STATE OF MINNESOTA
IN COURT OF APPEALS
A12-146

Bradley K. Meier,
Appellant,

vs.

First Commercial Bank, et al.,
Respondents.

Filed July 30, 2012
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-11-11376

John Fabian, David H. Redden, Fabian May & Anderson PLLP, Minneapolis, Minnesota (for appellant)

Ansis V. Viksnins, Lindquist & Vennum, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from the summary-judgment dismissal of appellant's breach-of-contract claim arising out of respondent-bank's failure to either give appellant an 18-month written notice of employment termination or pay appellant 18 months of salary as

severance pay, appellant argues that the district court erred by determining that respondent is excused from performing under the doctrine of impossibility because either of the contractual options would constitute a "golden parachute payment" that respondent is prohibited from paying. We affirm.

FACTS

Respondent Commercial Bancshares, Inc. (CBI) is a bank holding company, and respondent First Commercial Bank (FCB) is a wholly owned subsidiary of CBI that operates a commercial bank in Minnesota. As a member of the Federal Deposit Insurance Corporation (FDIC) and a state-chartered bank, FCB is subject to both FDIC and state regulations.

Appellant Bradley K. Meier was employed as the president and chief executive officer of FCB from 2003 through November 18, 2010. In 2007, the parties entered into an employment agreement, which provided that Meier's employment was at will, subject to certain conditions. Section 1.04 of the agreement stated: "Employee's employment under this Agreement shall be at-will, subject to the conditions, procedures and obligations arising from termination by Employee or Employer as provided in Section 2 of this Agreement." Section 2.03 of the agreement stated:

> Employee may be terminated without Cause, as Cause is defined in Section 2.01. In such case, Employee shall be entitled to all earned Compensation, and to either (a) eighteen (18) months' prior written notice of such termination, or (b) severance pay in a dollar amount equal to Employee's highest annual compensation received and cost of benefits (excluding telephone and car allowance) for the eighteen (18) months immediately preceding his termination date . . . .

The employment agreement set Meier's annual salary at $250,000, subject to an annual increase of at least eight percent.

From December 10, 2008, through February 19, 2009, the Minnesota Department of Commerce conducted a regulatory examination of FCB. The department concluded that FCB urgently needed additional capital, and, in July 2009, FCB agreed to the entry of a cease-and-desist order, which required FCB to acquire and maintain increased amounts of capital, reduce its loan-portfolio concentration in commercial real estate, minimize adversely classified assets, and replenish loan-loss reserves.

FCB's financial condition continued to deteriorate. FCB lost $5,817,000 in 2009 and $12,998,000 in 2010. By the third quarter of 2010, FCB was not complying with the capital requirements in the cease-and-desist order, due to the declining value of commercial real estate, which required additional capital to be committed to loan-loss reserves.

On November 18, 2010, the FCB board terminated Meier's employment. A letter that Meier received at the board meeting stated that the board was "suspending [Meier's] job responsibilities immediately." The letter also stated:

> We are mindful of the terms of your Employment and Non-Competition Agreements. Given [FCB's] difficult financial condition, we believe our regulators will not permit [CBI] to redeem your stock. Further, even if you qualify for severance payments, we believe our regulators will not allow [FCB] to pay you any severance. Accordingly, the Board has asked me to communicate its willingness to negotiate modifications to your Employment and Non-Competition Agreements in a manner that will allow you to seek employment in our trade area. Please let me know if you are interested in pursuing this option.

Meier responded by letter stating that, under the employment agreement, CBI and FCB are

> required to provide me either 18 months prior written notice of termination or pay in lieu of any such notice. As the November 18, 2010 letter expressed the Company's unwillingness to provide 18 months of compensation in lieu of notice (and other benefits owed to me under the Employment Agreement), I urge you to reconsider and provide me the 18 months of notice of termination.

Meier's counsel then sent a letter to FCB demanding $91,354 for unpaid wages and $10,997 for unpaid personal time off. The letter also stated that "additional salary" was due under section 2.03 of the employment agreement. Within 24 hours of receiving the letter, FCB paid Meier the amounts stated as due for unpaid wages and personal time off. Meier's counsel then sent a letter demanding an additional $437,000 under section 2.03 of the employment agreement.

Respondents sent letters to the FDIC and the Federal Reserve Bank requesting permission to pay Meier under section 2.03 of the employment agreement. Meier also sent a letter to the FDIC and the Federal Reserve, arguing that payment for 18 months in lieu of notice should not be deemed a golden parachute payment. The FDIC determined that the payment would constitute a golden parachute payment and requested additional information to determine whether the payment would be authorized. The FDIC denied FCB's request to pay Meier under section 2.03 of the employment agreement.

Meier brought this lawsuit against respondents, alleging claims for breach of contract and violations of Minn. Stat. §§ 181.101, .13 (2010). The parties brought cross-

motions for summary judgment. The district court granted summary judgment for respondents on the breach-of-contract claim based on its determination that payment under section 2.03 would constitute a prohibited golden parachute payment and was, therefore, impossible. The district court granted summary judgment for Meier on his claim under Minn. Stat. § 181.13 and awarded Meier $12,447.15 in statutory penalties. The district court dismissed Meier's claim under Minn. Stat. § 181.101. This appeal followed.[1]

D E C I S I O N

I.

On appeal from a summary judgment, appellate courts review de novo whether a genuine issue of material fact exists and whether the district court erred in applying the law; in doing so, appellate courts view the evidence in the light most favorable to the party against whom summary judgment was granted. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009).

"[P]erformance of a contractual duty may be excused when, due to the existence of a fact or circumstance of which the promisor at the time of the making of the contract neither knew nor had reason to know, performance becomes impossible." *Powers v. Siats*, 244 Minn. 515, 520, 70 N.W.2d 344, 348 (1955). The impossibility defense is not available to a party that learns that performance is impossible in time to avoid the impossibility but fails to do so, and the defense does not apply when the "impossibility or

[1] Appellant does not appeal from the portion of the summary judgment that dismissed his claim under Minn. Stat. § 181.101.

impracticability of performance is wholly attributable to the subjective inability of the promisor." *Id.*, 70 N.W.2d at 348-49. "[T]he unforeseen exercise of governmental authority rendering performance [of a promisor's contractual obligation] impossible will excuse the promisor's obligation." *Automatic Alarm Corp. v. Ellis*, 256 Minn. 520, 523, 99 N.W.2d 54, 56 (1959). The defendant has the burden of proving impossibility. *Den Mar Constr. Co. v. Am. Ins. Co.*, 290 N.W.2d 737, 743 (Minn. 1979).

Federal law allows the FDIC to "prohibit or limit, by regulation or order, any golden parachute payment." 12 U.S.C. § 1828(k)(1) (2006). Meier does not dispute that when his employment was terminated, FCB was prohibited from making a golden parachute payment because it was in a troubled condition. But Meier contends that respondents failed to prove their impossibility defense because, under the terms of his employment agreement, FCB could have given him 18 months' notice of his termination and continued paying him for his work during the notice period and the payments that FCB made to him would not have been golden parachute payments.

> The term "golden parachute payment" means *any payment* (or any agreement to make any payment) in the nature of compensation by any insured depository institution[2] or covered company for the benefit of any institution-affiliated party[3] *pursuant to an obligation of such institution* or covered company *that* –
>
> *(i) is contingent on the termination of such party's affiliation with the institution* or covered company; and –
>
> (ii) is received on or after the date on which --
>
> . . .

[2] It is undisputed that FCB is an insured depository institution.
[3] It is undisputed that Meier is an institution-affiliated party.

> (III) the institution's appropriate Federal banking agency determines that the insured depository institution is in a troubled condition (as defined in the regulations prescribed pursuant to section 1831i(f) of this title) . . . .

12 U.S.C. § 1828(k)(4)(A) (2006) (emphasis added).

In short, a payment in the nature of compensation by FCB to Meier would have been a golden parachute payment if the payment was made pursuant to an obligation of FCB that was contingent on termination of Meier's employment or affiliation with FCB. The payment obligation that Meier claims was breached is FCB's obligation pursuant to section 2.03(a)[4] of his employment agreement, which states, "Employee may be terminated without Cause, as Cause is defined in Section 2.01. In such case, Employee shall be entitled to all earned Compensation, and to . . . eighteen (18) months' prior written notice of such termination." Meier makes three arguments why the district court erred in concluding that payments for his services during an 18-month notice period would have constituted golden parachute payments.

Meier first argues that "[i]n order to be a golden parachute payment, a payment must be made pursuant to an obligation that is contingent on 'termination,' meaning termination must occur before performance is due." Meier contends that FCB's obligation to provide him 18 months' notice of termination could not be contingent on termination because "providing prior notice of termination must, by its own terms, be performed ***before*** termination."

[4] The parties do not dispute that payment of severance pay under section 2.03(b) of the employment agreement would have been a golden parachute payment.

But Meier's argument that "contingent on 'termination,' mean[s] termination must occur before performance is due" is based on his claim that a contingency is also known as a condition precedent. To support this claim, Meier cites *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1974). That opinion addresses the definition of a "condition precedent," but it does not state that a contingency is also known as a condition precedent or in any other way address the meaning of "contingency" or "contingent." *Id.*

"Contingent" means "[d]ependent on something else; conditional." *Black's Law Dictionary* 362 (9th ed. 2009). Under the employment agreement, FCB could terminate Meier's employment without cause, but if it did so, it was obligated to either pay severance pay or give Meier 18 months' notice of his termination. Meier's argument that notice of termination could not occur before termination fails to recognize that "terminate" and "termination" have two meanings. "Terminate" means both "[t]o put an end to" and "[t]o end." *Black's Law Dictionary* 1609 (9th ed. 2009). "Termination" means both "[t]he act of ending something" and "[t]he end of something in time or existence." *Black's Law Dictionary* 1609 (9th ed. 2009). Section 2.03(a) states, "Employee may be terminated without Cause." Because this phrase indicates a grant of authority,[5] the first meaning of "terminate" applies. The language does not simply acknowledge that Meier's employment may come to an end without cause; it grants FCB authority to put an end to Meier's employment without cause. And, when FCB put an

[5] "May" means "[t]o be allowed or permitted to." *The American Heritage Dictionary of the English Language* 1112 (3d ed. 1992).

end to Meier's employment, its act of ending the employment was a termination. This means that FCB's obligation to provide notice was dependent on, and therefore contingent on, FCB's termination of Meier's employment. There was no obligation to provide notice until there was a termination.

Section 2.03(a) continues by stating, "In such case, Employee shall be entitled to . . . eighteen (18) months' prior written notice of such termination." "In such case" refers to the case identified in the previous sentence, which is a case in which FCB terminates Meier's employment without cause. The entire phrase means that in a case in which FCB terminates Meier's employment without cause, Meier is entitled to 18 months' prior written notice of the termination. Because the 18-month notice period must have a beginning and an end, when "termination" is used in this phrase, its second meaning applies. FCB must provide notice 18 months before the time when the employment ends.

Meier next argues that the bank's obligation to pay him for his work during the 18-month notice period could not be contingent on his termination because the work would have been performed and the obligation to pay for the work would have arisen before his termination. Like Meier's first argument, this argument fails to recognize that FCB's act of putting an end to his employment was a termination. The 18-month notice period and any work that Meier would have performed during the notice period would have occurred after the termination.

Finally, Meier argues that "[FCB's] obligation to pay [him] for his work during the eighteen month notice period would not have arisen in any way from section 2.03" and, instead, would have arisen under section 1.05 of the employment agreement, which

set his compensation for services performed. But this argument ignores section 1.04 of the employment agreement, which states, "Employee's employment under this Agreement shall be at-will, *subject to the* conditions, procedures and *obligations arising from termination by* Employee or *Employer as provided in Section 2* of this Agreement." (Emphasis added.) If section 2.03 were not in the agreement, FCB could have terminated Meier's employment without cause and without prior notice. *See Pine River State Bank v. Mettille*, 333 N.W.2d 622, 628 (Minn. 1983) (stating general rule that, when contract is for indefinite duration, corollary is that either party may terminate it at any time for any reason). Upon Meier's termination, FCB's only obligations to pay Meier were its obligations under section 2, and these obligations arose because of the termination.

As an at-will employee, Meier's employment would have simply continued if it was not terminated. When the FCB board terminated Meier's employment, it had no obligation to pay Meier under section 1.05 of the employment agreement. But because FCB terminated Meier's employment, its obligation under section 2.03(a) to give Meier 18 months' notice of the end of his employment arose. Any obligation to make a payment during the 18-month notice period arose from section 2.03.

The district court did not err in concluding that payments for Meier's services during an 18-month notice period would have constituted golden parachute payments.

Affirmed.