Owens v. House of Delegates, 1 ROP Intrm. 513E (1988)
YOLANDA R. OWENS,
Plaintiff,

v.

HOUSE OF DELEGATES (HOD)
SANTOS OLIKONG, SHIRO KYOTA,
IGNACIO ANASTACIO, officially and individually, jointly and severally and MOSES ULUDONG, jointly and severally,
Defendants.

CIVIL APPEAL NO. 6-86
Civil Action No. 52-86

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: July 27, 1988

Counsel for Appellant: Kaleb Udui

Counsel for Appellee: John Tarkong

BEFORE: LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice Pro Tem

SUTTON, Justice:

The facts impelling litigation and this appeal are uncontested.

Plaintiff/Appellee (hereinafter Appellee), a U.S. Citizen, was hired as Legislative Counsel for the House of Delegates (hereinafter HOD) of the Olbiil Era Kelulau ⊥513F (hereinafter OEK) effective July 21, 1985.

A contract of employment (hereinafter, Contract) was executed by Appellee and Santos Olikong, then Speaker of the HOD. The term of employment was one (1) year to July 21, 1986 (Contract, Plaintiff Exhibit 1). This Contract contained a termination provision which allowed termination by either party on thirty (30) days minimum notice of cause, unless during such notice period the cause for termination was corrected, in which case the right to terminate was dissolved (Contract, supra, § 6(b)).

Appellee actually arrived in Palau to begin her employment on or about August 12, 1985.

The evidence at trial reveals a long list of defects in Appellee's performance beginning at

almost the outset of her employment. They include: lengthy absences during which Appellee was traveling on non HOD business, numerous instances when Appellee was absent from her work place during working hours and could not be located when needed, late submissions of shoddy, poor quality work, unavailability during working hours because she was playing tennis, and lack of commitment and professional attention to the job she was hired to perform.

The evidence at trial was that on at least five (5) occasions prior to her termination Appellee was warned personally by Speaker Olikong about these defects in performance and urged to correct them.

The trial court found that her performance was indeed ⊥513G defective and that the evidence at trial "indicates [ ] without question" that the defects discussed with her were present (Judgment, p. 8). Such conclusion, we FIND, is amply supported by the evidence.

On February 4, 1985, a House Bill was delivered to Appellee's Office for her urgent review. Final reading of the Bill was scheduled for the following morning of February 5, 1985, which was the last day on which the Bill could be considered and passed to the Senate in that session. Appellee was not present and had left no word of her whereabouts. Later that afternoon of February 4 she was seen in town by Hersey Kyota, Chief Clerk of the House of Delegates, who informed her of the Bill and of the urgency of her review.

On February 5, 1985, Appellee failed to report to work and to review the Bill, with the result that it was not received by the Senate prior to adjournment and could not be acted upon.

This incident, on the heels of the Appellee's continued defective performance, impelled Vice Speaker Kyota to prepare and serve the letter of termination (hereinafter, Kyota Letter) which is at the crux of this controversy (Letter, February 5, 1986, Plaintiff Exhibit 2). Appellee was informed by the letter served on February 5, 1986, that she was in default of the Contract under paragraphs 4(a), (c) and (d) and more specifically that she was guilty of "repeated unavailability, poor office supervision and lack of dedication ⊥513H to the needs of [members of the House of Delegates]". She was further informed that her employment was terminated as of April 1, 1986 pursuant to paragraph 6(b) of the Contract.

Appellee responded by letter on the following day, February 6, 1986 (Plaintiff Exhibit 3). She denied the defects alleged in the Kyota letter and claimed that any defects had been cured.

Subsequent meetings were held between Appellee and the Speaker and Appellee and the Vice Speaker concerning her dismissal. Appellee maintained her position that the defects had been cured and the Speaker and Vice Speaker took the position that such were incurable.

On March 3, 1986, Appellee vacated her office and on March 4, 1986, she submitted a personnel action form indicating that she was "resign[ing]" effective March 14, 1986. It was concluded at trial that neither party considered that this action effected the April 1 termination date established by the Kyota letter but simply provided the most expeditious process by which Appellee could obtain her final paycheck.

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Appellee filed the Complaint in this matter on March 14, 1986, and an Amended Complaint upon which this appeal is based on April 1, 1986.

After a trial lasting four (4) days (April 23-26, 1986) Judgment was rendered orally and on May 6, 1986, written Judgment was entered.

The trial court ruled that HOD had breached the ⊥513I Contract of Employment by not providing Appellee with notice of termination and by not specifying how Appellee had defaulted on the contract.

The trial court denied Appellee's claim for additional compensation at the Chief Legal Counsel level as well as the allegation that a conspiracy existed between certain named persons to terminate her. The trial court found, in the first instance, that she had applied for and been denied promotion to Chief Legislative Counsel (Judgment, p.9), and in the second, that "not a scintilla of evidence [was] presented at trial that any such conspiracy existed" (Judgment, p. 10).

The trial court ruled against Appellee re her charges of sexual harassment on grounds of failure of proof.

Defendant at trial had filed a Counterclaim against Plaintiff alleging in essence that damages were due Defendant for misrepresentation on the ground that Plaintiff at the time of hire had represented herself to be a competent attorney capable of performing the tasks required in the position of Legislative Counsel and that subsequent performance had demonstrated that she lacked such capability and that therefore she had acquired the position under false pretenses.

The trial Court ruled against Defendant/Appellant on the Counterclaim with no comment.

Damages were set by the trial Court at $9,692.28, the Court holding that Appellee was entitled to her salary prorated to the end of the Contract period plus repatriation expenses not to exceed $2,000.00.

⊥513J The Court ruled that the Cost of the telephone calls made at HOD expense by Appellee prior to December 1, 1985 was to be borne by HOD noting that, while some of these calls were designated "official" by Appellee, many appeared otherwise, but that Defendant had failed to rebut Plaintiff's testimony as to their nature.

Finally, the Court denied Appellee's prayer for punitive damages, holding that the evidence failed to establish the presence of any tortuous act for which such damages would be available.

Appellant raises five (5) points of error, the first three (3) being essentially a claim that the Court's rulings on the breach of contract by the HOD and damages awarded therefor were incorrect, and that the Court's ruling on Defendant's Counter claim and the Court's award of the cost of telephone calls prior to December 1, 1985, to Plaintiff, were in error.

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We first take up Appellant's points of error re the Counterclaim and telephone calls.

We FIND that the trial Court was correct in denying the Appellant's Counterclaim as such does not state a cause of action, nor was the evidence sufficient at trial to establish the theory of misrepresentation pleaded. The trial court is AFFIRMED on this issue.

We REVERSE the trial Court's judgment re the telephone calls made by Defendant prior to December 1, 1985, at HOD expense and HOLD that the evidence at trial (Defendant Exhibit ⊥513K E & F and Transcript, pp. 202-216) gainsays the decision that all pre December 1, 1985, calls were "official" calls.

We remand this issue to the trial Court with Orders that the trial court determine, on a call by call basis, which of the pre December 1, 1985, calls were directly related to the work of the HOD and which were not and to offset the cost of those calls found to be personal, if any, against any award ultimately found for Appellee on remand or, if no award for Appellee, to charge her for their cost.

On the issue of the lower Court holding that HOD was in breach of contract we FIND for Appellant and remand for further proceedings consistent with this decision.

Section 6(b) of the Employment Contract requires written notice of defects and provides thirty (30) days for the defaulting party to cure such defects and, if cured, removes cause for termination and the right of the terminating party to end the obligations of the Contract.

We HOLD at the outset that RPPL 1-37, § 8 (codified at 33 PNC § 205) exempts Appellee from the requirements and protections of the Palau Public Service System and that the Contract is paramount to and supercedes any rules or regulations adopted as guidelines by the HOD from Title 33 PNC where the rights and duties of the parties are concerned.

Taken together, the several conversations between Appellee and the Speaker at which the latter warned Appellee of defects in her work and the Kyota letter of February 5, 1986, ⊥513L which noticed her of termination effective fifty four (54) days later on April 1, 1986, we HOLD, constitute compliance by HOD with the notice provisions of § 6(b) of the Contract of Employment. We FIND that the specific defects needing cure under § 6(b) were clearly expressed to Appellee and that notwithstanding any oral representation to the contrary by the Speaker or Vice Speaker she had opportunity to cure such defects.

We HOLD further, that Appellee's response by letter on February 6, 1986 (Plaintiff Exhibit 3) constitutes a waiver of her right to cure.

A waiver is a voluntary or intentional relinquishment of a known right, claim, or privilege. 28 Am. Jur.2d. Waiver, § 154.

The elements of Waiver are:

1. The Party waiving must know of the existence of the right or privilege and must be in a position to assert it.

2. The right or privilege must be in effect.

3. The waiver of the right or privilege must be voluntary and intentional.

A right secured by a contract may be waived. 28 Am. Jur. 2d, supra, § 162.

Appellee, having signed the contract of Employment is held to knowledge of all the provisions thereof. Appellee's receipt of the Kyota letter executed or placed in effect her ⊥513M right to cure the defects noted and to assert the provisions of § 6(b) of the Contract to protect herself from termination.

Appellees letter of February 6, 1986, in response to the Kyota letter clearly expresses the intentional and voluntary nature of her waiver of the right under § 6(b) to cure defects.

The oral expression by Appellants to Appellee that the defects could not be cured does not constitute a waiver of any right, claim or privilege by Appellant. Rather, such may be and is viewed by the Court as an announcement by Appellants of their intention to breach the provisions of § 6(b) or to unilaterally expunge their duty to rescind the termination if a cure of defects by Appellee was effected.

This announcement by Appellant had no legal effect where the right and privilege of Appellee to cure is concerned since it is basic, black letter law that oral expressions shall not serve to alter a written contract.

Appellee, having been advised, both formally and informally, of the areas of her performance that were lacking could have taken advantage of the period of fifty four (54) days allowed her before the effective date of her termination and "cured" the defects thus removing HOD power under the Contract to terminate her and if such continued to be sought to be executed she would then have had a ripe cause of action against HOD and appropriate remedies available for wrongful termination and breach of the contract.

⊥513N Appellee chose, however, to deny that such defects existed and to allege, therefore, that "cure" had been accomplished. The legal effect of such position, we HOLD, is that Appellee thus waived her right to cure defects under § 6(b) of the Contract.

Accordingly we REVERSE the Trial Court Judgment holding Appellant in breach of contract and the concommitant award of damages in the amount of salary prorated to July 21, 1986. We HOLD that the test to be applied on remand consistent with our opinion is the amount of unpaid salary due Appellee to effective date of termination, April 1, 1986.

We also REVERSE the Judgment insofar as repatriation costs were awarded to Appellee. The Trial Court grounded that judgment on the holding that Appellant had breached the contract

thus entitling Appellee to relief pursuant to § 6(c) of the Contract. Our reversal of that holding operates to reverse this judgment as well.

As to Costs we leave that judgment to the trial Court on remand according to that Court's discretion and consistent with this opinion.

Finally the Court comments on the lack of written and oral response from Appellee to the issues raised in this appeal.

Appellee's Counsel of record at trial was John Tarkong, Attorney at Law. At no time has Mr. Tarkong withdrawn from such representation by any lawful or appropriate means known to the Court. The Court takes notice that Mr. Tarkong ⊥513O filed on November 4, 1987, "Waiver of Appearance and Oral Argument" scheduled for that date on this appeal as "Attorney for Appellee". The Court takes further notice that Mr. Tarkong has had served upon him all Appellate filings since and including the Notice of Appeal herein.

Accordingly, the Court presumes that Mr. Tarkong has continued to represent Appellee throughout these proceedings and has fulfilled his legal and ethical obligations pursuant to such representation. If this is not the case there may be a cause of action available to Appellee and a remedy in a separate action, however, such is not before this Court at this time.

In summary:

We REVERSE the trial Court's Judgment that HOD breached the Contract of Employment and the award to Appellee of $9,692.28 of salary to July 21, 1986, and Hold that Appellee is entitled to an amount equal to her salary prorated through April 1, 1986, and remand to the Trial Court for determination of the amount due.

We reverse the trial Court's Judgment that Appellee is entitled to repatriation pay and HOLD that she must bear her own expenses of repatriation.

We REVERSE the trial Court's Judgment that Appellee not be held accountable for the cost of any phone calls made at the expense of HOD prior to December 1, 1985.

We AFFIRM the trial Court dismissal and/or denial of the Appellant's Counter Claim.

⊥513P We remand the case to the trial Court for further proceedings consistent with this Opinion.