Consideration

Under Delaware law, a valid contract exists where: (1) the parties intended that the contract would bind them; (2) the terms of the contract are sufficiently definite; and (3) the parties exchange legal consideration.⁶

When analyzing consideration issues, this Court must limit its inquiry to whether sufficient consideration exists, and not whether the alleged consideration is fair or adequate.⁷ Promises made in a contract will not constitute consideration where the promise is a mere illusion, such that the promise exists only in form, and not in substance.⁸ In an employment contract context, sufficient consideration can exist if the employee receives a benefit or experiences a beneficial change.⁹

For example, in *Hammermill Paper Company v. Palese*, the Court of Chancery reasoned that a beneficial change to an employee's status was sufficient consideration to support a non-competition agreement.¹⁰ Similarly, the Court of Chancery in *Newell Rubbermaid Incorporated v. Storm* found that Delaware law permits continued employment to serve as consideration for an at-will employee's agreement to a restrictive covenant.¹¹

⁶ *Osborn ex rel Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

⁷ *Id.* at 1159.

⁸ *Mobil Oil Corp. v. Wroten*, 303 A.2d 698, 701 (Del. Ch. 1973), *aff'd*, 315 A.2d 728 (Del. 1973).

⁹ *Hammermill Paper Co. v. Palese*, 1983 WL 19786, at *3 (Del. Ch.).

¹⁰ 1983 WL 19786, at *3.

¹¹ 2014 WL 1266827, at *9.

In *Newell*, the Court explained that continued employment was sufficient consideration because: (1) the defendant was granted a benefit that held actual value; and (2) the defendant's likelihood of future employment was likely high under the circumstances.¹² The Court also noted that the inclusion of a contingency into a benefit granted does not automatically make the promise illusory.¹³

Croman asserts *Newell and Hammermill* are not applicable in these circumstances because those cases involved employers that were contractually bound to provide the employee with a benefit of value. Conversely, Croman argues that KOLD was not contractually bound to provide Croman with anything of value. In support of this argument Croman specifically points to the language of Paragraph 13 of the Employment Contract, which provides: "Employer shall have fulfilled its entire obligation to Employee by paying Employee the compensation set forth in Paragraph 3 of this Agreement." Croman argues that Paragraph 10, read in conjunction with Paragraph 3, shows the absence of an obligation on the part of KOLD to provide Croman with anything of value.¹⁴

¹² *Newell*, 2014 WL 1266827, at *9.

¹³ *Id.*

¹⁴ Paragraph 3 of the Employment Contract provides: "Subject to the provisions of this agreement, the Employee's initial salary will continue in the amount in effect on the Effective Date, and the Employee will be considered for a salary increase on each salary review date that occurs during the Term....In addition to the compensation set forth above, Employee will be entitled to participate in the benefits program applicable to all full-time employees of Employer and will be subject to all of Employer's policies."

Croman also relies on the deposition testimony of current Raycom Vice President of Human Resources Susan Willower (“Willower”) to further show that KOLD was not obligated to provide anything of value to Croman. Specifically, Willower testified that it was her understanding that even if Croman had quit one day after signing the Employment Contract—without receiving any training—she still would be required to pay \$35,000 in liquidated damages.

However, the Court finds that Paragraph 13 must be read in context with Paragraph 10 to give effect to all the provisions of the Employment Contract. Taken in context, the only reasonable inference is that the Liquidated Damages Provision was included as a way for KOLD to recoup the losses from its obligation to train Croman, if Croman prematurely terminated her employment. If Paragraph 13 were intended as an “escape clause” that permitted KOLD to forego providing Croman with any training, there would be no reason to include the Liquidated Damages Provision of Paragraph 10. In fact, the purpose of the Employment Contract appears to be to define the parties’ benefits and obligations with regard to Croman’s participation in the Program for leadership development.

Further, if the facts were reversed—and Croman had left KOLD without receiving any training under the Program—the Court would find that Croman was not obligated to pay any liquidated damages. In that scenario KOLD would not have fulfilled its obligation under the Employment Contract, so Croman would not be bound by the Liquidated Damages Provision. The Court finds that KOLD was

obligated to provide Croman with Program training in exchange for the potential benefit of liquidated damages.

Therefore, the Court finds that *Hammermill* and *Newell* apply. Croman's continued employment with KOLD constitutes adequate consideration for the Employment Contract.

Further, the Court finds that Croman's participation in the program provided actual value to Croman. Willower testified that throughout the Program Croman was provided with "training, development, [and] opportunities to meet with leadership that she would not have otherwise had." For example, Croman was included on trips to Montgomery, Alabama to attend Raycom's general sales leadership conference, and to New York City to meet with the firm that brokered Raycom's sales to national advertisers. These opportunities held actual value because they provided Croman with the knowledge and skills necessary to be a general sales manager within Raycom. Additionally, because KOLD actually provided Croman with the training, the benefit to Croman was neither contingent, nor illusory.

Also, Croman's likelihood of future employment with KOLD was high after participating in the Program. Willower testified that one of the primary purposes for creation of the Program was to "prepare people for greater roles within the organization." This statement is corroborated by the fact that only six of the sixty local sales managers were selected to participate in the Program. Further, Croman

testified that at least two of the Program's participants were promoted within Raycom after completing the Program. The Court finds the only reasonable inference is that Croman was likely to stay employed with Raycom either in her position as a local sales manager, or in a higher position.

The undisputed facts demonstrate that Croman's participation in the Program beneficially changed Croman's status at Raycom by providing Croman with actual value. Had Croman declined participation in the Program, Croman would not have been exposed to the information she received, or involved in the opportunities she experienced. It is also highly likely that Croman would have maintained employment with Raycom after the training had she not resigned for a position with KRIS. Therefore, the Court finds that KOLD provided adequate consideration to Croman in exchange for her execution of the Employment Contract.

The Liquidated Damages Provision is Reasonable and Enforceable

In Delaware, liquidated damages are presumptively valid and enforceable, unless the liquidated damages constitute a penalty.¹⁵ The Court only will construe a liquidated damages provision to be a penalty if it is a "sum inserted into a contract that serves as a punishment for default, rather than a measure of

¹⁵ *Bhaskar S. Palekar, M.D., P.A. v. Batra*, 2010 WL 2501517, at *6 (Del. Super.).

compensation for its breach.”¹⁶ On the other hand, the Court will not construe a liquidated damages provision to be a penalty if: (1) at the time of contracting, the damages the parties might reasonably anticipate were difficult or impossible to ascertain; and (2) the stipulated amount reasonably estimates the damages that would likely be caused by a breach, or is reasonably proportionate to the damages which have actually been caused by the breach.¹⁷

KOLD argues the Liquidated Damages Provision is enforceable because it was a reasonable forecast of KOLD’s damages at the time of contracting. Croman counters, arguing the Liquidated Damages Provision is unenforceable because some of KOLD’s damages were easily ascertainable at the time of contracting, and that the total liquidated damages were not a reasonable estimate of KOLD’s potential losses.

In this case, the disputed Liquidated Damages Provision provides: “[I]n the event of breach of this contract on the part of the Employee, the Employee shall pay to the Employer, the sum of \$35,000 dollars.” Raycom’s former Vice President of Human Resources James Baucom (“Baucom”) testified that the \$35,000 figure included “hard” costs that KOLD expended in connection with Croman’s training. Specifically, these costs were Croman’s travel and lodging for Program trips, time spent by Program presenters to prepare and plan, as well as

¹⁶ *S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*, 1997 WL 817883, at *2 (Del. Super.).

¹⁷ *Bhaskar*, 2010 WL 2501517, at *6.

Croman's time away from her local sales manager position. The total amount of these "hard" costs was \$11,300. That estimate is not disputed by the parties.

Baucom then testified that the remaining balance of the \$35,000 in liquidated damages was derived from less certain "intangible" costs KOLD would suffer as a result of a breach. The costs included: (1) lost productivity; (2) lost revenues; (3) lost ratings; (4) increased operating costs; (5) lost promotions; (6) advertising costs for Croman's replacement; and (8) other associated costs of finding Croman's replacement. To calculate the total amount of liquidated damages, KOLD added the "hard" costs to the "intangible" costs.

The Court finds that at the time of contracting, KOLD's potential damages were difficult to ascertain. KOLD's damages were uncertain because the "intangible" costs relate to the amount of increased revenue KOLD would *not* realize through Croman's new knowledge and skills conferred by the Program. In drafting the Employment Contract, KOLD recognized that quantifying this number would be difficult, but still felt it necessary to include some representative dollar amount in the liquidated damages. Baucom testified that to calculate this amount, KOLD took one-half of one-percent of prior revenue attributed to Croman as a local sales manager and used it as a reasonable estimate of Croman's potential revenue improvement post-training. KOLD then further reduced that number, even though it was less than the increase in revenue KOLD expected from Croman following completion of the training.

The Court will not disturb the parties' initial voluntary agreement that the damages were difficult to ascertain.¹⁸ The Liquidated Damages Provision explicitly provides: "The parties acknowledge however, that such costs are difficult to ascertain, calculate and foresee." By executing the Employment Contract, Croman and KOLD unambiguously agreed that KOLD's damages were difficult to ascertain at the time of contracting.

The Court also finds, as a matter of law, that the Liquidated Damages Provision is a reasonable estimate of KOLD's damages in the event of a breach by Croman. As discussed, KOLD used less than one-half of one-percent of prior revenue attributed to Croman as a local sales manager as a reasonable estimate of Croman's potential revenue improvement. KOLD then added those "intangible" costs to the "hard costs" to determine its potential damages. The Court finds the liquidated damages are reasonable because of the reasonable method used to calculate the "intangible" costs, as well as the certainty of the "hard" costs.

Finally, the Court is satisfied that the \$35,000 in liquidated damages was calculated as a way to compensate KOLD for a potential breach of contract, and the amount does not constitute a penalty. There is no evidence in the record to

¹⁸ See *Piccotti's Rest. v. Granice's, Inc.*, 1988 WL 15338, at *2 (Del. Super.) (holding that when parties have unambiguously concluded that their damages will be difficult to ascertain, by including such language in a liquidated damages provision, the Court should not disturb their decision).

support a reasonable inference that the \$35,000 was intended to punish Croman for a breach of contract.

CONCLUSION

The Court finds that no genuine issue of material fact exists to prevent the Court from granting summary judgment. The Court finds as a matter of law that Croman's participation in the Program and continued employment provided adequate consideration to support the Employment Contract as enforceable. The Court also finds as a matter of law, that the \$35,000 amount in the Liquidated Damages Provision is reasonable, enforceable, and does not constitute a penalty.

THEREFORE, the Plaintiff/Counterdefendant's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston