United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7123 **September Term, 2017**

FILED ON: APRIL 2, 2018

XENOPHON STRATEGIES, INC.,
APPELLEE

v.

JERNIGAN COPELAND ATTORNEYS, PLLC,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-01774)

Before: TATEL, MILLETT, and KATSAS, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

ORDERED AND ADJUDGED that the decision of the district court be affirmed.

This suit arises out of a dispute over the meaning of the term "retainer" in a contract between Jernigan Copeland Attorneys, PLLC ("Jernigan") and Xenophon Strategies, Inc. ("Xenophon"). In 2014, Jernigan retained Xenophon to provide public relations services in the lead-up to a high-profile lawsuit. According to the parties' contract, Xenophon would provide a number of specific services and, in exchange, "[would] be compensated with a monthly retainer of $30,000 plus expenses." Joint Appendix (J.A.) 9. Months after Xenophon commenced work, Jernigan's client informed it that it no longer wished to pursue the lawsuit. Jernigan then provided Xenophon a contractually-required sixty-day termination notice. *Id*. at 224–25. In response, Xenophon filed suit against Jernigan, seeking to recover over $300,000 allegedly owed under the contract. Compl. ¶ 1.

Xenophon moved for summary judgment on liability and damages before the district court, contending that the term "retainer" unambiguously meant that it was entitled to a monthly flat fee of $30,000 for its services. Jernigan responded that it was at least ambiguous whether the

retainer was a prepayment or deposit from which Xenophon could deduct for its billable work. The district court, applying D.C. law, under the contract's choice-of-law provision, ruled in favor of Xenophon and concluded that the term "retainer" in this particular contract unambiguously required payment of a flat fee. *See Xenophon Strategies, Inc. v. Jernigan Copeland & Anderson, PLLC*, 268 F. Supp. 3d 61, 70 (D.D.C. 2017). We review that decision de novo. *Chenari v. George Washington University*, 847 F.3d 740, 744 (D.C. Cir. 2017).

On appeal, Jernigan offers three reasons for reversing the district court, but none is persuasive.

First, Jernigan argues that because *Black's Law Dictionary* provides four somewhat varying definitions of the term "retainer," the district court erred in concluding the term was unambiguous. As the district court correctly recognized, however, it is well-settled under D.C. law that "meaning can almost never be plain except in a context." *Abdelrhman v. Ackerman*, 76 A.3d 883, 889 (D.C. 2013) (quoting Restatement (Second) of Contracts § 212 cmt. b). Thus, the mere fact that a term is susceptible to multiple meanings does not, as Jernigan suggests, lead to the conclusion that it is ambiguous whenever it is used. *See generally HolRail, LLC v. Surface Transportation Board*, 515 F.3d 1313, 1317 (D.C. Cir. 2008) ("[A]mbiguity is a creature not of definitional possibilities but of . . . context." (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994))).

Second, Jernigan argues that other provisions of the contract counsel in favor of concluding that the term "retainer" was at least ambiguous. In particular, Jernigan emphasizes that Article 5.1 of the contract, which requires Xenophon to submit "detailed summar[ies] of billable time . . . the following month, after it is incurred," J.A. 10, has practical effect only if Xenophon's fees depend on its accounting of the actual amount of work it has completed. Appellant's Br. 33. But, contrary to Jernigan's reading, Article 5.1 also clearly delineates between invoices sent at the beginning of the month for the full $30,000 and billing summaries sent at the end of the month. The contract plainly states that payment is due immediately upon receipt of the former, while never suggesting that payment might be adjusted after receipt of the latter.

Other provisions of the contract also make clear that the "retainer" functioned as a flat fee. Specifically, Article 1.2 explains that Xenophon may charge for "[a]dditional services . . . that fall outside the boundaries of the Scope of Services" at the firm's "then-currently hourly rates." J.A. 8. If the retainer was a deposit from which Xenophon was supposed to deduct for its billable work, presumably Xenophon would charge for all of its work at its "hourly rates" rather than just the work that fell "outside . . . the Scope of Services." *Id.* Likewise, Article 2.2 requires Jernigan to provide notice sixty days prior to termination. *Id.* at 9. If Xenophon's payment depended on the specific tasks performed, Jernigan could render the protections of this notice period meaningless by simply directing Xenophon to stop work. Thus, interpreting the contract "as a whole, giving a reasonable, lawful, and effective meaning to all its terms," *Debnam v. Crane Co.*, 976 A.2d 193, 197 (D.C. 2009), we agree with the district court that the contract unambiguously compensates Xenophon with a monthly flat fee of $30,000 plus expenses while the agreement is in effect.

Third, Jernigan argues that the term "retainer" is ambiguous because the attorney who entered into the contract on behalf of Jernigan testified that he subjectively understood the term "retainer" to mean a prepayment or deposit based on his years of experience as an attorney. But because Jernigan failed to raise this contention before the district court, we decline to consider it for the first time on appeal. *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1043 (D.C. Cir. 2003).

Finally, in addition to finding Jernigan liable for breach of contract, the district court concluded that Xenophon was entitled to pre-judgment interest. When awarding this interest, the district court relied, in part, on its determination the Jernigan had failed to contest Xenophon's request for interest payments. On appeal, Jernigan disputes that it conceded this point, noting that it included the issue in its "Statement of Genuine Issues Necessary To Be Litigated." Appellant's Br. 44. Even assuming the issue was not conceded, the contract itself contemplates payment of interest on unpaid balances, *see* J.A. 10 ("Xenophon reserves the right to impose an interest charge equal to its own borrowing rate for any invoice payment outstanding more than 30 days."), and the district court did not abuse its discretion in awarding pre-judgment interest at the rate of 5% compounding monthly, *see Forman v. Korean Air Lines Co.*, 84 F.3d 446, 450 (D.C. Cir. 1996).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk