Cite as 2024 Ark. App. 214

ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-22-745

ROBERT VANHOOK, M.D. APPELLANT V. MEDICAL EMERGENCY TRAUMA ASSOCIATES, PLLC APPELLEE	Opinion Delivered March 27, 2024 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTEENTH DIVISION [NO. 60CV-21-5887] HONORABLE MACKIE M. PIERCE, JUDGE REVERSED AND REMANDED

WENDY SCHOLTENS WOOD, Judge

Dr. Robert VanHook appeals the Pulaski County Circuit Court's order granting summary judgment to Medical Emergency Trauma Associates, PLLC (META), and dismissing his breach-of-contract complaint after determining that META had the right under the parties' contract to terminate Dr. VanHook. Dr. VanHook brings four points on appeal: (1) the circuit court erred in granting summary judgment when questions of fact remained as to whether he was terminated for cause; (2) the circuit court erred in considering separate agreements to which Dr. VanHook was not a party in determining that cause existed to terminate his contract with META; (3) the circuit court erred in granting summary judgment as to the affirmative defense of impossibility; and (4) the circuit court erred by relying on hearsay evidence when determining that cause existed to terminate the contract. In the alternative to these points, Dr. VanHook also argues that the circuit court erred in

finding that he was not entitled to be paid under the contract from May 3, 2021, the date META quit scheduling Dr. VanHook, through June 3, 2021, the date META terminated him. We reverse and remand because the circuit court improperly considered hearsay in its decision.

On February 1, 2021, Dr. VanHook, an emergency-room physician, entered into a contract (the Contract) with META, which provides emergency-room physicians to certain Arkansas hospitals. Pursuant to the Contract, Dr. VanHook agreed to "provide medical care and treatment to emergency room and trauma injury patients assigned to [him] through Arkansas hospitals under contract with META," and META agreed to schedule the services on an "as-needed basis." The Contract specifically provided that Dr. VanHook was not an employee but an independent contractor and was not entitled to any "benefits" offered to META employees. Under the Contract, Dr. VanHook was in control of the hours he worked, and if he "desire[d] to work a full complement of hours," the Contract provided that he would "be scheduled an average of Ten (10) shifts per month." META agreed to pay Dr. VanHook $220 an hour for services performed at two of Arkansas Heart Hospital's (AHH's) locations—Arkansas Heart Hospital in Little Rock (AHHLR) and Encore Medical Center in Benton (Encore). For the time period in question, META provided physicians to these two hospitals only pursuant to separate professional services agreements (PSAs) between META and AHH.[1] META's "sole interest and responsibility" under the Contract

[1]The 2020 and 2021 PSAs state in relevant part that AHH has the right to approve all physicians provided by META and the right to terminate its agreements with META if

was to assure that the services contemplated by the Contract were "performed in a competent, efficient and satisfactory manner." The Contract's term was for one year, but it could be terminated by either party by "delivering written notice ninety (90) days in advance of the effective date to the other party." META also had the right to terminate the Contract "for cause, if necessary"; however, what constitutes cause is not specifically set forth in the Contract.

After META received numerous complaints about Dr. VanHook's performance from the two hospitals shortly after execution of the Contract, it performed an interim physician evaluation and found several areas of concern, including nonstandard diagnostic evaluation, impeding appropriate evaluation of potentially unstable patients, lack of candor, and unprofessional interpersonal skills. On April 5, 2021, META held a meeting with Dr. VanHook and the administration from Encore and AHHLR to present the evaluation and to try and resolve the issues and concerns. Things did not improve, and according to META's president, AHH informed META that Dr. VanHook was not to be placed on the work schedule at either facility.[2]

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any physician conducts himself or herself in an "unprofessional" manner, cannot "work cooperatively" with other staff, or "engages in acts of disruptiveness."

[2]Dr. Amy Pittman, Dr. VanHook's supervising physician at META, called Dr. VanHook on the morning of May 3 after he had completed his shift and told him not to report to Encore that evening. Dr. VanHook was never scheduled to work again at either facility.

On May 2, 2021, META sent a letter to Dr. VanHook, designated as a "Mutual Termination of Independent Contractor Agreement," explaining that the purpose of the letter was to provide ninety days' notice in accordance with the parties' Contract, which would terminate by mutual agreement effective August 2. The letter requested that Dr. VanHook sign and date the acknowledgement at the bottom of the letter indicating that he agreed. While Dr. VanHook claimed that he did not receive this letter and that he would have signed it if he had received it, on May 5, he sent a letter to META stating that he did not agree to the "immediate contract amendment and termination." He acknowledged possible incompatibility and a "poor fit," but he expressed concern that he was being asked to leave "without notice under threat of adverse professional action." He agreed that META could exercise the ninety-day-termination clause but said META would have to pay him the "contractually obligated ten shifts per month."

Dr. John Menard, president of META, responded to Dr. VanHook in a letter dated May 12, stating that AHH's demand that Dr. VanHook no longer be placed on the schedule was due to staff complaints and Dr. VanHook's being a "poor fit" rather than to any allegation of professional malpractice. Dr. Menard said that AHH stated it would not relent in its demand that Dr. VanHook not be scheduled in any of its facilities, and he asked Dr. VanHook to "consider signing the letter we sent which will allow you the opportunity to resign."

On June 3, META sent Dr. VanHook a letter titled "Termination of Independent Contractor Agreement," which stated that the purpose of the letter was to provide Dr.

VanHook with "written notice of termination" in accordance with the Contract. It provided that the Contract "is being Terminated for Cause, effective immediately, due to your failure to maintain a relationship with Hospital Administration and their request that you not be scheduled to provide services at either" AHHLR or Encore.

On September 21, Dr. VanHook filed a complaint against META alleging breach of contract. Specifically, Dr. VanHook alleged that he had performed all conditions, covenants, promises, and agreements required of him under the Contract; that he was terminated on May 3 because he was a "poor fit"; that META's stated reasons for terminating him did not constitute cause for termination; and that META's actions violated the terms of the Contract and constitute a breach. He attached the Contract to his complaint.

META answered and later moved for summary judgment alleging that it had the right to terminate the Contract due to Dr. VanHook's violation of its terms.[3] Specifically, META contended that the Contract required Dr. VanHook to provide medical care and treatment to "patients assigned to [him] through Arkansas hospitals under contract with META," which consisted solely of AHHLR and Encore; that the Contract allowed META to terminate for cause; and that META had received numerous complaints about Dr. VanHook

[3]One of the alleged "violations" was that Dr. VanHook "fail[ed] to maintain his privileges and remain in good standing" at AHHLR and Encore. As the case developed, META admitted that Dr. VanHook never lost his privileges at the hospitals and abandoned this allegation. There is nothing in the record suggesting Dr. VanHook lost privileges or was terminated for this reason. Finally, the circuit court clarified in its order denying reconsideration that Dr. VanHook did not fail to maintain his privileges at either hospital. Thus, we will not address Dr. VanHook's arguments regarding privileges.

during his brief tenure and attempted to address them. META alleged that after META's and AHH's unsuccessful attempts to resolve the issues with Dr. VanHook, META was instructed by AHH that it was not to place Dr. VanHook on the work schedule at either of its facilities. When Dr. VanHook refused to sign the mutual-termination agreement META sent to him on May 2, META terminated the Contract with Dr. VanHook on June 3 for cause, specifically due to Dr. VanHook's "failure to maintain a relationship with [AHH] and their request that [he] not be scheduled to provide services" at either of their facilities. META attached to its motion the Contract, the PSAs between AHH and META, the interim physician evaluation, an affidavit of Dr. Menard, the May 2 letter requesting mutual termination of the Contract, Dr. VanHook's May 5 letter, Dr. Menard's May 12 letter, and META's June 3 letter terminating Dr. VanHook for cause.

Dr. VanHook filed a response, attaching his own affidavit, in which he claimed that he had never been notified by META, AHHLR, or Encore that his privileges had been terminated; that he worked cooperatively with the nurses at Encore; that he attended a brief meeting regarding areas of concern but otherwise was not notified by META, AHHLR, or Encore that he was the subject of an investigation or a professional-review action; that he did not receive the May 2 letter and would have signed it if he had received it; that he was guaranteed to be scheduled an average of ten shifts a month; and that he is not a party to the PSAs between META and AHH. In his brief attached to the response, he argued that META terminated him because he was a "poor fit," that cause is not defined in the Contract, and what constitutes cause is a fact question not appropriate for summary judgment. He also

argued that the nurses' complaints about him and AHH's demand to Dr. Menard that Dr. VanHook not be placed on the schedule are hearsay.[4]

Following a hearing, the circuit court entered an order on August 18 granting META's motion for summary judgment and dismissing the complaint. In relevant part, the circuit court found that AHH instructed META not to place Dr. VanHook on the work schedule at either AHHLR or Encore and that META had the right under the Contract to terminate Dr. VanHook "due to the fact that he was restricted from working at the only two facilities to which he was assigned." Therefore, the court found that Dr. VanHook could not demonstrate a breach of the agreement, and "his contract claim fails."

Dr. VanHook filed a motion for reconsideration stating that the circuit court's order did not articulate the specific date Dr. VanHook had been terminated and rearguing that META did not have cause to terminate him and thus that he was owed ninety days' pay. He argued that even if cause existed to terminate him, he was entitled to be paid for the period from May 2 through June 3 because the Contract guaranteed him a minimum of ten shifts a month, and he was not scheduled for any shifts during May.

[4]In subsequent responses, the parties attached Dr. Menard's deposition in which he stated that META terminated Dr. VanHook because AHH demanded that he not be scheduled to work. They also attached Dr. VanHook's deposition in which he stated that he had worked for META at only AHHLR and Encore, META had informed him that AHH said he could no longer be scheduled to work at either hospital, and META had terminated him because he could not work at either hospital. Finally, Dr. VanHook attached various emails between META employees about the Contract and how to terminate it.

In its September 13 order denying the motion for reconsideration, the circuit court found that Dr. VanHook was terminated for cause in the June 3 letter. It denied Dr. VanHook's request for payment through June 3, finding that he was not entitled to any payment because he could not be scheduled during that time at either facility, and he performed no services. The court also adopted META's "impossibility of performance" affirmative defense, which META had included in its answer and argued in the hearing on the motion for reconsideration. According to the circuit court, it was undisputed that Dr. VanHook could not be scheduled at either AHHLR or Encore, the only two facilities serviced by META under the Contract, and that, due to Dr. VanHook's failure or inability to honor his obligation under the Contract, META was permitted to terminate the Contract. Dr. VanHook appealed the August 18 and September 13 orders.

A circuit court may grant summary judgment only when it is clear that there are no genuine issues of material fact to be litigated and that the party is entitled to judgment as a matter of law. *Scott v. Nichol*, 2022 Ark. App. 255, at 4, 645 S.W.3d 369, 372. Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* at 4, 645 S.W.3d at 372. On appellate review, we determine if summary judgment was appropriate by deciding whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. *Id.* at 4–5, 645 S.W.3d at 372. This court views the evidence in the light most favorable to the party against

whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* at 5, 645 S.W.3d at 372.

These are the facts that META presented in support of its motion for summary judgment and that the circuit court accepted as undisputed in granting the motion: (1) the Contract states that Dr. VanHook was hired to provide "medical care and treatment to emergency room and trauma injury patients assigned to [Dr. VanHook] through Arkansas hospitals under contract with META," (2) the only facilities under contract with META at all relevant times were AHHLR and Encore, (3) both hospitals refused to allow META to schedule Dr. VanHook to provide services at their respective facilities, (4) Dr. VanHook could not and did not perform under the Contract, and (5) META terminated Dr. VanHook because he could not fulfill his obligations under the Contract. For his first and fourth points on appeal, Dr. VanHook argues that the circuit court's summary-judgement order must be reversed because it erroneously relied on hearsay evidence; therefore, there remains a question of fact regarding whether he was terminated for cause.

Hearsay is a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted. Ark. R. Evid. 801(c) (2023). When hearsay is offered and would not be admissible at trial, the circuit court may not consider the hearsay in its summary-judgment analysis. *Am. Gamebird Rsch. Educ. & Dev.*, 2017 Ark. App. 297, at 5, 521 S.W.3d 176, 178. Only testimony setting forth "such facts as would be admissible in evidence" may be offered in support of a motion for summary judgment. Ark. R. Civ. P. 56(e) (2023).

Dr. VanHook argues that multiple statements in the evidence presented and considered by the circuit court constitute hearsay, but we focus here on Dr. Menard's statements, which are at the heart of the "undisputed" facts set forth above constituting cause. META attached several letters to its motion for summary judgment in which Dr. Menard stated that AHH demanded Dr. VanHook not be scheduled in any of its facilities. Dr. Menard also quotes from his letters in his affidavit. Further, in his deposition, Dr. Menard states, "I was told directly by the president of [AHH] that [Dr. VanHook] could no longer work there," and "[AHH] said he could not work [there]."

Although all these statements were allegedly made by AHH or its representatives and not by Dr. Menard, META contends that the statements are not hearsay because they were not offered to show the truth of the matter asserted but rather to show the basis for META's action in terminating Dr. VanHook. *See Yafai Invs., Inc. v. Arkmo Foods, LLC*, 2021 Ark. App. 484, at 9 (holding that an out-of-court statement is not hearsay if it is offered to show a course of conduct or basis of action). META's contention that Dr. Menard's statements were offered as a "basis of action" is belied by the circuit court. It is clear in the following excerpt from the court's summary-judgment order that it considered these statements on the issue of cause and specifically found the statements to be true.

> 4. [AHH] instructed [META] not to place [Dr. VanHook] on the work schedule at either facility following numerous complaints by [AHH] staff. [AHH] indicated that they would not relent in their demand to restrict [Dr. VanHook] from working at the facilities.
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> 5. [META] had the right under the [Contract] to terminate [Dr. VanHook] due to the fact that he was restricted from working at the only two facilities to which

> he was assigned. Therefore, [Dr. VanHook] cannot demonstrate a breach of the [Contract] and his contract claim fails.

The only way the court could have arrived at these findings was by considering the statements for the truth of the matter asserted therein—that AHH would not allow Dr. VanHook to work in its facilities. Other than Dr. Menard's hearsay, there is no other admissible evidence in the record that AHH would not allow Dr. VanHook to work at its hospitals. Because the circuit court improperly considered these hearsay statements, we must reverse because there remain disputed fact questions about whether Dr. VanHook was terminated for cause.

For Dr. VanHook's third point on appeal, he challenges the circuit court's adoption of META's affirmative defense of impossibility of performance in its order denying Dr. VanHook's motion for reconsideration. Because it constitutes an independent and alternative ruling for the circuit court's order, we will briefly address this point. In the order denying Dr. VanHook's motion for reconsideration, the circuit court "adopt[ed]" META's affirmative defense of impossibility of performance, finding it was undisputed that Dr. VanHook could not be scheduled at either of AHH's facilities, and Dr. VanHook could not honor "his full and complete obligation and responsibility" under the Contract; thus, META was permitted to terminate the Contract. As discussed above, the statements that Dr. VanHook could not be scheduled at either of AHH's facilities are hearsay. Because the circuit court relied on this hearsay evidence in adopting META's defense of impossibility of performance, we also reverse this basis for granting META's motion for summary judgment because there is a fact question as to whether performance was possible.

Finally, Dr. VanHook brings two additional points on appeal: the circuit court erred in considering the PSAs between META and AHH in making its determination that cause existed, and if we uphold the summary-judgment order, we should reverse the circuit court's denial of his request to be paid for the month he was told not to report for work. Because we reverse and remand the circuit court's order granting summary judgment, we need not address either of these arguments.

Reversed and remanded.

VIRDEN and KLAPPENBACH, JJ., agree.

James & Carter, PLC, by: *Daniel R. Carter*, for appellant.

Gill Ragon Owen, P.A., by: *Kelly W. McNulty*, for appellee.