NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1347

DONALD SNOW, JR.

VERSUS

HOLISTIC HEALTH, A PROFESSIONAL MEDICAL CORP.

Judgment Rendered: February 11, 2011

Appealed from the
Thirty-second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Docket Number 154,895

Honorable Randall L. Bethancourt, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs And Assigns reasons.

WHIPPLE, J.

This appeal arises from a suit filed by plaintiff in district court, asserting claims for breach of contract and enrichment without cause/quantum meruit, for which he sought additional compensation from his former employer. Plaintiff appeals the trial court's judgment, which granted the defendant's motion for summary judgment and dismissed plaintiff's suit. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Donald Snow, Jr., a doctor of acupuncture and oriental medicine, was recruited by Holistic Health, A Professional Medical Corporation ("Holistic Health") to work as an acupuncture assistant. He executed a two-year employment contract with Holistic Health on March 23, 2007, with employment commencing on May 14, 2007. Pursuant to the terms of the employment contract, Snow's monthly compensation was to be calculated as "forty percent (40%) of revenue over fourteen thousand dollars ($14,000.00) **collected** each month under [Snow's] name," with a guaranteed monthly minimum compensation of $4,000.00. (Emphasis added). The $14,000.00 figure was the amount agreed upon to cover Snow's overhead, including the help of one part-time assistant.

In June 2007, after he began the employment, Snow requested additional assistance, and the parties orally agreed to increase his overhead figure to cover the cost of additional assistants. An addendum to the employment contract was later executed on August 3, 2007, to reflect the earlier June 2007 oral agreement that Snow's overhead expense would be increased by $4,000.00 per month for each additional full-time employee Snow requested. The result of this amended agreement was that the figure

representing Snow's overhead expense increased from $14,000.00 to $20,000.00 per month.[1]

Thereafter, on September 7, 2007, Snow was asked to resign in lieu of his employment being terminated. At that time, Snow resigned. On July 11, 2008, he instituted this suit against Holistic Health. In his petition, Snow asserted a breach-of-contract claim, contending that Holistic Health had failed to pay him the compensation due for his services in accordance with the parties' contract and seeking all compensation due under the terms of the contract and all compensation, penalties, and attorney's fees recoverable pursuant to LSA-R.S. 23:631 and 23:632. Alternatively, Snow contended that Holistic Health was liable to him under the theory of enrichment without cause or quantum meruit pursuant to LSA-C.C. art. 2298.

On August 4, 2009, over a year after suit was filed, Holistic Health filed a motion for summary judgment, contending that it was entitled to judgment in its favor as a matter of law because Snow was unable to prove that Holistic Health had breached the employment contract or that he was entitled to any further compensation. In support of its motion, Holistic Health submitted: (1) the affidavit of Dr. Lisa Lee-Alevizon, a co-owner of Holistic Health; (2) the employment agreement between Snow and Holistic Health; (3) the addendum to the employment contract; (4) Snow's written resignation; (5) a "Payment Allocation Report by Post Date," generated by Holistic Health and upon which Snow's compensation was calculated; (6) a "Provider Activity Report" generated by Holistic Health; and (7) interrogatories and requests for production of documents propounded by Holistic Health together with Snow's answers and responses.

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[1]The increase in Snow's overhead expense included the expense of full-time and part-time help.

In her affidavit, Dr. Lee-Alevizon attested that, pursuant to Snow's employment contract, the salary Snow earned was calculated based on payment collected and not charges billed out. She further explained therein that Snow's compensation was calculated from the Payment Allocation Report, which listed all **payments** allocated to his services each month and upon which his monthly earnings were based.[2]

Holistic Health noted that in response to interrogatories and requests for admissions, Snow had stated that he was without sufficient information to determine the actual amount of compensation to which he was entitled. However, he indicated therein that he believed he was owed $49,085.47, an estimate which he calculated based upon a 70% collection rate, a rate which Snow stated was a "conservative estimate" based on a "Google search of medical billing industry standards." Thus, Holistic Health contended, because Snow could not offer any evidence that he was owed additional wages based on the **actual** collections of Holistic Health, he could not meet his burden of proof at trial to establish that he was entitled to any further compensation, and Holistic Health was entitled to summary judgment, dismissing Snow's claims.

In opposition to the motion for summary judgment, Snow contended that he could not calculate the amount to which he was due because Holistic Health refused to provide him with sufficient data. Additionally, despite the fact that the suit had been pending for over a year and despite the absence in

[2]In her affidavit, Dr. Lee-Alevizon attested that "several months" after Snow left the employment of Holistic Health, an error was discovered wherein Snow had not been credited for certain prepaid services during the month of August 2007, resulting in Snow having been paid $2,370.73 less than what he was owed. However, when the discrepancy was discovered, Holistic Health issued a payment in the amount of $2,370.73 to Snow through his attorney. The record before us does not show precisely when this payment was made or whether it was made prior to Snow filing the instant lawsuit. Nor does the record reflect that Snow was asserting his claim for attorney's fees based on this $2,370.73 payment.

the record of any motions to compel discovery, Snow further contended that it would be patently unfair to grant summary judgment before the production of the evidence which he alleged that Holistic Health had failed to provide to him through supplementation of its discovery responses.

On August 28, 2009, the date of the scheduled hearing for the motion for summary judgment, the parties agreed to continue the hearing without date and further agreed that Holistic Health would provide Snow with billing and collection records for five patients selected by Snow to allow Snow to demonstrate that questions of fact existed as to his entitlement to additional compensation.

After receiving the records for the five patients he selected and propounding further discovery to Holistic Health, Snow filed a supplemental memorandum in opposition to the motion for summary judgment, contending that, for one of the five patients whose billing records were provided to him, he and his assistants had performed services that produced a $22,000.00 payment to Holistic Health, but that the $22,000.00 payment was not reflected in the billing records for that particular patient provided to him by Holistic Health. Snow further contended that he and his assistants performed services for the five patients whose billing records he reviewed that resulted in an additional $32,000.00 in accounts receivable for which he had not been credited in the wages he was paid.

In support of these contentions, Snow submitted a copy of the $22,000.00 insurance payment made payable to Holistic Health; a copy of the Account Activity Report for that particular patient produced by Holistic Health, which did not reflect the $22,000.00 payment; and the response by Holistic Health's counsel to Snow's questions about these amounts. Snow contended that based on this evidence, he had demonstrated a "clear and

unequivocal material question of fact," given Holistic Health's failure to produce records reflecting the $22,000.00 payment and the alleged $32,000.00 in discrepancies between the charges billed and the collections reflected in Holistic Health's billing records for these five patients. Thus, Snow argued, summary judgment was inappropriate.

In further support of its motion for summary judgment, Holistic Health filed a supplemental affidavit of Dr. Lee-Alevizon. In her supplemental affidavit, Dr. Lee-Alevizon attested that Snow's last date of employment was September 6, 2007. She further noted that pursuant to the employment contract, Snow had contractually agreed that his compensation was to be calculated as a percentage of revenue **collected**. With regard to the $22,000.00 payment referenced by Snow in his supplemental opposition, Dr. Lee-Alevizon noted that the check was issued on September 19, 2007 and posted on September 26, 2009, after Snow's employment with Holistic Health had ended.[3] Dr. Lee-Alevizon further attested that Snow's employment contract provided that "employer shall have the right at any time to immediately terminate this agreement without cause upon notice to employee and upon paying employee $4,000.00 in severance pay" and that in such an event, the agreement was deemed terminated, and Holistic Health was relieved and released from any further obligations to Snow. Thus, Dr. Lee-Alevizon attested that under the terms of the employment contract, Snow was simply not entitled to any funds received **after** his employment terminated.

Additionally, with regard to the $32,000.00 difference between charges and receipts, Dr. Lee-Alevizon explained that this sum represented

[3]The September 26, 2009 date appears to be a typographical error. However, the date is of no moment in that the check was clearly issued, and therefore would have been posted, **after** Snow's last date of employment.

payments not yet received for services rendered, i.e., accounts receivable. Dr. Lee-Alevizon further attested that Snow had been paid all compensation for **revenues collected prior to his termination date** for services performed by him and his assistants.

The hearing on the motion for summary judgment was reset for November 13, 2009, and on that date, after hearing argument from counsel, the trial court granted Holistic Health's motion for summary judgment and dismissed Snow's suit with prejudice. From the judgment of dismissal, Snow appeals, contending that the trial court erred: (1) when it granted summary judgment in favor of Holistic Health because the wages Snow seeks to recover were earned and the law prohibits contracts that forfeit earned wages; and (2) in granting summary judgment on a contract when the intent of that contract was in dispute.

BURDEN OF PROOF AND STANDARD OF REVIEW FOR SUMMARY JUDGMENT

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA-C.C.P. art.

966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA-C.C.P. art. 967(B).

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 765. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 243-244, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146.

DISCUSSION

Through his first assignment of error, Snow contends that the trial court erred in granting summary judgment and dismissing his claim because

he is entitled to a percentage of all fees attributable to services he rendered while an employee of Holistic Health, regardless of whether the fees were collected while he was still so employed or after his employment terminated.

Snow contends that pursuant to LSA-R.S. 23:634(A), he is entitled to wages "actually earned" at the time of his resignation and that, while his employment contract with Holistic Health describes how Snow's compensation would be calculated, it is silent as to **when** his wages were considered "earned." According to Snow, he **earned** his compensation when he and his assistants performed the patient services.

Snow avers that he offered evidence in opposition to the motion for summary judgment from the five patients whose billing records he was allowed to examine reflecting $22,000.00 in revenue collected after his employment ended and $32,000.00 in uncollected revenue, all for services he rendered while employed at Holistic Health. He asserts that pursuant to his contract and by law, he is entitled to 40% of the revenue collected **and to be collected** less his overhead in the months that it is collected.

Alternatively, in his second assignment of error, Snow contends that if this court finds that the parties to a contract may negotiate what constitutes "earned" wages, then a question of fact remains as to the parties' intent about what was owed under the contract.

Louisiana Revised Statute 23:631(A)(1)(b) imposes a duty on an employer, upon resignation of any employee, to timely pay wages owed, as follows:

> Upon the resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, on or before the next regular payday for the pay cycle during which the employee was working at the

time of separation or no later than fifteen days following the date of resignation, whichever occurs first.

Moreover, pursuant to LSA-R.S. 23:634(A), "[n]o person ... shall require any of his employees to sign contracts by which the employees shall forfeit their wages if discharged before the contract is completed or if the employees resign their employment before the contract is completed." Rather, "employees shall be entitled to the wages **actually earned** up to the time of their discharge or resignation." (Emphasis added).

An employer who fails or refuses to comply with the provisions of LSA-R.S. 23:631 shall be liable to the employee either for ninety days' wages at the employee's daily rate of pay, or full wages from the time of the employee's demand for payment until the employer tenders the amount of unpaid wages to the employee, whichever is the lesser amount of penalty wages. In addition, reasonable attorney's fees shall be allowed the employee in the event of a well-founded suit for unpaid wages. LSA-R.S. 23:632; Becht v. Morgan Building & Spas, Inc., 2002-2047 (La. 4/23/03), 843 So. 2d 1109, 1111-1112.

In order to recover penalty wages and attorney's fees pursuant to LSA-R.S. 23:632, the claimant must show that: (1) wages were due and owing; (2) demand for payment was made where the employee was customarily paid; and (3) the employer did not pay upon demand. Becht, 843 So. 2d at 1112.

As stated above, in support of its motion for summary judgment, Holistic Health contended that Snow could not establish that wages were due and owing under the employment contract executed by the parties. In granting summary judgment, the trial court agreed. Accordingly, we first consider the terms of the employment contract and the addendum, which

governed the parties' employment relationship. Section 3.01 of the employment contract provides as follows relative to compensation:

> As compensation for Employee's services hereunder, Employee will receive forty percent (40%) of revenue over fourteen thousand dollars ($14,000.00) **collected each month** under Employee's name. All compensation shall be subject to withholdings required by law. Employee shall be entitled to receive a monthly minimum amount of Fourth Thousand And No/100 ($4,000.00) Dollars per month, provided that this monthly minimum compensation shall be reduced pro rata on a time basis in the event that Employee takes a leave of absence that is not covered by paid vacation or holiday. Any minimum compensation not justified by revenue received in the Employee's name according to the previous formula shall be credited against future compensation during the contract period. If Employee fails to collect enough revenue to support the minimum compensation according to the above formula, any excess compensation provided will be considered bonus at the end of the contract period and will not carry over to future contract periods or count against revenue collected in future contract periods.

Section 3.02 of the addendum to the employment contract further provides as follows with regard to compensation:

> The first fourteen thousand dollars ($14,000.00) collected is to cover overhead and includes the cost of one part time (half time) employee. Extra employees may be requested to provide additional assistance and will increase the base overhead by four thousand dollars ($4,000.00) per month for each additional full time employee.

Thus, according to the employment contract and the addendum thereto, Snow's monthly compensation was specified as a percentage of **revenues received**, or collected, under his name after overhead expenses were first deducted from the amount of revenues collected. Moreover, section 6.04 of the employment contract further provided as follows with regard to compensation upon termination of employment:

> Employer shall have the right at any time to immediately terminate this Agreement without cause upon notice to Employee and upon paying Employee Four Thousand and No/100 ($4,000.00) Dollars in severance pay. In such event, this Agreement shall be deemed terminated and Employer shall

be relieved and released from any further obligations to Employee.

Accordingly, with regard to Snow's contention that the terms of the employment contract do not define his "earned" wages or compensation, we conclude that the contract clearly defines the compensation **earned** by Snow, i.e., as a calculated amount based on monthly **collections** for services performed under his name, and not based on the **services provided** by Snow in any given month. Moreover, under the terms of the contract, upon termination of the employment agreement, Snow was not entitled to any future sums **collected** for any services previously provided.

In Becht v. Morgan Buildings & Spas, Inc., 2001-1091 (La. App. 1st Cir. 6/21/02), 822 So. 2d 56, 59, aff'd, 2002-2047 (La. 4/23/03), 843 So. 2d 1109, cert. denied, 540 U.S. 878, 124 S. Ct. 289, 157 L. Ed. 2d 142 (2003), a former employee sought an award of commissions that he alleged he earned prior to his resignation, but which had not yet been collected by the employer as of the date of his resignation. In concluding that the former employee was not entitled to such commissions, this court noted that the employment contract at issue therein provided that the terminated salesperson "will receive his [commission] on those sales made prior to termination if the product has been DELIVERED, ACCEPTED, [sic] by the customer AND the account has been PAID IN FULL prior to the end of the last business day during which he ... was at work." Becht, 822 So. 2d at 59. While the former employee argued that the provision of the employment contract that limited commissions to sales that were **paid in full** by the day of resignation violated the provisions of LSA-R.S. 23:634, as a prohibited forfeiture of "wages earned," the majority held that "considering the nature of the sales and the **clearly-established method of determining**

compensation based on verifiable post-sale events, we find no error in the trial court's failure to award commissions on these contracts." Becht, 822 So. 2d at 59 (emphasis added).

Although a dissent was filed in the Becht case, arguing that the employee should have been entitled to commissions earned, the majority's holding in the case has been the law in this circuit since 2002. Moreover, although the Louisiana Supreme Court granted writs, certiorari was granted on another issue, i.e., whether the parties could by contract extend the time period for paying wages earned. Becht v. Morgan Building & Spas, Inc., 2002-2047 (La. 4/23/03), 843 So. 2d 1109, cert. denied, 540 U.S. 878, 124 S. Ct. 289, 157 L. Ed. 2d 142 (2003). The Supreme Court ultimately did not reach that issue, but, in affirming the merits of the case with regard to **other** sums claimed by and found to be due the former employee (as distinguished from the claim for commissions on sales not yet paid for), the Supreme Court stated as follows: "Furthermore, the stipulation reflects that all of the conditions entitling plaintiff to a commission under the employment contract, *i.e.*, delivery, acceptance, and **payment by the customer**, had been satisfied before plaintiff resigned from employment." Becht, 843 So. 2d at 1112 (emphasis added). Thus, considering the merits of the employee's various claims and the terms of the contract, the Supreme Court seemingly applied (and apparently upheld) the contract as written, accepting as valid the terms of the contract that allowed for the payment of commission only on those sales for which payment had been made prior to the employment terminating.

Similarly, in the instant case, the employment contract negotiated between Snow and Holistic Health contained a **clearly established method of determining compensation** based on verifiable post service events. With

regard to the parties' agreement that Snow's earnings would be calculated based on payments collected rather than charges billed out, Dr. Lee-Alevizon explained in her affidavit that many of Snow's charges had to be written off before they were billed due to insurance limitations and that charges billed out to insurance companies were often denied, resulting in Holistic Health frequently not getting paid on claims until several months after they were billed out, and sometimes longer. Additionally, we note that Snow was not independently employed such that he may have been considered to have **earned** all fees upon the rendition of services. Rather, he was an employee of Holistic Health, who negotiated an employment contract whereby his earnings were a specified factor of monthly **collections** for services rendered under his name, with a monthly minimum salary guaranteed.

On review, we agree with the trial court that Snow failed to make the requisite showing that he was entitled to any percentage of future sums collected by Holistic Health after the termination of his employment. Nor did he establish that any question of fact remains as to the intent of the parties with regard to the clear terms of the employment contract he negotiated. Thus, considering the nature of his employment as well as the clearly defined terms of the employment contract regarding compensation, we find no error in the trial court's finding that Holistic Health proved its entitlement to judgment as a matter of law dismissing Snow's claims for additional compensation. See Becht 822 So. 2d at 59.

CONCLUSION

For the above and foregoing reasons, the November 24, 2009 judgment, granting Holistic Health's motion for summary judgment and

dismissing Snow's claims with prejudice, is hereby affirmed. Costs of this appeal are assessed against appellant, Donald Snow, Jr.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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DONALD SNOW, JR.

VERSUS

HOLISTIC HEALTH, A PROFESSIONAL MEDICAL CORP.

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McCLENDON, J., concurs and assigns reasons.

In my opinion, Section 3.01 of the employment contract is not clear and unambiguous, as found by the majority. To the extent that the majority relies on the case of **Becht v. Morgan Buildings & Spas, Inc.**, 01-1091, p. 4 (La.App. 1 Cir. 6/21/02), 822 So. 2d 56, 59, aff'd, 02-2047 (La. 4/23/03), 843 So. 2d 1109, cert. denied, 540 U.S. 878, 124 S. Ct. 289, 157 L. Ed. 2d 142 (2003), to support its discussion of the contract terms, I find **Becht** distinguishable. The language in the employment contract in this case, unlike that in **Becht**, contained no qualifying language limiting revenues to only those collected prior to the employee's termination date. Thus, Section 3.01 could be interpreted to include revenues collected *at any time* as long as the fees were collected under Dr. Snow's name. However, because Section 6.04 of the employment contract clearly gave the employer the right to terminate the employment agreement at any time without cause simply upon notice and payment of the severance amount, I agree with the result reached by the majority. Therefore, I respectfully concur.