STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 15

In the Matter of the Liquidation of:

Wisconsin Reinsurance Corporation and 1st Auto & Casualty Insurance Company

Case No. 2023CV1310

Case Code: 30703

LIQUIDATOR'S RESPONSE TO OBJECTION TO LIQUIDATOR'S DENIAL OF CLAIM

Mr. Fogg signed his employment contract (the "Contract") in May 2022 (Fogg Aff. Ex. 1), and Wisconsin Reinsurance Corporation ("WRC") went into rehabilitation about a year afterwards. (Dkt. No. 12.) WRC's liquidator ended his employment six months later when the company entered liquidation on January 2, 2024. (*See* Dkt. No. 22.) All told, then, Mr. Fogg fulfilled approximately eighteen months of his five-year contract. (*See* Fogg Aff. Ex. 1 at § 2.) He now contends he is entitled to recover more than $660,000 from the WRC liquidation estate for full severance benefits, as well as twelve additional weeks of compensation.

Mr. Fogg's demand rests solely and exclusively on the notion that the termination of his employment was without "cause," as defined in the Contract. He was terminated, however, by an "action" of the Office of the Commissioner of Insurance ("OCI"), a regulatory body with supervision over WRC, acting as WRC's liquidator (the "Liquidator"). His termination thus squarely met the Contract's definition of "cause." Mr. Fogg nevertheless insists the Contract's language cannot mean what it plainly says, and that it should be read to include limitations that simply are not there. The Court should decline Mr. Fogg's invitation to rewrite the agreement so he can capture a massive share of whatever assets remain for class five claimants. On the clear,

unambiguous language of his contract, his termination was for cause. Accordingly, he is not entitled to severance benefits, and his objection to the Liquidator's determination should be overruled.

Mr. Fogg's Termination Was For Cause, and He Therefore is Not Entitled to Severance Benefits.

Section 5 of the Contract governs termination of Mr. Fogg's employment, and termination for cause is covered by Section 5(C). As relevant here, "cause" is defined as follows: "Cause means . . . the suspension or prohibition (whether temporary or permanent) from the Executive participating in the conduct of WRC's affairs by action of any regulatory agency having supervisory responsibility over WRC[.]" (Fogg Aff. Ex. 1 at § 5(C)(f).) Mr. Fogg's termination unquestionably meets this definition.

The decision to seek liquidation of WRC – rather than to pursue further efforts at rehabilitation – was the Commissioner's, acting as WRC's rehabilitator. As stated in the petition for an order placing WRC in liquidation, the Commissioner "determined" that the rehabilitation plan was unlikely to be successful, the Commissioner concluded "that further attempts to rehabilitate WRC and 1st Auto would be futile," and the Commissioner asked "the Court for an Order for Liquidation of WRC and 1st Auto[.]" (Dkt. No. 17 at ¶¶ 31, 34(a), and 42.) As both Rehabilitator and Liquidator of WRC, the Commissioner was free to terminate Mr. Fogg's employment under Wis. Stat. §§ 611.63(6) and 645.46(11). Justin Schrader, acting as Special Deputy Rehabilitator, gave Mr. Fogg notice of his termination on December 28, 2023, effective upon entry of an order placing WRC into liquidation (Fogg Aff. Ex. 2), which occurred just five days later.

All these actions and judgments, from the decision to seek WRC's liquidation to the decision to end Mr. Fogg's employment, were the Commissioner's. Mr. Fogg does not contest

that fact, nor does he contest that OCI has supervisory authority over WRC. He does, however, question whether OCI can be deemed to have suspended him if it "merely asked for an order invoking the statutory requirement of such suspension[.]" (Objection, p. 7). But OCI *did* seek that order. Moreover, the implication of Mr. Fogg's question – that his termination was an inevitable consequence of liquidation – is incorrect. Under Wis. Stat. § 611.63(6), when "an order of rehabilitation or liquidation is issued," WRC's "contractual obligations" to Mr. Fogg "terminated." It does not follow, however, that the Commissioner as Rehabilitator and Liquidator lacked the authority or discretion to continue or reaffirm those obligations. To the contrary, in rehabilitation an executive's "powers" and "authority shall be suspended, *except as they are redelegated by the rehabilitator*." (Wis. Stat. § 645.33(2) (emphasis added).) And in liquidation, the liquidator has authority to "appoint or engage employees and agents," to "*affirm* or disavow any contracts to which the insurer is a party," and to "do other acts not herein specifically enumerated" that aid in the liquidation. (Wis. Stat. § 645.46(2), (11)(a), and (23) (emphasis added).) This Court affirmed those powers in both its rehabilitation order (Dkt. No. 12 at ¶¶ 4, 7) and its liquidation order. (Dkt. No. 22 at ¶ 5.) To be sure, the Liquidator would have needed the Court's approval had it desired to continue Mr. Fogg's employment after WRC entered liquidation (Wis. Stat. § 645.46), but the Liquidator chose not even to ask. Instead, he specifically asked the Court for an order suspending the authority of WRC's officers and managers (Dkt. No. 17 at ¶ 42(g)), which the Court granted. (Dkt. No. 22 at ¶ 7.) Mr. Fogg was terminated not by some mechanical operation of law, but rather as a result of the Commissioner's deliberate decisions to request liquidation and to end the further involvement of all WRC's officers and managers.

That should end the inquiry. Mr. Fogg's employment was terminated ("permanent" "suspension") by the "action" of a "regulatory agency having supervisory responsibility over WRC" – *exactly* meeting the definition of "cause" in the Contract. He therefore is not entitled to severance benefits.

Mr. Fogg protests, though, that Section 5(C)(f) of the Contract cannot apply to his termination, because all *other* definitions of "cause" entail wrongful conduct or misfeasance. Thus, he says, it "is clear beyond doubt that every one of the 8 'cause' definitions in section 5(C) is designed to punish specific misfeasance[.]" (Objection (Dkt. No. 50) at p. 6.) And it "is equally clear" that in termination by a regulatory agency, "allegations of misfeasance were required" to trigger a for-cause determination. (*Id.*)

To adopt Mr. Fogg's preferred limitation of Section 5(C)(f) only to circumstances of alleged malfeasance would require the Court to imply or import language that is simply not there. The provision should not be read as written, he says, but instead should be read as, "Cause means . . . the suspension or prohibition (whether temporary or permanent), based on allegations of wrongdoing, from the Executive participating in the conduct of WRC's affairs by action of any regulatory agency having supervisory responsibility over WRC[.]" But a Court may not add language to a contract to achieve one party's preferred meaning. *Folkman v. Quamme*, 2003 WI 116, ¶ 42, 264 Wis.2d 617, 644-45 ("[T]he Folkmans must *add* the words 'for each insured' for the endorsement to acquire the meaning they offer. We may not judicially revise policy language in this manner.") (emphasis in original). Rather, the Court should enforce the Contract as written. *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶ 9, 266 Wis.2d 124, 133-34 ("[R]egardless of the parties' intentions, unambiguous contract language controls contract

interpretation. When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.") (quotations and citation omitted).

That result is supported, not undermined, by the other definitions of "cause" in Section 5(C)(f). Mr. Fogg is correct that each of the other definitions includes an express reference to immoral or wrongful conduct, or to poor performance:

- "Intentional fraud," "embezzlement" (Section 5(C)(a));
- "Conviction of a felony . . . involving moral turpitude" (Section 5(C)(b));
- "Illegal use of drugs" (Section 5(C)(c));
- "Intentional misconduct . . . that is materially injurious to the Company" (Section 5(C)(d));
- "Willful breach . . . of the duty of loyalty" (Section 5(C)(e));
- "Failure to correct a material deficiency in the performance of his duties" after an opportunity to cure (Section 5(C)(g)); and
- "Intentional breach" of the Contract (Section 5(C)(h)).

That does not mean, as Mr. Fogg would have it, that suspension by a regulatory agency under Section 5(C)(f) must be read as limited only to suspension premised on wrongful conduct. To the contrary, the contrast between that definition of "cause" and the others suggests Section 5(C)(f) was intentionally *not* so limited.

Mr. Fogg and WRC knew how to limit and qualify the circumstances justifying for-cause termination. Not just any fraud would do, only "intentional" fraud. Not just any felony conviction, only one "involving moral turpitude." Only an "intentional" breach, a "willful" breach, "intentional" misconduct, and "material" deficiency. The Contract could have similarly limited "cause" under Section 5(C)(f) to regulatory suspension involving "allegations of

misfeasance," but it conspicuously did not do so. The absence of such qualifying and limiting language sets Section 5(C)(f) apart from the other definitions of "cause." It is *different*.

Mr. Fogg nevertheless insists that Section 5(C)(f) is ambiguous because of the "context of the linkage" of the various definitions of "cause." (Objection, p. 6.) Not so. Contract language is ambiguous if it is "susceptible to more than one reasonable interpretation." *Kernz*, 2003 WI App 140, ¶ 10. Mr. Fogg does not argue that the language of Section 5(C)(f) is itself amenable to more than one interpretation, and he may not *generate* ambiguity through resort to "context." In any event, that "context" and "linkage" is less momentous than Mr. Fogg would have this Court believe. Section 5(C) merely enumerates various conditions that constitute "cause" for termination – many for criminal behavior or intentional misconduct, one for poor performance, and one for removal by a regulatory body. Mr. Fogg does not explain why these various definitions are "linked" in a manner that somehow limits the meaning and applicability of any particular definition. Each definition of "cause" is understandable and enforceable on its own terms.

The cases offered by Mr. Fogg do not compel a different result. He cites *Carey v. Rathman*, 55 Wis.2d 732, 200 N.W.2d 591 (1972) for the proposition that "specific words and phrases must be considered in relation to the nature and the object of the transaction and read in light of other provisions of the contract and of the circumstances surrounding its execution." (Objection, p. 6-7.) Fair enough, but the Court in *Carey* was confronted with an ambiguous contract. *See* 55 Wis.2d at 739-40 (describing and analyzing the parties' various interpretations of the "disputed paragraph"). *Carey* stands for the proposition that context can help *resolve* ambiguity, not create it where it does not otherwise exist, as Mr. Fogg attempts to do. *Langer v. Stegerwald Lumber Co.*, 259 Wis. 189, 47 N.W.2d 734 (1951), by contrast, involved a contract

that was *not* ambiguous. 259 Wis. at 193 ("We conclude that the language, given its ordinary meaning, clearly indicates the intention to give . . .") The Court rightly rejected an attempt to contravene that plain meaning with "a trick interpretation or twist upon one word." *Id.* at 192. Consistent with innumerable cases confirming that contracts are to be enforced as written, *Langer* simply held that a party cannot fabricate ambiguity with a "trick" or a "twist." There is no such gamesmanship involved here. The Liquidator merely seeks enforcement of the plain, unambiguous language of Section 5(C)(f) of the Contract.

At bottom, Mr. Fogg wants this Court to rewrite the Contract because he believes it is unfair. "The Commissioner's attempt to turn a statutory termination of *all* management into a 'for cause' termination as to Fogg, unfairly and improperly denies Fogg the substantial benefits of the Agreement for which he bargained, and on which he relied[.]" (Objection, p. 8.) Generalized concerns of "fairness" do not govern contract interpretation, and they certainly do not overcome a contract's plain terms. *Milwaukee Police Supervisors Org. v. City of Milwaukee*, 2020 WI 20, ¶ 24, 406 Wis.2d 279 ("We do not balance equities in interpreting either ordinances or contracts – we apply their plain meaning."); *Carey*, 55 Wis.2d at 738 (courts "cannot engage in equitable redrafting of contracts," and a "reasonable, fair, and just" interpretation will be preferred over an "unusual or extraordinary" interpretation only "if equally consistent with the language used").

The Liquidator's application of Section 5(C) is not unfair in any event. The fundamental purpose of Chapter 645 is the "protection of the interests of insureds, creditors, and the public generally" (Wis. Stat. § 645.01(4)), and a liquidator's duties and authority are directed to that purpose. The Liquidator takes no pleasure in terminating Mr. Fogg's employment or in recommending denial of his claim, but the Liquidator's decisions were not "cruel" or "cynical."

(Objection, p. 5.) The Liquidator must follow the law and consider many different interests, and the reality is that allowing Mr. Fogg's claim would potentially negatively impact other claimants, reducing by a large amount the claims-paying resources in the WRC estate. When the plain terms of the Contract disallow that result, the Liquidator cannot simply disregard them without compromising his duties to other creditors, policyholders, stakeholders, and the public. Enforcing the Contract as written is not unfair to Mr. Fogg, while not enforcing it would be grossly unfair to other claimants.[1]

CONCLUSION

Mr. Fogg had a contract. The Liquidator seeks to enforce it as written in plain language, while Mr. Fogg seeks to rewrite to his benefit, supposedly to honor its "context" and vague assertions of fairness. Mr. Fogg's position is unwarranted under the contract and the law, and would compromise the interests of other claimants if adopted. His objection should be overruled.

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[1] Mr. Fogg's objection to the Liquidator's denial of his claim should be overruled for the reasons stated in the text. If the Court nevertheless disagrees, his claim should not be allowed in the amount he demands. If Mr. Fogg had been terminated without cause, his termination would have been governed by Section 5(b) of the Contract, which requires twelve weeks' advance notice of termination and payment to him throughout that notice period. (Fogg Aff. Ex. 1, p. 4.) Mr. Fogg's claim includes his salary for that twelve-week period. (Schrader Decl. Ex. 1.) Claims for such prospective compensation are flatly disallowed by Wis. Stat. § 645.63(6).

Mr. Fogg's proof of claim did not itemize his claim according to the type of compensation he sought (*id.*), so the Liquidator is unable to determine at this time the amount of any such disallowance.

Dated at Madison, Wisconsin this 11th day of November, 2024.

Respectfully submitted,

GODFREY & KAHN, S.C.

By: *Electronically signed by James A. Friedman*
James A. Friedman
State Bar No. 1020756
Zachary P. Bemis
State Bar No. 1094291
Anthony S. Baish
State Bar No. 1031577

Attorneys for Petitioner Nathan Houdek, Commissioner of Insurance of the State of Wisconsin

One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
jfriedman@gklaw.com
zbemis@gklaw.com
tbaish@gklaw.com

32061555.2