IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID L. HENZLER,

Petitioner,

v.

No. 18-0507

(Appeal from Civil Action No.16-C-1580,
Circuit Court of Kanawha County)

TURNOUTZ, LLC and
LARRY MARKHAM,

Respondents.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that the respondents were entitled to the benefit of the Severance Agreement and General Release the Plaintiff entered into with his former employer, leading the Court to improperly grant respondents' Motion For Summary Judgment.

II. STATEMENT OF THE CASE

The Petitioner, David Henzler, was employed by Cross America Partners, LP and its predecessor, One Stop, Inc., for approximately nineteen years. (Appendix Record at 2). His last position of employment was as an Area Supervisor. In 2016, Cross America Partners, LP decided that it no longer wanted to operate convenience stores in certain locations. (A.R. at 3).

As a result, Mr. Henzler's position with Cross America Partners, LP ceased to exist. (A.R. at 3). Subsequent to Mr. Henzler being informed that his employment with Cross America Partners, LP was ending, he entered into a Severance Agreement with his employer, Cross America Partners, LP. (A.R. at 97). As is typically done in such circumstances, in exchange for a certain sum, the Mr. Henzler waived any claims against his former employer. (A.R. at 97).

Also in 2016, Cross America Partners, LP entered into an agreement whereby Respondent Turnoutz, LLC would lease forty-one convenience store locations previously operated by Cross America Partners, LP, and Respondent Turnoutz, LLC would operate convenience stores out of those locations. (A.R. at 106). Of course, Turnoutz, LLC, in order to operate those forty-one convenience stores, needed employees. Because Mr. Henzler lost his employment with Cross America Partners, LP, he was in need of employment and sought a position with Respondent Turnoutz, LLC. (A.R. at 3). Mr. Henzler applied for employment with Turnoutz, LLC but was rejected by respondents in favor of less qualified, substantially

younger candidates. (A.R. at 3-4).[1] As a result of respondents' discriminatory actions in failing to hire Mr. Henzler on the basis of his age, Mr. Henzler filed suit against the respondents.

Thereafter, respondents filed a Motion to Dismiss And/Or For Summary Judgment before the Circuit Court. (A.R. at 20). Respondents argued that they were somehow entitled to the benefit of the Severance Agreement and General Release that the Plaintiff executed with his former employer when he lost his employment with Cross America Partners, LP.

Although the respondents were not a party to the Agreement between Mr. Henzler and his former employer, the respondents' Motion for Summary Judgment motion was granted by the Circuit Court and the Order entered on May 7, 2018. (A.R. at 83). On June 1, 2018, Petitioner filed his Notice of Appeal.

III. SUMMARY OF ARGUMENT

There are only two ways the Circuit Court could have determined that the respondents were parties to the contract between Mr. Henzler and his former employer:

1. If respondents were actually named as parties to the contract;

   or

2. If respondents were successors, affiliates, assigns or heirs[2] of M&J Operations, LLC, CST Brands, Inc. or CrossAmerica Partners LP (f/k/a Lehigh Gas Partners LP).

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[1] Mr. Henzler asserts that Respondent Larry Markham (a Vice President and General Manager with Respondent Turnoutz, LLC) participated in making the discriminatory decision not to hire Mr. Henzler on the basis of his age and aided, abetted, incited and/or compelled Respondent Turnoutz, LLC to engage in age discrimination in violation of the West Virginia Human Rights Act. (A.R. at 3, 169).

[2] Respondents did not argue below that they should have been considered parents, partners, subsidiaries, divisions, predecessors, officers, directors, trustees, partners, shareholders, managers, employees, agents, representatives,

It is uncontroverted that the respondents are not actually named as parties to the contract. Furthermore, there is no evidence that respondents could be considered successors, affiliates, assigns or heirs of M&J Operations, LLC, CST Brands, Inc. or CrossAmerica Partners LP (f/k/a Lehigh Gas Partners LP). In fact, all of the relevant documents clearly describe that the respondents entered into lease agreements (a landlord/tenant relationship) with a completely different entity, Lehigh Gas Wholesale Services, Inc. Therefore, the Circuit Court's grant of summary judgment to the respondents was improper.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the Circuit Court's Order granting respondents' Motion for Summary Judgment erred in the application of settled law and was against the weight of the evidence, as such, this matter is appropriate to be scheduled for oral argument and consideration under Rule 19 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

Petitioner is appealing the grant of summary judgment to the Respondent by the Kanawha County Circuit Court. A circuit court's entry of summary judgment is reviewed *de novo.* Syl.Pt.1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (2011); *see also* W. Virginia Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., 234 W. Va. 469, 766 S.E.2d 416, 421 (2014)

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volunteers, consultants, insurers, attorneys, executors, administrators or legal representatives of M&J Operations, LLC, CST Brands, Inc. or CrossAmerica Partners LP. Further, the Circuit Court did not rule that such relationships existed. Therefore, this brief will focus on the argument of the respondents, and the ruling of the Court, that respondents were successors, affiliates, assigns or heirs of M&J Operations, LLC, CST Brands, Inc. or CrossAmerica Partners LP.

("Our review in this case is unquestionably plenary as we are examining the grounds upon which the trial court relied in granting summary judgment to the respondent.").

In order to succeed on a motion for summary judgment, a defendant carries a heavy burden. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl.Pt.3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963).

Courts considering motions for summary judgment "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." Painter, 192 W. Va. at 192. Justice Cleckley stated in the context of an employment discrimination case, Conrad v. ARA Szabo, 198 W. Va. 362, 370, 480 S.E.2d 801, 809 (1996):

> In Hanlon v. Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995), we cautioned circuit courts to be particularly careful in granting summary judgment in employment discrimination cases. Although we refuse to hold that simply because motive is involved that summary judgment is unavailable, the issue of discriminatory animus is generally a question of fact for the trier of fact, especially where a prima facie case exists. The issue does not become a question of law unless only one conclusion could be drawn from the record in the case.

To survive a motion for summary judgment, "the plaintiff must make some showing of fact which would support a prima facie case for his claim." Syl.Pt.2, Conaway v. Eastern Associated Coal Corp., 178 W. Va. 475, 457 S.E.2d 152 (1995). "[T]he showing the plaintiff must make as to the elements of the *prima facie* case in order to defeat a motion for summary judgment is *de minimis.*" Syl.Pt.4, in part, Hanlon, 195 W.Va. 99, 464 S.E.2d 741.

Regarding the interpretation of a contract, "subject to any underlying factual determinations which may arise, it is the province of the circuit court, and not of a jury,

to interpret a written contract . . ." Wood v. Acordia of W. Virginia, Inc., 217 W. Va. 406, 411, 618 S.E.2d 415, 420 (2005), citing Syl.pt.1, Toppings v. Rainbow Homes, Inc., 200 W.Va. 728, 490 S.E.2d 817 (1997), Syl.pt.1, Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937), Syl.pt.6, Franklin v. T.H. Lilly Lumber Co., 66 W.Va. 164, 66 S.E. 225 (1909). The interpretation of a contract, as in the case of summary judgment, is also reviewed by the Supreme Court of Appeals *de novo.* *See* Syl.pt.2, Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462 (2002); Wood, 217 W.Va. at 411.

A review of the facts and law in this matter reveal the error of the Circuit Court below.

1. The Circuit Court Erred In Finding That Petitioner Released His Claims Against Respondents

As referenced above, there are only two ways the Circuit Court could have determined that the respondents were parties to the contract between Mr. Henzler and his former employer:

1. If respondents were actually named as parties to the contract; or
2. If respondents were successors, affiliates, assigns or heirs of M&J Operations, LLC, CST Brands, Inc. or CrossAmerica Partners LP (f/k/a Lehigh Gas Partners LP).

It is without dispute that the respondents are not named as parties to the Severance Agreement Mr. Henzler entered into with his former employer. (A.R. 97-102). This absence makes perfect sense. There is no reason why an entity that is leasing real estate from Lehigh Gas Wholesale Services, Inc. would be mentioned in a severance agreement and release between a separate entity and one of its employees. The agreement states "[t]his Severance Agreement and General Release ("Agreement") is made and entered into by **David Henzler** ("Employee"), and

M&J Operations LLC. ("M&J")[3]. (A.R. at 97) (emphasis added). Obviously, the respondents were not parties to the agreement.

Having not been named as parties to the agreement, respondents are forced to stretch their argument further. Respondents asserted before the Circuit Court that somehow they should be considered a "successor, assign, affiliate, and/or heir"[4] of M&J Operations, LLC, CST Brands, Inc. or Cross America Partners, LP. (A.R. at 21). Respondents based this argument on paragraph 2.2 of the Severance Agreement and General Release, which states, in relevant part, as follows:

> Employee hereby irrevocably and unconditionally releases and forever discharges **M&J, CST Brands, Inc.** ("CST"), **CrossAmerica Partners LP** (f/k/a Lehigh Gas Partners LP) ("CAP"), each of their respective Affiliates (as hereinafter defined), parents, partners, subsidiaries, divisions, assigns, predecessors, and successors (by merger, acquisition or otherwise), and the past present and future officers, directors, trustees, partners, shareholders, managers, employees, agents, representatives, volunteers, consultants, insurers and attorneys of and for each of the foregoing, and their respective heirs, executors, administrators, legal representatives and assigns (hereinafter referred to as the "Company Released Parties") from any and all claims, demands, causes of action, and liabilities . . .

(A.R. at 97-98) (emphasis added).

Nevertheless, there is absolutely no evidence that Turnoutz, LLC is a "successor", "assign", "affiliate" or "heir" to M&J Operations, LLC, CST Brands, Inc. or Cross America

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[3] M&J Operations, LLC is the parent corporation of CrossAmerica Partners, LP, Petitioner's former employer and an entity specifically made a party to the Release. (A.R. at 97).

[4] Despite asserting in a conclusory fashion throughout their Motion for Summary Judgment that Turnoutz, LLC is an "assign" or "heir" to M&J Operations, LLC and/or Cross America Partners, LP, respondents never substantively addressed those conclusory allegations. Respondents completely failed to demonstrate to the Court how Turnoutz, LLC could be considered an "assign" or "heir." Nevertheless, the Circuit Court ruled that such a relationship existed, despite the fact that there was no evidence to support it.

Partners, LP.[5] The respondents' argument in support of their position is that the "Master Lease Agreement" and its subsequent amendments somehow made Turnoutz, LLC a successor, assign, affiliate or heir of one of the named parties: M&J Operations, LLC, CST Brands, Inc. or Cross America Partners, LP. However, the parties to the Master Lease Agreement and subsequent amendments are Turnoutz, LLC and a completely different entity, Lehigh Gas Wholesale Services, Inc. (A.R. at 106, 150, 153, 160). There is nothing in the Master Lease Agreement between Turnoutz, LLC and Lehigh Gas Wholesale Service, Inc. that can be construed to make Turnoutz, LLC a successor, assign, affiliate or heir of M&J Operations, LLC , CST Brands, Inc.

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[5] Additionally, it is unlikely that waiving any claims arising under the West Virginia Human Rights Act against an entity that is not even named in the document would comport with the requirements of W.Va. C.S.R. §77-6-3, relating to the requirement that such a waiver be knowing and voluntary.

> 3.1. An individual may not waive any right or claim under the West Virginia Human Rights Act unless the waiver is knowing and voluntary.
> 3.2. Except as provided in 3.3., a waiver shall not be considered knowing and voluntary unless all of the following conditions are met:
> 3.2.a. The waiver is part of an agreement between the individual and the employer that is written in plain English and in a manner calculated to be understood by the average person with a similar educational and work background as the individual in question;
> 3.2.b. The waiver specifically refers to rights or claims arising under the West Virginia Human Rights Act;
> 3.2.c. The waiver does not extend to rights or claims that may arise after the date the waiver is executed;
> 3.2.d. The individual waives a right only in exchange for consideration that is in addition to anything of value to which the individual already is entitled;
> 3.2.e. The individual is advised in writing to consult with an attorney prior to executing the agreement and is provided with the toll free telephone number of the West Virginia State Bar Association (1-866-989-8227);
> 3.2.f. The individual is given a period of at least twenty-one (21) days within which to consider the agreement; and
> 3.2.g. The agreement provides that for a period of at least seven (7) days following execution of such agreement, the individual may revoke the agreement in writing, and the agreement shall not become effective or enforceable until the revocation period has expired.

W.Va. C.S.R. 77-6-3.

or Cross America Partners, LP. For that reason alone, the respondents' arguments fail and the Order Granting Defendants' Motion For Summary Judgment should be reversed.

Nevertheless, even if M&J Operations, LLC, CST Brands, Inc. or Cross America Partners, LP was a party to the Master Lease Agreement, respondents' arguments would still fail because the lease agreements are clear that Turnoutz, LLC is merely a "***tenant***". The "Master Lease Agreement" specifically states as follows:

> THIS MASTER LEASE AGREEMENT (this "Lease"), is made as of the 9th day of September, 2015, with an effective date of 9/22/2015 (the "Master Lease Effective Date"), by and between Lehigh Gas Wholesale Services, Inc., having their principal office at 645 W. Hamilton Street, Suite 500, Allentown, PA 18101 ("**Landlord**") and Turnoutz LLC, a Virginia limited liability company, having its principal office at 3130 Chaparral Drive, Suite 102, Roanoke, VA 24018 ("**Tenant**").

(A.R. at 106) (emphasis added).

The terms "Landlord" and "Tenant" are used repeatedly throughout the forty-three page "Master Lease Agreement" detailing the rights, responsibilities and duties of the parties. (A.R. at 106-148). Further, the "Amendment To Master Lease Agreement", "Second Amendment To Master Lease Agreement", and ""Third Amendment To Master Lease Agreement" contain nothing which indicates that Turnoutz, LLC is anything other than a tenant. (A.R. 150-162). These sophisticated parties defined the scope of their contractual relationship as landlord and tenant. In the "Master Lease Agreement" there is not one reference to Turnoutz, LLC being named as a successor, assign, affiliate or heir to any other entity.

It is abundantly clear that M&J Operations, LLC, CST Brands, Inc. and Cross America Partners, LP were not taken over by Turnoutz, LLC as a part of the real property lease agreement. There is no allegation that any of those entities ceased to exist as a result of the

simple lease agreement between Lehigh Gas Wholesale Services, Inc. and Turnoutz, LLC. Nor would a simple lease agreement be expected to contain such terms. Therefore, Turnoutz, LLC cannot be considered a "successor" to M&J Operations, LLC, CST Brands, Inc., Cross America Partners, LP, or even Lehigh Gas Wholesale Services, Inc. (the actual party to the "Master Lease Agreement").

A "successor" entity is defined as:

> A corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.

Black's Law Dictionary 1446 (Bryan A. Garner ed., 7th ed., West 1999).

A "successor corporation" is one that has acquired or merged with another company. *See* Davis v. Celotex Corp., 187 W. Va. 566, 573, 420 S.E.2d 557, 564 (1992); West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc., 238 W. Va. 465, 477–78, 796 S.E.2d 574, 586–87 (2017). It is apparent that Turnoutz, LLC is a tenant, not a successor.[6]

However, respondents argued below that Turnoutz, LLC is a "successor" simply because it decided to hire many of the former employees of Cross America Partners, LP, and decided to offer the same product brands, hours of operation and pay rates for employees. Nothing about these independent decisions made by Turnoutz, LLC transform it from a "tenant" to a

[6] Because Turnoutz, LLC is a tenant, it is not entitled to the benefit of the Severance Agreement and General Release. However, respondents argued below that Petitioner waived his claims against them because he allegedly waived all claims arising from his employment, the separation from that employment, or any investigation and/or interview conducted by or on behalf of M&J. It is clear that the decision by Turnoutz, LLC not to hire Mr. Henzler on the basis of his age does not "arise from" his employment with Cross America Partners, LP nor his "separation from that employment." Petitioner's claims against Turnoutz, LLC are completely independent from his previous relationship with Cross America Partners, LP. Even if Petitioner was never employed by Cross America Partners, LP, the decision of Turnoutz, LLC not to hire him on the basis of his age would be actionable.

"successor" corporation under the law. Moreover, in making the determination that Turnoutz, LLC was a successor, the Circuit Court cited no authority to support such a conclusion.

Furthermore, Turnoutz, LLC cannot be considered an "affiliate" of Cross America Partners, LP or any of the released entities. An "Affiliate" is defined in the Settlement Agreement and Release as:

> [A] person or entity that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person or entity specified. The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract, or otherwise.

(A.R. at 98).

There is no evidence whatsoever that M&J Operations, LLC, CST Brands, Inc., Cross America Partners, LP or even Lehigh Gas Wholesale Services, Inc. have the power to direct the management and policies of Turnoutz, LLC, or vice versa. As shown by the Master Lease Agreement, the only legal relationship between the parties is that of landlord and tenant. Of course, even that relationship only exists between Turnoutz, LLC and Lehigh Gas Wholesale Services, Inc. Accordingly, Turnoutz, LLC cannot be considered an "affiliate" of the above referenced companies sufficient to be considered a beneficiary of the Severance Agreement and General Release.

Finally, although Petitioner believes the Court has sufficient evidence to reverse the decision of the Circuit Court based upon the four corners of the Severance Agreement and General Release as well as the Master Lease Agreement, if the Court determines that additional facts are relevant and necessary then the Circuit Court Order should be reversed because at the

time the Circuit Court granted summary judgment discovery was not yet complete. Rule 56(c) of the West Virginia Rules of Civil Procedure states that "[a summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c).

This Court has specifically held that "summary judgment is appropriate only after adequate time for discovery." Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872, 881 (1996). Further, this Court has held that "a decision for summary judgment before discovery has been completed must be viewed as precipitous." Board of Ed. of Ohio County v. Van Buren and Firestone, Architects, Inc., 165 W.Va. 140, 267 S.E.2d 440, 443 (1980).

VI. CONCLUSION

Based upon the foregoing evidence and authority, it is apparent that the Circuit Court committed error in granting respondents' Motion For Summary Judgment. Therefore, this Court should reverse and vacate the Order of the Circuit Court of Kanawha County on the issue addressed above, direct the Circuit Court to deny respondents' Motion for Summary Judgment and grant the Petitioner such other and further relief as the Court deems appropriate.

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