NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1448-11T2

MARGOT W. TELEKI,

Plaintiff-Appellant,

v.

TALK MARKETING ENTERPRISES, INC.,

Defendant,

and

DAVID J. CLARK, DOUGLAS CAMPBELL and BRIAN REGAN,

Defendants-Respondents.

Submitted June 5, 2012 – Decided June 19, 2012

Before Judges Baxter and Nugent.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C-0085-11.

Peter Petrou, attorney for appellant.

Warren F. Clark, attorney for respondents.

PER CURIAM

Plaintiff Margot W. Teleki appeals from an October 24, 2011 Chancery Division order that granted summary judgment to defendants David J. Clark, Douglas Campbell and Brian Regan,

thereby dismissing plaintiff's complaint and absolving defendants of responsibility to pay plaintiff the salary promised her in an Employment Agreement. Plaintiff negotiated the Employment Agreement with Talk Marketing Enterprises, Inc. (TMEI), the corporation of which defendants were officers. We agree with plaintiff's contention that the judge impermissibly allowed parol evidence to alter the unambiguous terms of the Employment Agreement, thereby negating the wage payment guarantee established by N.J.S.A. 34:11-4.1 and 4.2. We reverse.

I.

On September 23, 2005, plaintiff sold her ailing telemarketing companies, Talk Marketing, L.L.C. and Talk Marketing, Inc., to TMEI. The principal shareholders of TMEI were defendants Clark, Campbell and Regan. The transaction was set forth in three documents, an Asset Purchase Agreement, an Assumption of Liabilities Agreement and an Employment Agreement, all dated September 23, 2005. It is the latter document that gave rise to this appeal.

The Asset Purchase and Assumption of Liabilities Agreements, when read together, provide that in return for plaintiff selling her telemarketing company to TMEI, TMEI: would assume responsibility for payment of a $200,000 demand loan

issued by Wachovia Bank to plaintiff's telemarketing company; and would agree to negotiate with Wachovia "to have [plaintiff's] personal and collateral guarantees terminated" as to that $200,000 loan. In addition, the Asset Purchase and Assumption of Liabilities Agreements specified that a $400,000 loan from Wachovia to plaintiff's telemarketing corporation would remain plaintiff's sole responsibility; however, TMEI agreed to "endeavor" to pay down the principal balance of that loan, and further agreed to negotiate with Wachovia for the removal of the payment guarantees made by plaintiff.

As is evident, TMEI made no cash payment for the purchase of plaintiff's telemarketing companies. The parties did, however, adopt the Employment Agreement, under which TMEI was obligated to pay plaintiff a salary of $4166.67 twice per month, or $100,000 per year, for each of ten years.

We describe the Employment Agreement in some detail, as its provisions are critical to resolution of the issue on appeal. The Employment Agreement contained the following provisions:

- Plaintiff would serve as the Vice President of Sales for TMEI, working as an "outside sales person."

- TMEI would provide plaintiff an expense account of $275 per month to pay for plaintiff's sales expenses, including travel expenses, auto payments and mileage, gasoline and toll expenses, and telephone charges.

- TMEI would pay plaintiff "a salary of One Hundred Thousand Dollars ($100,000.00) per year, payable in equal twice-monthly installments at [TMEI's] normal pay periods ('Base Salary')."

- In addition to the $100,000 annual Base Salary, TMEI would pay plaintiff commissions of five percent on any existing accounts, and fifteen percent on any accounts sourced by plaintiff.

- During plaintiff's "employment hereunder, Employee will serve in such capacity and with such duties as shall reasonably be required by the Chief Executive Officer."

- "[Plaintiff] will be entitled to receive her base salary without regard to her performance or any targets, sales goals or achievements."

- At her option, plaintiff would represent TMEI at trade shows, if requested to do so by the CEO.

- TMEI would provide plaintiff with health insurance as part of TMEI's health insurance plan.

- Plaintiff was entitled to four weeks vacation.

- If plaintiff were to die before the end of the ten-year period covered by the Employment Agreement, all of her rights under the Agreement would terminate; however, TMEI would remain obligated to pay to her estate any accrued Base Salary or commissions owing to plaintiff at the time of her death.

Notably, the Employment Agreement also included an integration clause, which provided as follows:

> Th[is] Agreement constitutes the entire agreement between the parties hereto on the subject matter hereof and may not be modified without the written agreement of both parties hereto.
>
> [(Emphasis added).]

Between September 23, 2005 and January 30, 2009, TMEI faithfully paid plaintiff the agreed-upon salary of $8333.33 per month. TMEI treated the payments as wages, because TMEI annually issued plaintiff a W-2. Each W-2 showed the deductions normally withheld for payment of wages, such as income taxes, social security, unemployment insurance and Medicare. Additionally, TMEI's corporate tax returns included an itemized deduction for the salary paid to plaintiff.[1]

In January 2009, the economic climate for telemarketing companies began to sour, and on January 30, 2009, TMEI notified plaintiff that it would unilaterally reduce her monthly salary from $8333.33 to $2600, a reduction of sixty-eight percent. Plaintiff responded to that salary reduction by filing a complaint and order to show cause against TMEI on June 16, 2011,

[1] The tax return contains an aggregate deduction for employee salaries, without listing the employees' names. Plaintiff asserts -- and defendants do not dispute -- that the salary paid to plaintiff comprised part of the itemized deduction.

seeking to compel TMEI to restore her salary to the $8333.33 specified in the Employment Agreement.

Two months later, plaintiff filed an amended complaint, asserting the same claims against TMEI that she had set forth in her original complaint but now, for the first time, asserting claims against the individual officers of the company, defendants Clark, Campbell and Regan. Plaintiff sought the sum of $68,999.95 as liquidated damages due her for the underpayment of wages through August 2011.

In a May 26, 2011 letter from defendants to plaintiff, they notified her that her "salary payments" would be discontinued, effective immediately. Defendants did, however, make a payment to plaintiff in mid-June of $2800, representing partial payment of her salary at the reduced amount specified in TMEI's January 30, 2009 correspondence, consisting of $1400 for June 15, 2011 and $1400 for June 30, 2011. TMEI has not made any payments of salary to plaintiff since June 2011. On September 1, 2011, TMEI filed for bankruptcy protection. Thereafter, plaintiff proceeded solely against the individual defendants.

On October 20, 2011, the court conducted a hearing on plaintiff's order to show cause and request for a preliminary injunction to compel the individual defendants to pay plaintiff the salary of $8333.33 specified in the Employment Agreement.

At that hearing, defendants asserted that during the negotiations leading to the acquisition of plaintiff's telemarketing business, defendants had made it clear -- and plaintiff had agreed -- that defendants would incur no personal liability under the Employment Agreement. Defendants also argued that despite its title of "Employment Agreement," and despite the language requiring TMEI to pay to plaintiff "[d]uring her employment . . . a salary of One Hundred Thousand Dollars ($100,000.00) per year," the so-called Employment Agreement was, in reality, a mechanism for the deferred purchase of plaintiff's telemarketing company (emphasis added).

Defendants maintained that, as a result, the provisions of N.J.S.A. 34:11-4.1 and 4.2 -- which impose individual liability on corporate officers for payment of wages -- were inapplicable. In particular, defendants maintained that because the purchase by TMEI of the corporate assets of plaintiff's telemarketing company was structured in a way that avoided any lump-sum payment at the time of closing, the parties had instead agreed to pay the capital costs of acquisition over a ten-year period through a document they entitled an "Employment Agreement."

Defendants argued that plaintiff knew, at the time the Employment Agreement was signed, that defendants would have no

"personal liability for anything in the transaction." They pointed to defendant Clark's certification, in which he stated:

> I cannot emphasize strongly enough how adamant all three individually named Defendants were in the negotiations, regarding the asset purchase of [plaintiff's] distressed business, that neither myself, Douglas Campbell nor Brian Regan would be personally responsible for any obligations [to] [plaintiff]. In the Asset Purchase Agreement, the Buyer, Talk Marketing Enterprises, Inc. assumed various liabilities, including payment of the $200,000.00 demand loan from Wachovia Bank for which [plaintiff] was personally responsible. I further attach . . . a document entitled "Assumption of Liabilities" pursuant to which Defendant Talk Marketing Enterprises, Inc., as buyer, assumed various liabilities of Talk Marketing, LLC and Talk Marketing, Inc. as seller. It was well understood by all parties to the transaction that the individual members of Talk Marketing Enterprises, Inc., myself, Douglas Campbell and Brian Regan, were not accepting personal responsibility for anything in the transaction, and [plaintiff] and her attorney at the time agreed that there would be no personal responsibility of any of the buyers who were buying through a corporation.
>
> [(Emphasis added).]

Plaintiff opposed defendants' attempt to avoid responsibility for payment of the salary promised her under the Employment Agreement. She argued that the obligation of corporate officers, such as defendants, to ensure the payment of wages is statutory, arising under the New Jersey Wage Payment

Law, N.J.S.A. 34:11-4.1 and 4.2. She maintained that the New Jersey Wage Payment Law obligates persons who assume authority over corporate operations to pay salary and wages to corporate employees when the corporation defaults on its obligation to do so.

The judge ruled in favor of defendants. She reasoned that plaintiff should not be permitted to obtain the benefit of the Wage Payment Law when she was not asked to perform any services for TMEI after January 2009. The judge also held that in the absence of a negotiated personal guarantee by the individual defendants to pay plaintiff a salary, plaintiff was not entitled to the protection of the New Jersey Wage Payment Law, and was not entitled to the payment of salary by the individual defendants.

In reaching that conclusion, the judge looked beyond the express provisions of the Employment Agreement to conclude that the agreement reached by the parties was something other than what it expressly purported to be, namely, an agreement for the payment of wages. The judge held that the Employment Agreement was, in actuality, an Asset Purchase Agreement under which the individual defendants had no personal liability. The judge stated:

> I don't care if it says wages. If they are not wages, then they are not subject to

> this [A]ct. This [A]ct specifically applies to wages. And it is designed to protect people . . . who have worked on a time, task, piece or commission basis [who] haven't been paid. . . . But a buy out agreement which is essentially what this agreement was is not subject to the [W]age [A]ct because they are not wages.
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> . . . .
>
> And when we look at the [E]mployment [A]greement, it is a nearly ineluctable conclusion that that [E]mployment [A]greement was the result of the purchase of her shares of stock -- of her assets.
>
> . . . .
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> The company is still liable on the [E]mployment [A]greement. But the individuals are not liable and they are not liable under N.J.S.A. 34:11-4.1 ad sec [sic]. And . . . [there is a] distinction between the personal liability imposed by . . . the wage statute . . . and personal liability for a buy out of assets.
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> . . . .
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> There is an assumption of liability agreement, an asset purchase agreement[,] [and] an employment agreement. I really couldn't find anything that would impose personal liability here.

Because the judge's ruling was based upon an interpretation of the statute that effectively disposed of the entire matter, the parties consented to treat the judge's ruling as a motion for summary judgment, thereby creating a final order for

purposes of appeal. The judge signed a confirming order on October 24, 2011.

On appeal, plaintiff maintains that the dismissal of her complaint constitutes reversible error of law because the Employment Agreement, when read in conjunction with N.J.S.A. 34:11-4.1 and 4.2, imposed personal liability on the individual defendants for the payment of wages. She maintains that she did, in fact, provide services to TMEI for more than three years pursuant to the Employment Agreement, for which she was paid a salary of $8333.33 per month; and TMEI, as well as the individual defendants, its corporate officers, treated the $8333.33 as wages by providing plaintiff with a W-2 and making the normal salary deductions for social security, Medicare and unemployment insurance. Finally, she asserts that the judge impermissibly ignored the integration clause in the Employment Agreement, which forbids reference to any external understandings or agreements.

II.

When reviewing an order granting summary judgment, we employ the same standard as that governing the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). Where the granting or denial of summary judgment depends upon statutory construction and interpretation, our review of the

judge's rulings on issues of law is de novo. City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010).

In relevant part, the New Jersey Wage Payment Law provides that every employer is obliged:

> [to] pay the full amount of wages due to his employees at least twice during each calendar month[.]
>
> [N.J.S.A. 34:11-4.2 (emphasis added).]

The term "wages" is defined as follows:

> "Wages" means the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto.
>
> [N.J.S.A. 34:11-4.1(c).]

The Wage Payment Law defines an employer, in relevant part, as "any individual . . . [or] corporation . . . employing any person in this State." N.J.S.A. 34:11-4.1(a). The statute further provides that for purposes of the obligation to pay wages, the officers of a corporation who are responsible for its management, are to be treated as the "employers of the employees of the corporation." The applicable statute states:

> For the purposes of this [A]ct, the officers of a corporation and any agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation.

[Ibid.]

We recently reaffirmed the obligation of corporate officers for payment of employee wages when the corporation itself defaults on its payment obligations. DeRosa v. Accredited Home Lenders, Inc., 420 N.J. Super. 438, 464 (App. Div. 2011). See also Mulford v. Computer Leasing, Inc., 334 N.J. Super. 385, 399 (Law Div. 1999) (observing that under the Wage Payment Law, liability of directors and officers is secondary to the corporation's liability, so that the personal liability of corporate officers comes into play only in instances where the corporation reneges on its salary obligations). Moreover, because "'employees are the obvious special beneficiaries of the [Wage Payment Law],'" the statute should be read to create "'a private right of action in court against employers . . . to protect and enforce [employees'] rights thereunder.'" Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 137-38 (App. Div. 2003) (quoting Mulford, supra, 334 N.J. Super. at 394).

The question presented by this appeal is whether any provision in the applicable statutes relieves defendants, as the corporate officers, of the responsibility to ensure the payment of wages in the circumstances presented here, where the corporation has defaulted on its obligation to pay wages. In urging us to affirm the order under review, the individual

defendants assert that after the early part of 2008, plaintiff no longer "showed up for work." Such an argument ignores two facts. First, as we have already noted, the September 23, 2005 Employment Agreement expressly provided that during plaintiff's employment, she would "serve in such capacity" and would perform "such duties as shall reasonably be required [of her] by the Chief Executive Officer." The Employment Agreement also specifies that plaintiff would be "entitled to receive her base salary without regard to her performance for any targets, sales goals or achievements." For that reason, it is clear that if the CEO chose not to ask plaintiff to perform any assignments, which is the case, the Employment Agreement nonetheless entitled her to be paid.

Second, there is no dispute that the Employment Agreement negotiated by the parties did not expressly provide for a waiver of the statutory protection enjoyed by plaintiff as an employee of TMEI. See Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 390 (App. Div. 1997) (holding that a waiver of a statutory right must be knowing and voluntary).

Moreover, the terms of the Employment Agreement are instructive, as the document contains numerous provisions reinforcing the nature of the Agreement as an employment relationship for which plaintiff was to receive wages. As we

have already noted, the Agreement: created specific responsibilities for plaintiff, designating her as the Vice President of Sales; specified the salary she would earn and the duration of her employment; enrolled her in TMEI's company health insurance plan; granted her four weeks of paid vacation; gave her an expense account of $275 per month for her work as "an outside sales person"; entitled her to represent TMEI at trade shows if requested to do so by TMEI's CEO; and guaranteed her the right to earn commissions ranging from five percent to fifteen percent.

Nothing in the language of the Employment Agreement suggests that it is anything other than what it purports to be, namely, a contract of employment under which plaintiff was entitled to a salary of $100,000 per year for a ten-year period. Indeed, the individual defendants do not dispute those terms. Instead, they urge us to accept the trial judge's determination that the surrounding circumstances justify disregarding the Employment Agreement's express terms, and to treat it essentially as a nullity.

In particular, the individual defendants urge us to concur in the trial judge's determination that despite all of the features that compel the conclusion that the document creates an employment relationship, plaintiff "understood that [she] would

not be required to perform any services for TMEI." Such a contention is belied by the uncontroverted evidence in the record showing that for more than three years after the Employment Agreement was adopted, plaintiff did, in fact, work as an outside salesperson for TMEI. Defendants' argument is also belied by the corporation's issuance of a W-2 to plaintiff in 2005, 2006, 2007, 2008, 2009 and 2010, and by the filing of a corporate income tax return in which TMEI availed itself of an itemized deduction for the wages it paid to plaintiff. Moreover, as the record makes clear, in the May 2011 correspondence between the parties' counsel before plaintiff filed her complaint, defendants' attorney referred to the payments being made to plaintiff as "salary payments," further evidencing defendants' recognition that the twice-monthly payments were salary, not an asset purchase.

We decline to accept the trial judge's approach, in which she stated, "I don't care if it [, the Employment Agreement,] says wages. If they are not wages, then they are not subject to this [A]ct." There is only one way the judge could have reached the conclusion that the Employment Agreement was, in reality, an asset purchase agreement that obligated defendants to make continued payments for the purchase of plaintiff's telemarketing company: by resorting to parol evidence and by considering

matters outside the provisions of the Employment Agreement. Doing so was error.

Where, as here, the terms of a contract, (the Employment Agreement), are clear and unambiguous, resort to parol evidence is improper. Conway v. 287 Corporate Ctr. Assocs., 187 N.J. 259, 268 (2006). Although a court that construes a document is obliged to "consider all of the relevant evidence that will assist in determining the intent and meaning of the contract," extrinsic evidence should never be permitted to "modify[]" or "curtail[] its terms[.]" Id. at 269 (citation omitted). As the Court explained in Conway,

> [e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing -- not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretive

> function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.
>
> [Ibid. (emphasis added) (quoting Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-02 (1953)).]

Thus, extrinsic evidence concerning the "circumstances leading up to the formation of the contract" is only permitted when necessary to interpret a disputed provision of the document. Ibid. When the contract terms are unambiguous, extrinsic evidence must not be considered. Ibid. In light of Conway, the judge's use of extrinsic evidence to alter, indeed curtail, the straightforward and unambiguous provisions of the Employment Agreement was error. However much the individual defendants may have hoped, intended or expected to be relieved of personal responsibility for payment of plaintiff's wages, this is not what the transactional documents said. Defendants did not ask plaintiff to sign a waiver of her right to hold them personally liable under the Wage Payment Law. Having failed to do so, they cannot take refuge in extrinsic evidence to alter the Employment Agreement by treating it as an asset purchase agreement. We reverse the judgment in favor of the individual defendants.

Plaintiff acknowledges that the obligation of the individual defendants to pay her a salary terminated on September 1, 2011, when TMEI filed its bankruptcy petition. Because the actual amount of wages remaining unpaid as of that date is unclear, we remand for a calculation of the amount of money due plaintiff. The remand shall be limited to that narrow purpose.

Reversed and remanded.