Affirmed and Memorandum Opinion filed February 2, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01030-CV

BADER MALALLAH, Appellant

V.

NOBLE LOGISTIC SERVICES, INC. F/K/A DEDICATED SERVICES, INC. AND SRS TEXAS HOLDINGS, LLC, Appellees

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On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2005-16364

MEMORANDUM OPINION

In this employment contract case, appellant Bader Malallah asks us to reverse the trial court's judgment that his claim is time-barred. He argues alternatively that (a) his employment could not be terminated without cause absent written notice, or (b) a cause of action accrued each time his employer failed to pay his wages after his termination. Because the first premise cannot be found in or implied from the contract, and the second premise is inconsistent with well-established case law, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Bader Malallah entered into a three-year employment contract with Dedicated Services, Inc., n/k/a Noble Logistic Services, Inc. ("Noble"), dated February 1, 1999. In March 2001, Noble terminated Malallah's employment, and on March 9, 2005, Malallah sued Noble and related entities for breach of contract. Noble defended the case on two grounds. First, Noble argued that it fired Malallah for cause under section 8.01 of the contract, in which the parties agreed that Noble "may terminate employee without notice" for certain enumerated acts or omissions. Second, Noble argued that the case was barred by the four-year statute of limitations.[1]

The case was tried to a jury who found that Malallah was not fired for cause but also found that Malallah was fired on March 2, 2001. On appeal, Malallah focuses on the jury's answers to the following three questions:

Question No. 1:	"Did Noble terminate Mr. Malallah for a reason listed in Section 8.01 of the Contract?"
Answer:	"No."[2]
Question No. 3:	"On what date did Noble unequivocally notify Mr. Malallah that it was terminating his employment before the expiration of the contract term?"
Answer:	"March 2nd, 2001."
Question No. 3A:	"On what date did Noble terminate Mr. Malallah?"
Answer:	"March 2nd, 2001."

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[1] Suit on a breach-of-contract claim generally must be filed within four years from the date the cause of action accrues. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 2008).

[2] This jury question reverses the burden of proof on the termination.

Malallah moved the trial court to disregard the jury's answers to Question Nos. 3 and 3A, arguing that these answers were immaterial in light of the jury's answer to Question No. 1. The trial court rendered judgment in Noble's favor, and expressly stated in its judgment, "Based upon the jury's answers to Questions 3 and 3A, the Plaintiff's claims are barred by the statute of limitations." Malallah also filed motions for new trial and to modify the judgment; in the latter motion, Malallah reasserted his argument that the jury's answers to questions 3 and 3A were immaterial. The trial court expressly denied these motions.

II. Issues Presented

In his first issue, Malallah argues that his claims are not barred by the statute of limitations, and thus, the trial court erred in rendering judgment in Noble's favor. In his second issue, he contends the trial court erred in failing to award him full contract damages and attorneys' fees.

III. Standard of Review

A trial court may disregard a jury finding only if there is no evidence to support the finding or if the issue is immaterial. *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 27 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Malallah concedes there is evidence to support the findings. Thus, the only issue is whether the jury findings were immaterial. A question is immaterial when it should not have been submitted or calls for a finding beyond the jury's province, such as a question of law. *Se. Pipe Line Co. v. Tichacek*¸ 997 S.W.2d 166, 172 (Tex. 1999). In addition, a properly-submitted question can be rendered immaterial by other findings. *Id.*; *Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997).

IV. Analysis

In his appellate brief, Malallah concedes that Noble informed him on March 2, 2001 that his employment was terminated. He argues that his breach-of-contract claim is not time-barred and the jury's findings on these issues are immaterial because Noble was required to provide written notice that it was terminating him without cause, and thus, his breach-of-contract claim did not accrue before March 16, 2001, when his termination was memorialized in writing. He additionally argues that a "trailing period" applies to this employment contract, such that a new breach-of-contract claim accrued each time Noble failed to pay Malallah wages that, but for his termination, would have been due.

A. No "Written Notice" Requirement

Although the contract does not expressly require Noble to provide written notice of termination without cause, Malallah infers that because the parties agreed he could be terminated for cause without notice, he could be terminated without cause only with notice. By applying the contract's notice provision to this implied requirement, he reasons that notice of termination without cause must be in writing because the parties agreed in section 9.01 of the contract that "[a]ll notices or other communications required under this [contract] may be effected either by personal delivery in writing or by certified mail, return receipt requested." Finally, he relies on the provision that "[n]otice shall be deemed to have been given when delivered or mailed" to argue that his termination was not effective before March 16, 2001, when his termination was memorialized in writing. He concludes that because the jury found he was not terminated for any reason stated in section 8.01, his breach-of-contract claim did not accrue until March 16, 2001, and therefore his claim, filed on March 9, 2005, is not time-barred.

The contract sets forth only four circumstances in which the parties agreed that written communication is required. First, the written approval of certain individuals was

required for Malallah to bind Noble. Second, Malallah agreed that he would not provide business or professional services to anyone other than Noble without Noble's prior written consent. Third, Noble agreed not to assign its rights under the contract without Malallah's written consent. Fourth, the parties agreed that Malallah could terminate the contract for cause by providing thirty days' written notice, or could terminate the contract without cause by providing sixty days' written notice. Significantly, the contract contains no parallel provision requiring or permitting Noble to terminate Malallah without cause by providing written notice.

An unambiguous contract will be enforced as written. *David J. Sacks, P.C. v Haden*, 266 S.W. 3d 447, 450 (Tex. 2008) (per curiam). "If the parties have expressly stated the terms of their agreement, they have created an express contract and are bound by it to the exclusion of conflicting implied terms." *Emmer v. Phillips Petroleum Co*., 668 S.W. 2d 487, 490 (Tex. App.—Amarillo 1984, no writ). The contract does not contain a written notice requirement. There is no reason to imply one. We therefore must reject Malallah's first argument.

B. No "Trailing Period" for Breach of a Term Employment Contract

Malallah next contends that a "trailing period" applies to this employment contract such that, after his termination, a new breach-of-contract claim accrued every time Noble allowed a previously-scheduled payday to pass without compensating him. He argues that "[a]ppellees did not breach the Contract until they failed to do what they promised—pay Dr. Malallah fixed monthly payments." But in his pleadings, Malallah alleged only that "Defendants breached the employment contract with Plaintiff by terminating his employment prior to the expiration of three years." The jury found that Noble terminated Malallah on March 2, 2001, and Malallah does not challenge this finding.

An employee under a term contract who is terminated before the end of the contract is entitled to damages and not wages. The breach arises when he is terminated, and a cause of action immediately accrues. *Dixie Glass Co. v. Pollack*, 341 S.W. 2d 530, 538–540 (Tex. Civ. App.—Houston 1960), *writ ref'd per curiam*, 347 S.W. 2d 596 (Tex. 1961). The employee is entitled to sue for damages for the full term of the contract and is not limited to the date of the trial. *Id*. The measure of damages is the present cash value of the contract less any amounts that he could have earned using reasonable diligence. *La Marque Indep. Sch. Dist. v. Thompson*, 580 S.W. 2d 670, 673 (Tex. App.—Houston [14th Dist.] 1979, no writ). An employment agreement calling for semi-monthly payments does not change this rule and does not create a cause of action for each missed payment. *Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App.—Fort Worth 1991, writ denied). The "trailing period" cases Malallah cites do not discuss a breach of a term employment agreement and do not apply here.[3]

V. CONCLUSION

Malallah's arguments do not demonstrate that the challenged findings by the jury are immaterial. To the contrary, those findings, together with the express terms of the contract, dictated the result reached by the trial court. We therefore conclude that the trial

[3] *See, e.g.*, *Barker v. Eckman*, 213 S.W.3d 306, 309–11 (Tex. 2006) (multiple breaches of bailment agreement to periodically forward proceeds from collection and sale of bull semen); *F.D. Stella Prods. Co. v. Scott*, 875 S.W.2d 462, 465 (Tex. App.—Austin 1994, no writ) (breach of equipment lease requiring fixed, periodic payments); *Hollander v. Capon*, 853 S.W.2d 723, 726 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (breach of continuing obligation to pay periodic child support); *Townewest Homeowners Ass'n, Inc. v. Warner Commc'n Inc.*, 826 S.W.2d 638, 640 (Tex. App.—Houston [14th Dist.] 1992, no writ) (breach of contract requiring quarterly payments of percentage of gross receipts from each of appellant's subdivisions in which appellee was allowed to install cable television equipment); *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 845–47 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (breach of agreement to provide employee with stock was not time-barred where employee brought suit less than two years after demand was first unequivocally refused).

court did not err in refusing to disregard these findings or in holding Malallah's claim to be time-barred. We overrule Malallah's first issue and affirm the trial court's judgment.[4]

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

[4] In light of our disposition of Malallah's first issue, we do not reach his second issue. *See* TEX. R. APP. P. 47.1.