

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

WILLIAM RYAN,)	
)	
PLAINTIFF)	
)	
v.)	Civil No. 98-298-P-H
)	
INTERSTATE BRANDS)	
CORPORATION,)	
)	
DEFENDANT)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this lawsuit, William Ryan seeks damages from his former employer, Interstate Brands Corporation (“IBC”), for breach of a contract of employment. I conclude that Mr. Ryan is entitled to recover \$197,730, based upon the following findings of fact and conclusions of law. See Fed. R. Civ. P. 52(a).

FINDINGS OF FACT

1. William Ryan is a resident of Massachusetts. IBC is a Delaware corporation with its principal place of business in Kansas City, Missouri. The amount in controversy exceeds \$75,000.

2. Just before his employment with IBC, Mr. Ryan was working as Vice-President and Controller of the John J. Nissen Baking Company (“Nissen”).¹ He had worked his way up through

¹ Nissen was a privately-held Maine corporation, a wholly-owned subsidiary of JSC Corporation (“JSC”), another Maine corporation. Nissen had approximately 1,000 employees and owned three bakery facilities: one in Portland, Maine; one in Worcester, Massachusetts; and one in Central Falls, Rhode Island. The corporate headquarters was in Portland. At its headquarters, Nissen had a few management personnel: a
(Continued next page)

the ranks at Nissen's Worcester facility from assistant plant controller to plant controller to general manager, eventually joining corporate management in Portland as corporate controller in 1992. On January 3, 1998, IBC purchased all of the assets of JSC, including Nissen and JSC's other subsidiaries. In connection with the takeover, IBC and Mr. Ryan executed a contract for Mr. Ryan's continued employment with IBC.

3. The contract provided a two-year term of employment. Mr. Ryan had the right to terminate the contract earlier upon ten days written notice if IBC "assign[ed him] duties or responsibilities . . . that differ[ed] substantially from the duties and responsibilities set forth on Schedule A" of the contract of employment. Joint Exh. 6 ("Contract") at § 4(d). Schedule A reads (in toto): "Substantially the same duties performed by Employee as Controller of Nissen prior to the date hereof." Id. at Sched. A.

4. All of the following are duties that Mr. Ryan was performing as controller of Nissen prior to the takeover:

- monthly reports to the board of directors
- responsibility for employee retirement benefit plans, including: monitoring performance of the pension fund, strategic decisions concerning the nature of the benefit plan (*e.g.*, defined benefit vs. defined contribution)
- responsibility for banking issues, including negotiating lines of credit and letters of credit and meeting quarterly with lenders, managing relations with servicing banks (*e.g.*, negotiating fees for payroll checking accounts)
- analysis of insurance needs, including workers' compensation insurance, and negotiating costs and terms with carriers
- coordination with external auditors and speaking for Nissen in decisions concerning footnotes and classifications on audited financial statements
- responsibility for federal taxes, including reviewing federal income tax returns and attending IRS audits as Nissen's sole representative and negotiator with the IRS
- service on the management committee in negotiations with all unions

president, a general manager, a controller (Mr. Ryan), and later, directors of sales and operations. Each bakery facility had more local management, including a general manager and a plant controller.

- responsibility for major commodities purchases, including responsibility for monitoring wheat and protein futures and placing orders with brokers

This list is not exhaustive.

5. Beyond the first month or two after the takeover, IBC did not assign Mr. Ryan any of the duties listed in the preceding paragraph. Rather, IBC assigned Mr. Ryan the typical duties for a plant controller within the IBC corporate structure and the kind of duties Mr. Ryan had performed before his promotion from plant controller to plant general manager to corporate controller at Nissen. Mr. Ryan's new duties differed substantially from the duties he was performing as controller at Nissen when he signed the contract.

6. On June 16, 1998, Mr. Ryan notified IBC in writing that it was in breach of section 4(d) of the employment contract, and he terminated the employment contract on June 26, 1998.

7. The contract contained a liquidated damages provision, which stated that if Mr. Ryan validly exercised his right to terminate the contract, IBC would pay him "(on the tenth day following termination), a lump-sum payment equal to the amount [Mr. Ryan] would otherwise be entitled to receive pursuant to Section 7(a)" of the contract. Id. at § 6(b).² The amount described in section 7(a) is Mr. Ryan's "annual salary of \$130,520 (as it may be increased from time to time pursuant hereto)." Id. at § 7(a).

8. At the time of the termination, June 26, 1998, Mr. Ryan's annual salary was \$131,820. A year and one-half remained until the end of the contract, January 3, 2000. The

² Mr. Ryan did not argue that he is entitled to amounts that otherwise would have been withheld, and IBC did not argue that such amounts should be deducted from the salary to determine the stipulated damages nor that a lump-sum amount "equal to" the sum Mr. Ryan would be entitled to receive must be capitalized.

liquidated damages provision of the employment contract called for a lump sum payment of \$197,730.

9. The parties did not intend the liquidated damages provision as a penalty for nonperformance.

10. At the time the parties negotiated the contract, the damages likely to be caused by IBC's future breach were difficult to estimate.

The money value of Mr. Ryan's total compensation was difficult to estimate because that compensation included fringe benefits of uncertain value, in addition to the defined salary; the defined salary itself was subject to raises of uncertain amount; and any damages would be subject to conflicting and difficult estimates of the present value of the income stream remaining to be paid on the contract.

Even if one could place a clear value on Mr. Ryan's total compensation under the contract, the portion of that value to which he would be entitled as damages upon breach would be very difficult to estimate, for two reasons. First, it would be difficult to estimate Mr. Ryan's actual damages from loss of earnings, because those damages are subject to mitigation by finding another job; the value of Mr. Ryan's reasonable efforts to mitigate, however, would have been very difficult to predict. Second, while the loss of earnings might be the major item of Mr. Ryan's damage, it would not be the sole item. It would be difficult to estimate the difference between the value of the performance Mr. Ryan had rendered prior to any breach and the value of the compensation received up to that point. For instance, compensation for the value of employment opportunities Mr. Ryan had foregone at the time of the takeover might have been spread over the life of the contract although Mr. Ryan provided that performance completely up front. Similarly, events might develop in such a way that IBC captured the lion's share of the value of Mr. Ryan's performance of the noncompetition

agreement early in the contract but paid for that performance in equal installments over the entire life of the contract. In fact, it stands to reason that Mr. Ryan's primary value to IBC would be during the conversion period immediately following the takeover, not later. Mr. Ryan's right to these future payments based on performance already rendered would not be subject to any duty to mitigate, rendering advance estimation of total damages all the more difficult.

11. The stipulated damages bore a reasonable relationship to the damages that Mr. Ryan was likely to suffer in the event of a breach.

The loss of salary was likely to be a major component of actual damages. Certainly the stipulated payment would turn out to overcompensate Mr. Ryan for loss of salary if Mr. Ryan found other work for some portion of the period between termination and the end of the original two year period. Such overcompensation would be offset, however, as the stipulated salary payments undercompensated Mr. Ryan's loss in any period that he could not find work, by not giving him fringe benefits and by not repaying him for performance already tendered but not yet fully paid for. As a rough and ready figure, the stipulated salary figure was a reasonable forecast of likely damages.

12. IBC has not established that Mr. Ryan failed to make reasonable efforts to mitigate his damages from IBC's breach of the employment contract.

13. The contract contains no provision relating to interest.

14. The contract contains a choice of law provision in favor of Maine law.

CONCLUSIONS OF LAW

A. The court has jurisdiction over this matter by virtue of diversity of citizenship and amount in controversy. See 28 U.S.C. § 1332. An individual's citizenship for diversity purposes is the place of his domicile. Domicile is not necessarily the same as residence, but residence is *prima*

facie evidence of domicile. See Anderson v. Watts, 138 U.S. 694, 706 (1891); Krasnov v. Dinan, 465 F.2d 1298, 1300 (3d Cir. 1972). A corporation is a citizen for diversity purposes both of the state in which it is incorporated and of the state in which it has its principal place of business. See 28 U.S.C. § 1332(c)(1).

B. Maine law governs this contract dispute. A federal court sitting in diversity applies the choice of law provisions of the state in which it sits, when the case has not been transferred from another district. See Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487, 496 (1941). Except in situations not relevant here, Maine will honor the choice-of-law provided for in a contract of employment. See Schroeder v. Rynel, Ltd., 720 A.2d 1164, 1166 (Me. 1998).

C. Under Maine law, an unambiguous contract must be interpreted from the plain meaning of the language used and from the four corners of the instrument. Whether an ambiguity exists is a question of law. Once an ambiguity is found, resolution of the ambiguity is a question of fact. Contract language is ambiguous when it is reasonably susceptible of different interpretations. See Portland Valve, Inc. v. Rockwood Sys. Corp., 460 A.2d 1383, 1387 (Me. 1983).

D. This contract is unambiguous. It says that Mr. Ryan will perform duties that do not differ substantially from substantially the same duties that he performed as controller for Nissen. It could not be clearer on three points: (i) the touchstone of the inquiry is the duties Mr. Ryan actually performed prior to the takeover (not, for example, duties he might reasonably expect to perform after the takeover or the duties that he might have performed at Nissen in the future if the takeover had not occurred); (ii) the contract permits some difference of duties before and after the takeover; and (iii) the contract permits such difference only if it is not “substantial.” IBC’s assignment to Mr. Ryan of duties that “differed substantially” from “substantially the same duties” he was performing at Nissen was a material breach of the employment contract.

E. Liquidated damages provisions can be valid under Maine law and have been held enforceable as part of a contract of employment. See Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995). Maine courts will enforce good faith attempts to fix a sum in advance as the equivalent of a prospective injury, but will not enforce a liquidated damages provision when in fact it is simply a penalty for nonperformance. “[T]he question of whether a stipulated amount is liquidated damages or a penalty [is] resolved by finding the intent of the parties.” Interstate Indus. Uniform Rental Serv., Inc. v. Couri Pontiac, Inc., 355 A.2d 913, 921 (Me. 1976).

F. Liquidated damages provisions are enforceable under Maine law when two conditions are met: (i) the amount of actual damages was difficult to forecast at the time of contracting, and (ii) there was “some reasonable relationship between the amount of damage fixed and that likely to be suffered.” Dairy Farm Leasing Co. v. Hartley, 395 A.2d 1135, 1139 (Me. 1978). The reasonableness of the stipulated amount is judged as of the time that the contract is made. See id., at 1137. The party seeking enforcement of the provision bears the burden of proving that these two elements are met. See id. at 1140. The liquidated damages clause here is enforceable.

G. Although the burden of proof in mitigation lies with IBC, see Tang of the Sea, Inc. v. Bayley’s Quality Seafoods, Inc., 721 A.2d 648, 651 (Me. 1998), and I have found that IBC did not prove a failure to mitigate, I also conclude that because the liquidated damages provision is enforceable, Mr. Ryan had no duty to mitigate his damages. The Law Court has not addressed this issue, but I predict that the court would declare that under Maine law there is no duty to mitigate where there is a valid liquidated damages provision. The Wisconsin Supreme Court has persuasively argued that this is the law in an employee’s suit for breach of an employment contract. See Wassenaar v. Panos, 331 N.W.2d 357, 369 (Wis. 1983). Other courts have adopted the same rule in other contexts. See Burst v. R.W. Beal & Co., 771 S.W.2d 87, 91-92 (Mo. Ct. App. 1989);

Lake Ridge Academy v. Carney, 613 N.E.2d 183, 190 (Ohio 1993). As some courts have observed, liquidated damages are an alternative to actual damages, and therefore the inquiry whether actual damages were or could have been reduced is not appropriate. See, e.g., Burst, 771 S.W.2d at 91-92; Wassenaar, 331 N.W.2d at 369. The Law Court clearly accepts the view that liquidated damages are an alternative to actual damages, see Dairy Farm Leasing Co., 395 A.2d at 1140, and I predict the court would rule, as these other courts have ruled, that there is no duty to mitigate damages where there is a valid provision for liquidated damages.

The rule is supported not only by precedent but also by logic. First, parties stipulate to damages in advance precisely so that they can avoid the difficulty and expense of litigating fact-intensive matters like failure to mitigate. See Aim Leasing Corp. v. Bar Harbor Airways, Inc., 499 A.2d 154, 157 (Me. 1985) (“[A] liquidated damages clause is designed to avoid the necessity of . . . proving actual damages.”). Second, liquidated damages, when permitted, are an alternative to actual damages, substituting the parties’ good-faith advance estimate of *likely* damages for a factfinder’s retrospective determination of *actual* damages. See id. To the degree that the mitigation inquiry serves to determine more precisely the scope of actual loss, it does not apply to liquidated damages.

H. Because Mr. Ryan has elected to receive liquidated damages under the agreement, that clause provides the full measure of his damages. He is not entitled to increased retirement benefits or other fringe benefits.

I. Mr. Ryan is entitled to prejudgment interest. Maine law governs the right to prejudgment interest in this case. See Commercial Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 774 (1st Cir. 1994). Under Maine law, prejudgment interest is proper in a civil action involving a contract where the contract contains no provision relating to interest. See 14 M.R.S.A. § 1602(1).

DISCUSSION

A. Breach

The heart of the matter here is a factual question: Did the duties that IBC assigned Mr. Ryan as plant controller at its Nissen plant “differ substantially” from duties that would be “substantially the same” as the duties he was performing as controller for Nissen prior to the takeover? (The language is awkward, but it is what the contract provides.) According to IBC, (i) no reasonable person would have construed the contract to mean that Mr. Ryan would continue to perform the duties he performed at Nissen so far as they fell outside the duties typical of a plant controller within IBC’s corporate structure; (ii) it was unreasonable for Mr. Ryan to believe he would perform the duties of a corporate controller after the takeover because IBC already had a corporate controller; and (iii) a plant controller’s duties at IBC’s new Biddeford plant (which would have been assigned to Mr. Ryan if he had not quit) should be considered substantially like those Mr. Ryan performed for Nissen because the Biddeford plant is larger than the entire Nissen operation prior to the takeover.

The argument is unpersuasive. The unreasonableness of a person’s reliance may be a defense in certain cases (*e.g.*, promissory estoppel, fraud), but certainly it is no defense to an express and unambiguous contract. Mr. Ryan was entitled to believe that his duties after the takeover would not differ substantially from what he was doing *at Nissen* (rather than from what controllers were doing *at IBC*) for no other reason than that IBC promised that in unambiguous language. If IBC meant—or if the parties intended to agree—that Mr. Ryan’s duties would not differ substantially from the duties performed by other IBC plant controllers, the contract could have said *that* in so many words. Nor was it unreasonable for Mr. Ryan to take IBC at its word. Mr. Ryan might very well have known that he would continue to work solely at the Nissen facility after the takeover, but that hardly speaks

to the duties that Mr. Ryan expected (or should have expected) that he would be performing. Based on the evidence, it would not have been unreasonable to expect that IBC might run Nissen as some kind of subsidiary, permitting Mr. Ryan to exercise substantially the full range of functions he exercised prior to the takeover. IBC's own witnesses testified that the salary provided in the contract far exceeded the salary typical for both plant controllers and divisional controllers in the IBC structure, justifying any reasonable person's belief that the duties contemplated in the contract were not merely those typical of an IBC plant controller.

The assigned duties were significantly less responsible than what Mr. Ryan had been doing and reduced him to a role he had performed earlier in his career. Even after Mr. Ryan gave his notice, IBC gave no description of his duties (current or contemplated) that would suggest that they were substantially the same as those he performed for Nissen. Moreover, IBC personnel who assigned duties to Mr. Ryan testified that they had never read the contract and had no knowledge of what Mr. Ryan's duties had been at Nissen before the takeover. In other words, the contractual provisions were not important in their decisions about what duties to assign. The material breach was obvious.

B. Prompt Pay Act

Mr. Ryan has asked that I reconsider my order granting partial summary judgment to IBC on the claim under Maine's Prompt Pay Act, 26 M.R.S.A. § 626. The prior ruling stands. The Prompt Pay Act does not govern Mr. Ryan's claim for damages in this case. See Bellino v. Schlumberger Techs., Inc., 753 F. Supp. 391 (D. Me. 1990), aff'd, 944 F.2d 26 (1st Cir. 1991). The Law Court's recent decisions holding that commissions already earned constitute wages under the Act, see Purdy v. Community Telecomm. Corp., 663 A.2d 25 (Me. 1995); Community Telecom. Corp. v. Loughran, 651 A.2d 373 (Me. 1994), do not disturb Bellino's holding that amounts that are not compensation

for services already rendered (like severance pay) are not wages within the meaning of the Act. Nothing in the facts of this case warrants treating unpaid liquidated damages under a contract any differently than severance pay.

C. Severance Pay

I reaffirm my trial ruling that Mr. Ryan was not entitled to severance pay under the company's severance policy. That policy applies only to at-will employees, see Joint Exh. 23 at § II, but Mr. Ryan had a contract for a term of employment; moreover, IBC offered Mr. Ryan continued employment, which renders the severance policy inapplicable, see id. at § I.C(2). Finally, the employment agreement was a fully integrated document, see Contract at § 11, and the severance agreement does not change any written employment agreement, see Joint Exh. 23 at § II.

CONCLUSION

For the foregoing reasons, IBC shall pay the full sum of liquidated damages stipulated in the contract, One Hundred Ninety-seven Thousand Seven Hundred Thirty Dollars (\$197,730), together with prejudgment interest and costs as provided by law.

SO ORDERED.

DATED THIS 19TH DAY OF JULY, 1999.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE