NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: Bobby Lewis Acres et al. v. Serco, Inc.
Case No. CL 2018-7300

Dear Counsel,

The matter came on for argument on April 5, 2019 on the Plaintiffs' Motion for Partial Summary Judgment and the Defendant's Motion for Summary Judgment. The court having

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considered the arguments of counsel, the record in this case, and the briefs submitted by the parties is now prepared to rule. The motions are denied.

I. Introduction

Plaintiffs are twenty-one (21) former employees of Serco Inc. ("Defendant"), a government contractor, who allege that Defendant failed to pay them certain hardship and danger pay "uplifts" while working as government contractors in Afghanistan. More specifically, Plaintiffs allege that Defendant (1) paid them only 15% rather than a 35% hardship uplift; (2) imposed an artificial ceiling of 40 hours per week on the aggregate hardship uplift; and (3) imposed the same artificial ceiling on the aggregate danger uplift.

The terms of Plaintiffs' employment are governed by their respective Offer Letters and Letters of Assignment (collectively "Employment Agreement"). Plaintiffs were employed by Defendant in various capacities from approximately 2012 to 2015. Prior to deployment to Afghanistan, Defendant sent each Plaintiff a contingent Offer of Employment ("Offer Letter") in which Defendant agreed to pay each Plaintiff specified base and overtime pay. Defendant further agreed to pay Plaintiffs hardship and danger uplifts on their base pay during their respective deployments. Defendant then presented each Plaintiff with a Letter of Assignment, either contemporaneous with or following the Offer Letter. The Letters of Assignment provided that Plaintiffs would receive a 15% hardship uplift and a 35% danger uplift on that employee's base pay.

On average, Plaintiffs' deployments lasted one to two years, and their hardship and danger uplifts remained 15% and 35%, respectively during the entire time. Plaintiffs each brought Complaints against Defendant in May 2018. The Court consolidated the cases on July 24, 2018. Defendant filed a Motion for Summary Judgment, and Plaintiffs filed a Motion for Partial Summary Judgment. It is these motions to which the Court now turns its' attention.

II. Motion for Summary Judgment Standard

Summary judgment is intended to allow courts to "bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1 (1954). Nevertheless, the Supreme Court of Virginia has indicated repeatedly that summary judgment is considered a

drastic remedy and is strongly disfavored. *Smith v. Smith*, 254 Va. 99 (1997). Accordingly, a trial court considering a motion for summary judgment must "accept as true 'those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Klaiber v. Freemason Assocs.*, 266 Va. 478 (2003). However, when there is no material fact genuinely in dispute, and when the moving party is entitled to judgment as a matter of law, the court shall enter judgment in that party's favor. Va. Sup. Ct. R. 3:20. Furthermore Summary Judgment is not appropriate "if reasonable persons may draw different conclusions from the evidence." *Doris Knight Fultz v. Delhaize America, Inc.*, 278 Va. 84 (2009).

In this case, the parties stipulated to many material facts. *See* Defendant's Ex. 1. While both parties relied upon these stipulations in their arguments to illustrate that there were no material facts genuinely in dispute, the Employment Agreements themselves present factual issues in dispute relative to contract interpretation. This issue requires resolution by the trier of fact.

III. Contract Ambiguity

The question whether a contract is ambiguous presents an issue of law. *Pocahontas Min. Ltd. Liability Co. v. CNX Gas Co., LLC*, 276 Va. 346 (2008). When the writing of the contract, considered as a whole, is clear, unambiguous, and explicit, a court asked to interpret such a document should look no further than the four corners of the instrument. *Id.* at 353. However, when the language of a contract is ambiguous, parol evidence is admissible, not to contradict or vary contract terms, but to establish the actual intent of the parties. *Cascades North Venture Ltd. Partnership v. PRC Inc.*, 249 Va. 574 (1995) (citing *Reed v. Dent*, 194 Va. 156 (1952)).

An ambiguity exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time." *Allen v. Green,* 229 Va. 588 (1985); *see also Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner,* 225 Va. 508 (1983); *Berry v. Klinger,* 225 Va. 201 (1983). Ambiguity is created by the "[d]oubtfulness [or] doubleness of meaning ... of an expression used in a written instrument. *Berry,* 225 Va. at 207. (Excerpt from *Cascades*, above at 579)

The construction of an ambiguous contract is a matter submitted to the trier of fact, who must examine the extrinsic evidence to determine the intention of the parties. *Cascades*, 249 Va.

at 579; *see Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc.*, 200 Va. 593, 596 (1959).[1]

In this case, the parties agreed that the entirety of the agreement was contained in the Offer Letters and Letters of Assignment. *See* Defendant's Ex. 1. Together, the Offer Letters and Letters of Assignment are read as the Employment Agreement, which collectively govern Plaintiffs' employment with Defendant. The problem that arises from this agreement between the parties is that the Offer Letter and Letter of Assignment both refer to the "Hardship" uplift, but define it in conflicting ways. The Offer Letters describe the rate at which Plaintiffs are to be paid, and then state that this will be paid "along with the uplifts for Danger and Hardship on your base pay as designated by the Department of State." *See* Plaintiffs' Ex. A(1). However, the Letters of Assignment state that Plaintiffs "…will receive a hardship allowance provided as a 15% differential…" *See* Plaintiffs' Ex. A(2).

While at first glance these two provisions might not appear to be at odds with one another, the pleadings filed in this case indicate otherwise. Plaintiffs argue that the Department of State Standardized Regulations ("DSSR") have been incorporated into the contract through use of the phrase "as designated by the Department of State" in the Offer Letters, and that the DSSR lists the "hardship" differential for placement in Afghanistan as 35%. *See* Plaintiffs' Ex. C. Defendant argues that the DSSR were not incorporated, but that even if the DSSR were incorporated, the 35% uplift is a discretionary amount, not a mandatory one.

A reading of both Defendant's and Plaintiffs' briefs make one point abundantly clear: both parties are reading the same documents and are understanding the same writing in different, yet not unreasonable ways. This uncertainty makes the contract ambiguous, and therefore the answers to these questions are more appropriately determined by the trier of fact. *See Eure*, 263 Va. at 668; *Cascades*, 249 Va. at 579.

IV. Conclusion

Plaintiffs and Defendant agree that the terms of the contracts between each individual Plaintiff and the Defendant are governed collectively by the Offer Letter and the Letter of

[1] See also *Geoghegan v. Arbuckle Bros.*, 139 Va. 92, 100 (1924)

> "But where the language of the contract is not clear and unambiguous, and resort to extrinsic evidence is necessary, if the situation is such that fairminded men might draw different conclusions therefrom, then the construction of the contract is for the jury under proper instructions from the court, even though the evidence be not conflicting."

Assignment. Together, these documents contain conflicting terms, creating ambiguity in the contract. The construction of ambiguous contracts, such as the Employment Agreements, is a matter to be determined by the trier of fact at trial, not on summary judgment. For these reasons, both Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment are denied.

[redacted]

Very truly yours,

[redacted]

Thomas P. Mann