

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Jeffery Allen Weber,

Plaintiff,

v.

Fore Transportation, Inc.,

Defendant.

No. 19 L 11319

Calendar S

Judge Jerry A. Esrig

ORDER

Plaintiff Jeffery Allen Weber filed a two count complaint against defendant Fore Transportation, Inc. ("Fore") for breach of contract (Count I) and violations of the Illinois' Wage Payment and Collection Act, 820 ILCS 115/4, ("Wage Act"). Fore moves to dismiss both counts pursuant section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615. For the reasons stated below, the motion is denied.

I.

A section 2-615 motion to dismiss attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615; *Hammond v. S.I. Boo, LLC*, 386 Ill. App. 3d 906, 908 (1st Dist. 2008). Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements which are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007). A section 2-615 motion should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

II.

A.

On January 1, 2017, Weber began working for Fore pursuant to a written employment agreement signed by both parties (the "Agreement"). In mid-2018, Weber voluntarily terminated his employment. He now sues for severance pay he claims is due and owing under the terms of the contract.

B.

Article IV of the Agreement is captioned "Termination of Employment Relationship." Section 4.1 is captioned "Termination by Jeff". It provides that he may "terminate his employment and this Agreement at any time, with or without cause" by giving the notice as described. The first sentence of section 4.2 apparently gives the company the right to terminate Weber "with or without cause," but parts of the sentence are incomprehensible, possibly related to typographical error or the omission of words.

Section 4.3 is entitled "Cause for Termination" and defines "cause," but only with respect to a termination of Weber by Fore. Although mentioned in section 4.1, "cause" for Weber to terminate is not defined. The reason for defining cause is unclear, since the court does not find anything in the agreement which turns upon whether termination by either party is for cause.

The last sentence of Section 4.3, and the sentence which is at issue in this lawsuit states:

If Termination is "for cause" or "without cause," Jeff will be eligible for One (1) year of base pay and health insurance benefits as a severance benefit that will be paid out in weekly installments.

Also relevant is Article V of the Agreement which is captioned "Jeff's Post-Employment Obligations." Sections 5.2 and 5.3 impose restrictions on Weber's post-employment dealings with Fore's customers and employees which run for "a period of 1 year immediately following the termination of his employment."

III.

Weber argues that he is entitled to severance regardless of who terminates his employment. Fore argues that severance

applies only if Fore terminates Weber's employment. Based on the authority and arguments provided on this motion, the court finds the language to be ambiguous.

As the court stated in *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 484 (1st Dist. 2009), "giving 'termination' its plain and ordinary meaning in an employment context, it means an end to employment and could mean a voluntary resignation, an involuntary termination or both." In the Agreement, the word "termination" is used to refer both to termination by Weber and termination by Fore. Looking only at the disputed sentence in isolation, it does not expressly limit severance to circumstances in which Fore terminates.

To be sure, the sentence dealing with severance pay appears in a section otherwise devoted to defining "cause" as it applies to termination by Fore. While this suggests that "termination" in this sentence relates to termination by Fore, it is not dispositive. For one thing, Fore concedes that severance was due as a result of any termination by Fore, even though the remainder of the paragraph and its heading refer only to termination for cause. For another, "case law warns against putting undue emphasis on such organizational devices." *Ill. Bell Tel. Co. v. Ill. Commerce Comm'n*, 362 Ill. App. 3d 652, 661, 298 Ill. Dec. 591, 600, 840 N.E.2d 704, 713 (2005) (dealing with statutory construction).

Fore argues that it makes no sense to provide severance to an employee who voluntarily terminates.¹ While this argument seems logical, it is not necessarily true. In fact, the desire to ensure the enforceability of the restrictive covenants may provide a reason for offering severance to an employee who voluntarily resigns. A review of Illinois law applicable to restrictive covenants shows why.

In general, where employment is terminable at will, a restrictive covenant is not enforceable unless an employee remains employed for a minimum of two years. *Fifield v. Premier Dealer Servs.*, 2013 IL App (1st) 120327 ¶19. This is true even where the employee resigns voluntarily. *Id.* ¶16, citing *Brown & Brown v. Murrone*, 379 Ill. App. 3d 724, 729 (3rd Dist. 2008). And, despite the five year term articulated in the Agreement,

¹ One might also argue that it makes no sense to give severance to an employee terminated for cause, including, for example "commission of any fraudulent or dishonest act in the performance of ... his duties," but the Agreement expressly provides for severance in such event. Agreement §4.3.

Weber was actually an employee at will. As discussed above, the Agreement provided that Weber could terminate or be terminated without cause on thirty days-notice. Effectively, this makes him an employee at will. *Criscione v. Sears, Roebuck & Co.*, 66 Ill. App. 3d 664, 667 (1st Dist. 1978) (“An at will employment relationship is one which has no specific duration, and such a relationship may be terminated at will by either the employer or the employee, for or without cause.”).

Here, the Agreement contained restrictive covenants. Absent the severance provision, Weber could have voluntarily terminated his employment after eighteen months entirely free of the restrictive covenants. Therefore, absent further evidence, the court cannot exclude enforcement of the restrictive covenants as a reason to provide severance even to an employee like Weber who voluntarily terminates.

Fore relies on *Covinsky*, 388 Ill. App. 3d 478. While the case is instructive, it is not dispositive. In all other contexts, the contract in *Covinsky* used “termination” to refer solely to termination by the employer. By contrast, in connection with the restrictive covenants, the contract spoke of “resignation” and “termination.” From this the court concluded that “the contract recognizes a difference between resignation and “other” terminations.” 388 Ill. App 3d 486. In the Agreement here, terminate and termination are used to refer both to termination by the employer and to termination by the employee. Resignation is not used at all.

B.

Fore moves to dismiss Count II on the grounds that “severance payments do not constitute final compensation under the [Illinois Wage Payment] Act and are, therefore, not recoverable under the Act.” *Covinsky*, on which Fore relies to support its arguments direct against Count I, holds otherwise. Severance pay and other termination benefits “meet the definition of final compensation under the Wage Act.” 388 Ill. App. 3d at 430. *See also, Kulins v. Malco, Microdot Co.*, 121 Ill. App. 3d 520, 525, (1st Dist. 1984) (“Because of the benefit to the employees and the character of the inducement by the employer, severance pay has frequently been characterized as a form of deferred compensation, earned in part each week that the employee works during the term of the contract and payable on discharge from employment, provided such discharge is not

induced by misconduct.”).² See also, 56 Ill. Adm. Code 300.530 (“Severance is a payment that an employee is entitled to be paid upon separation from employment pursuant to an agreement between the parties or established practice of the employer.”).

Majmudar v. House of Spices (India), Inc., 2013 IL App (1st) 130292, on which defendant relies, is easily distinguished. *Majmudar* involved a dispute over unpaid future compensation for the remainder of a terminated contract. In reaching its decision, the court relied upon *McClure v. International Livestock Improvement Services Corp.*, 369 N.W. 2d 801 (Iowa 1985). In *McClure*, the plaintiff claimed he was entitled to one month’s salary and attorneys’ fees under the Iowa Wage Act because he was not given proper notice of termination as required by his employment contract. The *McClure* court found the Act inapplicable because plaintiff’s claim was not for compensation, such as severance pay which was expressly covered by the Iowa Act.

In citing the *McClure* decision, the *Majmudar* court stated as follows:

Similarly, here we do not have a case where defendant owed plaintiff any additional final compensation under the Act pursuant to the terminated employment contract. Instead, we have a common law claim by plaintiff for a breach of contract, based on defendant terminating plaintiff’s employment without cause before the five-year period of employment was over, which plaintiff successfully litigated at trial.

Id. ¶ 18. Again, an employee has a vested right to severance pay. He does not have a vested right to contractual damages in the form of future lost wages for breach of contract.

* * * *

Based on the foregoing,

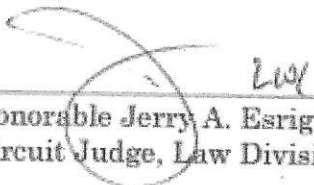
(1) Defendant’s motion to dismiss is denied;

² Plaintiff’s quotation from this case at does not have a page citation and does not appear to be verbatim.

- (2) Defendant shall answer the complaint on or before May 27, 2020;
- (3) The parties shall issue written discovery on or before June 18, 2020;
- (4) The case-management conference set for May 29, 2020 at 9:00 a.m. is stricken; and
- (5) The case is continued for a case management conference on August 5, 2020 at 10:00 a.m.

Failure to appear may result in dismissal for want of prosecution or entry of a default order.

ENTERED:



Honorable Jerry A. Esrig
Circuit Judge, Law Division

Dated: April 29, 2020

ENTERED
APR 29 2020
JUDGE ESRIG