NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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November 2, 2022

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Re: *Kara Macdonald v. Pruitt Title, LLC and Sara Bolton Cataliotti*
Case No. CL-2022-1579

Dear Counsel:

Before the Court is the defendants' Plea in Bar as to Count I (Breach of Contract) of Plaintiff's Complaint. The Plea in Bar pertains to the applicable statute of limitations and the accrual date of a cause of action for breach of contract as alleged in Count I. For the reasons stated below, the defendants' Plea in Bar is GRANTED.

At the conclusion of the evidentiary hearing in this matter on September 7, 2022, the Court took the Plea in Bar under advisement and directed the parties to file briefs. Since that time, the Court has reviewed the pleadings in this case, the briefs filed by each party, and the exhibits introduced into evidence at the hearing. The Court has fully considered the testimony of the witnesses and the arguments of each party. During the

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hearing, the Court observed the witnesses and their demeanor, and made determinations as to their respective credibility. To the extent the Court's discussion of the facts of the case today differs from a party's view of the facts, the recitation of factual matters herein will constitute the Court's findings of fact.

For the reasons set forth herein, the Court finds that the parties were subject to a written contract of employment commencing in 2013, and as orally modified in September 2016, that remained in force and effect. The oral modification was ratified through the parties' communications, their conduct, and their course of dealing. As a written contract, any claim thereunder alleging breach of contract is subject to a five-year statute of limitations pursuant to Virginia Code Ann. § 8.01-246(2), and the accrual date would be the date of the alleged breach. As plaintiff's Complaint was filed on February 7, 2022, any alleged breach of contract within plaintiff's Count I that accrued before February 7, 2017, is therefore time-barred.

The plaintiff became employed with the defendant company in 2013 pursuant to a written contract of employment. In September 2016, the terms of her employment were orally modified wherein the base threshold for her monthly commission calculation was raised from $10,000 to $11,500. Evidence was presented at the hearing of other terms of employment that were modified over time, including terms that benefitted the plaintiff such as an employer match to her 401K, a promotion to vice-president of the defendant company, payment of an advance outside of payroll, and a Christmas bonus. The evidence established that the plaintiff assented to each of these modifications, never objected to such modifications, and through her actions and course of dealing ratified such modifications.

It is well established that a written contract may be modified by a subsequent oral agreement. This is true even if the original contract is clear and unambiguous in its terms. *See, e.g., Reid v. Boyle*, 259 Va. 356 (2000); *see also Zurich General Accident & Liability Ins. Co. v. Baum*, 159 Va. 404 (1932). Modification of a contract "must be shown by 'clear, unequivocal and convincing evidence, direct or implied.'" *Reid*, 259 Va. at 370, *quoting Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 73 (1983). In addition, "the contracting parties, through a course of dealing, may evince a mutual intent to modify the terms of their contract." *Reid*, 259 Va. at 370.

The evidence in this matter was clear and convincing that an oral modification of the written contract of employment occurred in September 2016 regarding the plaintiff's commissions. The modification was evinced

through the communications and actions of the parties and their course of dealing. The plaintiff herself calculated her commissions on an Excel spreadsheet that she created and sent via email every month to her employer. Beginning in September 2016, the plaintiff applied the increased base threshold in her calculation of the commissions owed to her for the preceding month. Emails between the parties further corroborated that an oral modification of the contract occurred in September 2016. In addition, and at the plaintiff's request, the defendant employer hired a "dearest friend" of hers upon the plaintiff agreeing to change the base threshold of her monthly commission calculation.

The modified commission calculation became effective in September 2016, and although the plaintiff at the evidentiary hearing testified that she had feared a claim of "insubordination" if she objected to the change in the base commission threshold, she admitted that she was never threatened with termination or other detrimental action. The plaintiff further admitted that the defendant employer was "fair" in the operation of the company and that she never objected to the change in the base threshold. The Court finds that through her communications, actions, and course of dealing both contemporaneously and over the remaining four plus years of her employment, the plaintiff continuously and consistently acted in a manner evidencing her agreement to the modification.

The Court further finds the evidence clear and convincing that the oral modification of September 2016, while not creating a new and separate contract, modified the existing written contract of employment. As such, the plaintiff's claim under Count I, alleging breach of contract, is subject to a five-year statute of limitations pursuant to Virginia Code Ann. § 8.01-246(2).

The plaintiff asserts that by virtue of the nature of her employment, the accrual date of any alleged breach of contract is subject to the "continuing service exception" wherein her cause of action would not begin to accrue until after she left her employment in December 2020. This is not a correct recitation of law. This exception applies in situations where an employee is engaged in a distinct act for an employer. "This Court has recognized the continuing undertaking doctrine only with regard to a continuous or recurring course of professional services related to a particular undertaking. We have applied the doctrine in cases stating claims of breach of contract or negligence involving the professional services of physicians, attorneys, and accountants. We further have emphasized that the statute of limitations in such cases begins to run when the services rendered in connection with a particular undertaking or transaction have ended,

notwithstanding any continuation of the professional relationship that may involve other work for the same client or patient." *Harris v. K & K Insurance Agency*, 249 Va. 157, 161 (1995) (citations omitted). The Supreme Court in *Harris* declined to apply the continuing services exception in a claim involving an insurance broker, as the broker's services did not require continuing work and "cannot be characterized as continuing services related to a particular undertaking." *Id.* at 162. The Supreme Court also previously declined to apply the continuing services exception in cases involving services rendered by architects as the architects' services were deemed severable. *Id. at 161 fn.**; *see Nelson v. Commonwealth*, 235 Va. 228 (1988); *Commonwealth of Virginia, Ex Rel. Virginia Military Institute v. King*, 217 Va. 751 (1977).

These cases are persuasive, and this Court finds that they are determinative of the issue. Contrary to the limited examples above of the attorney or the physician or the accountant providing particular services for a particular undertaking with a particular client or patient, the plaintiff in the present matter was not employed for a particular undertaking with a particular client but rather worked in multiple transactions with many clients over the years. Consistent with controlling case law, the continuing services exception therefore is not applicable. The cause of action for plaintiff's claim of breach of contract accrued on the date of the alleged breach, and not on the date of termination of her employment with the defendant company.

For the reasons set forth above, the defendants' Plea in Bar is granted. An Order, in accordance with this Letter Opinion, shall issue this day.

Sincerely,

[redacted]

Manuel A. Capsalis
Judge, Fairfax County Circuit Court

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

KARA MACDONALD	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO: CL-2022-1579**
	)	
PRUITT TITLE, LLC, et al.	)	
	)	
Defendants.	)	
	)	

ORDER

BEFORE THE COURT is the Defendants' Plea in Bar as to Count I (Breach of Contract) of Plaintiff's Complaint. For the reasons stated in the letter opinion issued this date, and which letter opinion is incorporated herein, the Plea in Bar is granted.

SO ORDERED this 2nd day of November 2022.

AND THIS CAUSE CONTINUES.

[redacted]
Manuel A. Capsalis, Judge
Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY THE PARTIES OR BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA.