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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DIRECT CONSULTING ASSOCIATES, LLC
Plaintiff

HANNAH KESSLER
Defendant

Case No: CV-16-871922

Judge: MICHAEL J RUSSO

JOURNAL ENTRY

98 DISPOSED - FINAL

OPINION AND ORDER GRANTING PLAINTIFF DIRECT CONSULTING ASSOCIATES, LLC'S MOTION FOR SUMMARY JUDGMENT. O.S.J.
COURT COST ASSESSED AS EACH THEIR OWN.
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date

FILED
2017 SEP 22 P 2:18
CLERK OF COURTS
CUYAHOGA COUNTY

- 98
08/30/2017

STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	) SS:	
CUYAHOGA COUNTY	)	CASE NO. CV-16-871922

DIRECT CONSULTING ASSOCIATES, LLC	)	
Plaintiff,	)	
vs.	)	**OPINION ON SUMMARY JUDGMENT OF PLAINTIFF DIRECT CONSULTING ASSOCIATES, LLC**
HANNAH KESSLER,	)	
Defendant.	)	

MICHAEL J. RUSSO, JUDGE:

This matter comes before the Court on the motion for summary judgment of Plaintiff Direct Consulting Associates, LLC (DCA), the brief in opposition of Defendant Hannah Kessler (Kessler), DCA's reply in support of its motion for summary judgment, and the parties' evidentiary and other submissions.

DCA filed a four count complaint on November 15, 2016, seeking replevin of DCA's equipment and alleging its conversion, seeking declaratory judgment regarding provisions of Kessler's January 16, 2106 Employment Agreement (Agreement) with DCA with respect to venue and choice of law for future lawsuits, and alleging breach of contract for Kessler's failure to return DCA's property as required by the executed Return of Company Property Policy.

DCA seeks summary judgment as to only count three of its complaint for declaratory judgment. The relief requested is for the Court to declare:

> A) Venue lies exclusively in this Court as to any litigation between [DCA] and Defendant arising from the Employment Agreement or the employment relationship;
> B) Ohio law governs any dispute between the Parties arising from the Employment Agreement, or the employment relationship;
> C) Defendant is bound by the post-employment provisions of the Employment Agreement, including those provisions concerning non-disclosure of confidential information, prohibition on placement and contracting staffing of IT positions for 18 months following termination (non-competition), non-solicitation of [DCA]'s clients, and non-solicitation of [DCA]'s employees.

(Compl. ¶ 41). The validity of the Agreement between DCA and Kessler and the requested declaratory relief is not in dispute. The sole issue remaining is the scope of declaratory relief. At issue is Section 17 of the Agreement entitled "Governing Law; Exclusive Jurisdiction; Jury Trial Waiver" (Section 17) and whether it applies to statutory claims arising out of the "employment relationship."

DCA asserts that Section 17 governs all claims arising from the Agreement and as well as statutory claims arising from the employment relationship. Kessler argues that the plain language of the Agreement only governs contractual claims, as the language in Section 17 does not reference the employment relationship or more specifically any statutory claims that might be filed. The scope or meaning of Section 17 determines whether or not Kessler can bring statutory claims in Michigan, and therefore must be interpreted by the Court.

LAW AND ANALYSIS

Under R.C. 2721.03 and 2721.04, a party to a written contract may bring a declaratory action to have a court determine any question of construction arising under the contract, as well as a declaration of rights, status, or other legal relations under it. *Preferred Risk Ins. Co. v. Gill*,

30 Ohio St.3d 108, 111, 507 N.E.2d 1118 (1987). To prevail on a declaratory action, a party must show: "(1) that a real controversy between adverse parties exists; (2) which is justiciable in character; (3) and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost." *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 148-149, 586 N.E.2d 80 (1992). A party moving for summary judgment on a declaratory action must show that "pursuant to Civ.R. 56(C)...the evidence, viewed most strongly in favor of [the non-moving party], showed that there was no genuine issue as to any material fact and that [moving party] was entitled to judgment as a matter of law." *Id.*

In interpreting a contract, courts look to the contractual language used to find and carry out the intent of the parties. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313-14, 1996-Ohio-393, 667 N.E.2d 949; *see* also *Koster v. Mohammed Chowdhury*, 8th Dist. Cuyahoga No. 103489, 2016-Ohio-5704, ¶ 12. Once a court finds "the terms in an existing contract are clear and unambiguous, a court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 245, 374 N.E.2d 146 (1978). But if a court finds "a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary." *Inland Refuse Transfer Co. v. Browning-Ferris Industries, Inc.*, 15 Ohio St.3d 321, 322, 474 N.E.2d 271 (1984).

The parties here ask this Court to interpret the meaning of Section 17 of the Agreement. Section 17 states in part:

> This Agreement is entered into in Solon, Cuyahoga County, Ohio and its validity, interpretation and enforcement shall be governed by the laws of the State of Ohio for all purposes. Each party hereto irrevocably submits to their personal jurisdiction within and under the Court of Common Pleas of Cuyahoga County, Ohio and further agrees that such court ***shall be the exclusive forum*** with respect ***to any litigation*** that may arise between the parties ***pertaining to this agreement.*** (emphasis added)

Section 17 does not include the term "employment relationship," as Kessler correctly contends. But the Agreement, read as a whole, appears intended to govern the employment relationship. For example, Section 11 of the Agreement entitled "Employment at Will; Termination of Employment" directly mentions the "employment relationship." Kessler fails to cite to any controlling Ohio precedent to counter this interpretation of the Agreement as a whole and the Court is unpersuaded by *Kwiecinski v. Medi-Tech Internatl. Corp.,* U.S. District Court, Oregon, No. 3:14-CV-01512-BR, 2015 U.S. Dist. LEXIS 82535 (June 25, 2015).

The Court finds that the Agreement, taken as a whole, includes claims related to the employment relationship. DCA as an employer, who appears to regularly use employment agreements, admittedly could have used clearer language regarding the claims covered by the forum selection clause. Failure to do so in this instance, however, is not fatal. Section 11 read together with Section 17 clearly indicates the parties intended the Agreement to cover claims arising out of the "employment relationship."

JUDGMENT

After careful review, the Court concludes the Agreement as a whole clearly and unambiguously supports DCA's position as to the scope and meaning of Section 17 covering the employment relationship. The Agreement itself is clear and convincing evidence that the

Agreement's forum selection clause does cover the filing of any discrimination claims Kessler has or may file in a federal or state court that arise from the employment relationship.

Further, since the parties do not dispute DCA's remaining request for declaratory relief the Court declares that:

A) Venue lies exclusively in this Court as to any litigation between [DCA] and Defendant arising from the Employment Agreement or the employment relationship;
B) Ohio law governs any dispute between the Parties arising from the Employment Agreement, or the employment relationship;
C) Defendant is bound by the post-employment provisions of the Employment Agreement, including those provisions concerning non-disclosure of confidential information, prohibition on placement and contracting staffing of IT positions for 18 months following termination (non-competition), non-solicitation of [DCA]'s clients, and non-solicitation of [DCA]'s employees.

The parties stipulated to dismissal with prejudice of all other remaining claims and agreed to bear their own costs. Accordingly, this matter is now disposed of in its entirety. No just cause for delay.

IT IS SO ORDERED.

M J Russo

Michael J. Russo, Judge

9-21-2017

Date