RENDERED: FEBRUARY 21, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001646-MR

THORNTON OIL CORPORATION;
JAMES H. THORNTON; PBS 1 JOINT
VENTURE and MAPP, LLC — APPELLANTS

v. — APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 98-CI-004408

PAUL J. PERCONTI;
PABJI CORPORATION and
PJP HOLDING, INC. — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER AND TACKETT, JUDGES.

EMBERTON, CHIEF JUDGE. Paul J. Perconti was found by a jury to have committed conversion, fraud, and breach of his fiduciary duty while an officer and member of the Board of Directors at Thornton Oil Corporation and ordered to pay damages in the amount of $1,196,830.66. The trial court found, as a matter of law, however, that Perconti's misconduct did not forfeit his right to executive benefits payable under an October 1993, “top hat” agreement between Perconti and Thornton Oil. Thornton Oil and its owners, collectively referred to in this opinion as Thornton Oil, appeal the judgment awarding Perconti $2,657,969.

Perconti became employed by Thornton Oil in 1982, and worked until he was terminated in May 1998. Through the years Perconti advanced through the company and eventually became Chief Executive Officer and a member of its Board. He earned a six, and in some years a seven, figure salary and received executive perks such as cars, airplanes, and tickets to popular events. Additionally, he participated in executive profit plans. In 1985, a Profit Participation Plan for Key Executives was created under which Perconti was granted ten-percent interest in all Thornton Oil stores developed under his leadership and each year the ten-percent profit was designated as Perconti’s compensation under the plan. In 1991, pursuant to Perconti’s suggestion, a second profit sharing plan was created, the Long-Term Shadow Stock Plan, a ten year profit sharing program with benefits to be paid at the end of the ten years. Perconti, as well as other executives participated in the plan until it was discontinued in 1992.

In 1992, James Thornton, owner of Thornton Oil, decided to abolish the LTSSP and pay its participants accrued benefits. At the time the program was abolished, Perconti had

$1,008,854 in accrued benefits, but he agreed to forgo immediate payments of this large sum and instead to permit Thornton Oil to pay his benefits under the terms of an employment agreement. Also in 1992, believing that Perconti might become focused on the stores developed under his leadership rather than the older stores, James Thornton decided to abolish the Profit Participation Program. After consulting with accountants it was determined that the value of Perconti's interest in this plan was $1,500,019 which, if payable over a five year period, had a future value of $2.5 million.

In October 1993, Thornton Oil drafted a letter agreement that in pertinent part states:

> We have agreed to the termination of your interest in Thornton's Long-Term Shadow Stock Plan effective October 1, 1992 and to the settlement of your interest in the earlier Profit Participation Plan for key Executives, in consideration of the payments to you described in paragraphs 1 and 2 below.

Both paragraphs 1 and 2 provide for the payment of benefits, the amount dependent upon the time and circumstances of Perconti's termination. Paragraph 1 provides for the payment of $1,008,854 if Perconti remained an employee until September 30, 2000. Perconti would receive the entirety of that amount if terminated prior to that date as a result of any reason other than for cause. A third contingency provided that if Perconti's employment was terminated for "any other reason" he would be paid according to the following table:

TERMINATION DATE ON OR AFTER	APPLICABLE AMOUNT
October 1, 1993	$ 504,427
October 1, 1994	605,312
October 1, 1995	706,198
October 1, 1996	
October 1, 1997	907,969
October 1, 1998	1,008,854

Paragraph 2 likewise provides for differing payments dependent upon the circumstances for termination. If Perconti was terminated as a result of disability, death, or other circumstances beyond his control, Thornton Oil agreed to pay $2.5 million, but if terminated "for any other reason" it would pay: "The Lesser of (i) $2,500,000; or (ii) $250,000 times the number of completed periods of twelve months that have elapsed from and after October 1, 1990, through the date of such termination." There is no language in the letter agreement providing for forfeiture in case Perconti was discharged for cause. Both Thornton Oil and Perconti signed the agreement.

In the early 1990's Perconti began trading in the commodities market using Thornton Oil funds. James Thornton agreed to the trading but allegedly told Perconti to get out of the market if the company's losses exceeded $600,000. In 1996, Perconti expanded Thornton's positions and also formed a trading company called "Tegra" from which he and Thornton's chief financial officer, Kevin Hobbs, began personal trading. Perconti used Thornton Oil funds to conduct personal trading through Tegra. Although originally the trading was profitable, losses soon began to exceed millions of dollars, well above the amount authorized by Thornton. An indictment was returned against Perconti by the federal grand jury, and subsequently a trial resulted in a hung jury. Perconti then filed a civil action against Thornton Oil seeking to recover benefits under the October 1993 agreement and other damages not relevant to this appeal. Thornton Oil counterclaimed against Perconti for breach of fiduciary duty, conversion, and fraud.

In this appeal, Perconti does not challenge the jury's findings against him, so we accept that he committed the acts alleged and was fired for cause. The issue presented is whether he is entitled to recover $2,657,969 awarded him by the trial court.[1]

The interpretation of the contract is an issue of law for the court to decide.[2] In construing the language of a

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[1] The trial court found that the agreement is a top hat agreement, a plan that benefits only highly compensated executives and exists as a device to defer taxes. It is exempt from much of ERISA's regulatory scheme, including any vesting or non-forfeiture protections. See Gallione v. Flaherty, 70 F.2d 724 (2nd Cir. 1995). We agree with the trial court's finding and neither party presents a contrary argument.

[2] Fay E. Sams Money Purchase Plan v. Jansen, Ky. App., 3 S.W.3d 753, 757 (1999).

contract, the role of the courts is to ascertain the intentions of the parties.

> A fundamental rule in the construction of contracts is to determine the intention of the parties from the contract as a whole and to give it such an interpretation as will carry out that intention, and in so doing, the court may consider the subject matter of the contract, the object to be accomplished, the situation of the parties and their surrounding conditions and circumstances.[3]

The opening language of the agreement states its purpose and the intent of the parties, specifically, that it was made in consideration of the termination of the Profit Participation Plan and the LTSSP. It is not disputed that under both plans Perconti had amounts “vested” to which he was entitled at the time each of the plans was abolished. The first paragraph allows for a maximum benefit of $1,008,854, obviously referring to Perconti’s interest in the LTSSP. If he remained employed until September 30, 2000, or was terminated for reasons other than for cause prior to that date, he was likewise entitled to that amount. Only if Perconti was terminated prior to September 30, 2000, for cause would he suffer a decrease in benefits, which penalty was completely erased after October 1, 1998, at which time Perconti was entitled to the full amount of $1,008,854, even if terminated for cause.

[3] Meacham v. Louisville & N. R. Co., 293 Ky. 642, 169 S.W.2d 830, 832 (1943).

The second paragraph is similar in that it provides for a set amount of $2,500,000, if terminated for circumstances beyond Perconti's control. If, however, he is terminated for any other reason, the amount is set by the number of years capped at the $2,500,000 amount. The $2,500,000 was the amount determined to be Perconti's future interest in the abolished Profit Participation Plan.

There is no language in the agreement indicating Perconti could be subject to forfeit of the benefits. By its own terms it was a plan for Thornton Oil to defer payment of amounts due Perconti under previously abolished and payable plans. We find the trial court correctly ruled, as a matter of law, the agreement provides for payment of benefits even if Perconti was fired for cause.

Thornton Oil contends that under common law forfeiture principle, a corporate fiduciary, like any other fiduciary, should not be compensated for his disloyalty to the corporation. With the exposure of fraud and breach of duties committed by various corporate officers in our present corporate world, the courts may be inclined to strip such officers of any benefits earned during their period of unfaithfulness to the corporation. We do not reach this issue because the benefits in dispute in the present case were not payable as compensation during the period of disloyalty. The benefits that Perconti now seeks accrued prior to any alleged wrongdoing by him and were not the result of breach of his duties. Additionally, the inclusion of the contingency of his discharge for cause as a circumstance under which he could receive benefits negates any contention that forfeiture is applicable.

The judgment is affirmed.

ALL CONCUR.

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