AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

WILLIAM J. VILLARI, Claimant, v. AMERIS BANCORP AND AMERIS BANK, Respondents.	)	Case Number 01-18-0004-5781

ORDER AND AWARD

Claimant William J. Villari ("Mr. Villari"), represented by Steven Kushner, Esq. of Fellows LaBriola LLP and Jonathan Feldman, Esq. of Perlman Bajandas Yevoli and Albright, P.L., initiated the instant arbitration on December 13, 2018 by filing a Demand for Arbitration against Respondents Ameris Bancorp and Ameris Bank (hereinafter referred to collectively as "Ameris"), represented by Benjamin Razi, Esq., et. al. of Covington & Burling, LLP. Although the dispute between Mr. Villari and Ameris involves numerous facets, the central, and ultimately dispositive, issues involve the employment agreement dated January 31, 2018 between Mr. Villari and Ameris (the "Employment Agreement"). Mr. Villari alleges that he terminated the Employment Agreement on December 4, 2018 for "Good Reason" ("Good Reason") as that term is defined in the Employment Agreement. Ameris alleges that Mr. Villari's alleged termination on December 4, 2018 was ineffective for a number of reasons, chief among them that Ameris had allegedly terminated Mr. Villari's employment on November 26, 2018 for "Good Cause" ("Good Cause") as that term is defined in the Employment Agreement.

An evidentiary hearing was conducted before Arbitrator Ken Menendez (the "Arbitrator") in Atlanta, Georgia on August 12, 13 and 14 and October 2 and 3, 2019. After consideration of

the evidence presented at the hearing (both testimonial and documentary), the argument of counsel for Mr. Villari and Ameris, the post-hearing briefs and exhibits submitted by the parties, the applicable law, and for good cause shown, the Arbitrator rules as follows:

I. Villari's Objection to Testimony of Robert J. Rock

During the evidentiary hearing, Mr. Villari objected to the testimony of Robert J. Rock ("Mr. Rock"), who testified as an expert witness on behalf of Ameris. Mr. Villari argued that Mr. Rock's testimony addressed an ultimate issue of fact and therefore was not admissible. Ameris argued that Mr. Rock's testimony did not address an ultimate issue of fact, but rather that Mr. Rock provided his opinion regarding (1) Mr. Villari's alleged duty to report any fraud and (2) Ameris's License Fee payments to Mr. Villari.

After reviewing the transcript of the testimony of Mr. Rock, the Arbitrator rules that Mr. Rock's opinions did not address an ultimate issue of fact. Accordingly, Mr. Villari's objection is overruled and Mr. Rock's testimony is admissible.

II. Termination of the Employment Agreement

A. Termination for Cause

Ameris alleges that it terminated Mr. Villari's employment for Good Cause pursuant to Paragraph 6(a) of the Employment Agreement, which states in part as follows:

> "(a) Cause. The Employer may terminate Employee's employment with the Employer for Cause. For purposes of this Agreement, "Cause" shall mean:
>
> ... (ii) Employee's willful misconduct or gross negligence (including, but not limited to, a material willful violation of the Employer's written corporate governance and ethics guidelines and codes of conduct) in connection with the Employer's business or relating to Employee's duties hereunder; ...
>
> (vi) A willful act by Employee which constitutes a material breach of Employee's fiduciary duty to the Employer...."

Section 6(a) of the Employment Agreement also defines "willful" as an action "done, or omitted to be done, by Employee in bad faith or without reasonable belief that Employee's action or omission was in the best interests of the Employer."

Employment Agreement, ¶ 6.

B. Termination for Good Reason

Mr. Villari alleges that he terminated the Employment Agreement for Good Reason on December 4, 2018 pursuant to Paragraph 6(b) of the Employment Agreement, which reads as follows:

> (b) Good Reason. Employee may terminate Employee's employment with the Employer for Good Reason. For purposes of this Agreement, "Good Reason" shall mean (i) a material diminution in Employee's authority, duties or responsibilities; (ii) a material change in the geographic location at which Employee must regularly perform the services to be performed by Employee pursuant to this Agreement (other than a change in such geographic location to an office or other location closer to Employee's home residence); and (iii) any other action or inaction that constitutes a material breach by the Employer of this Agreement; provided however, that Employee must provide notice to the Employer of the condition Employee contends is good reason within 90 days after the initial existence of the condition, and the Employer must have a period of 30 days to remedy the condition. If the condition is not remedied within such 30-day period, then Employee must provide a Notice of Termination as set forth in Section 6(f) within 30 days after the end of the Employer's remedy period...
>
> (f) Notice of Termination. Any notice of termination (other than for death) shall be communicated by a Notice of Termination given in accordance with Section 14(i) of this Agreement. For purposes of this Agreement, a "Notice of Termination" means a written notice that (i) indicates the specific termination provision in this Agreement relied upon, (ii) to the extent applicable, sets forth in reasonable detail the facts and circumstances claimed to provide a basis for termination of Employee's employment under the provision so indicated and (iii) if the Termination Date (as defined below) is other than the date of receipt of such notice, specifies the Termination Date (which date shall be not more than 30 days after the giving of such notice, except as otherwise provided in Section 6(e)). The failure to set forth in the Notice of Termination any fact or circumstance which contributes to a showing of Disability, Cause or Good Reason shall not waive any right of Employee or the Employer hereunder or preclude Employee or the Employer from asserting such fact or circumstance in enforcing Employee's or the Employer's rights hereunder."

Employment Agreement, ¶ 6 (emphasis in original).

III. Termination Analysis

Ameris claims that it had Good Cause to terminate Mr. Villari's employment. Ameris cites numerous acts or omissions by Mr. Villari, any one of which Ameris claims constituted sufficient basis for a Good Cause termination of Mr. Villari's employment. These acts or omissions include (1) Mr. Villari's failure to timely disclose to Ameris a large fraud of which Mr. Villari became aware no later than January 31, 2018 (the "Failure to Disclose basis"); (2) Mr. Villari's alleged pursuit of a cannabis-related business despite express orders from his superiors to cease pursuing or undertaking such business (the "Cannabis Business basis"); and (3) Mr. Villari's alleged use of a company owned by Mr. Villari ("P1") to compete against a company owned by Ameris ("USPF") (the "P1 basis").

With regard to the Failure to Disclose basis, the record establishes that Mr. Villari became aware of the fraud in question (the "Brandywine fraud") no later than January 31, 2018 (*See* Tr. 326: 23 - 327:6) and that he did not immediately report the fraud to Ameris. Mr. Villari testified that he decided not to report the fraud to Ameris because he thought he could make the problem go away without alerting Ameris. *See* Tr. 327:23-35.

Ameris's Code of Conduct required Mr. Villari to "immediately" report "[a]ny suspected incident of fraud." RX-00010, Section 12. Mr. Villari testified that he knew that Ameris's policy required him to immediately report any suspected incident of fraud. *See* Tr. 252:18-253:2.

Mr. Villari's testimony establishes that his failure to report the fraud immediately was willful misconduct in that it was intentionally done. Mr. Villari's misconduct constituted (a) a material breach of his fiduciary duty to Ameris and (b) gross negligence.

In light of all of the foregoing, the Arbitrator finds that Mr. Villari's failure to report the Brandywine fraud to Ameris in a timely fashion constituted Good Cause for the termination of Mr. Villari's employment by Ameris. In light of the foregoing finding, the Arbitrator does not need to address the question of whether the Cannabis Business basis or the P1 basis constituted Good Cause for the termination of Mr. Villari's employment.

Mr. Villari alleges that even if his conduct constituted Good Cause for his termination, Ameris's termination was not effective because Ameris failed to terminate Mr. Villari in May of 2018 when it first learned of the Brandywine fraud. This argument fails. The Employment Agreement does not require Ameris to exercise its right to terminate an employee for Cause in any particular time period. Accordingly, the fact that Ameris did not terminate Mr. Villari until November 26, 2018 does not render Ameris's termination ineffective.

Mr. Villari's primary argument in opposition to the Ameris termination is that Mr. Villari terminated the Employment Agreement for Good Reason. On October 21, 2018, Mr. Villari sent an e-mail to Ameris CEO Dennis Zember in which Mr. Villari stated, among other things, the following:

> "The recent changes in my role at USPF are not what we contemplated in the Employment Agreement. The transition to a new President has not gone as we discussed and agreed. My duties, responsibilities, and authorities have changed materially, as you well know. Even my access to the USPF FinancePro system has changed or has been terminated…
>
> Given the changes and actions described above, let's agree to activate Section 6(b) of the Employment Agreement and terminate my role as (sic) USPF for 'Good Reason' with an effective date that we mutually agree to… We will want to effectuate all contractual obligations described in [Section] 6(b) of the bank's Employment Agreement."

Villari Exhibit 101.

Ameris argues that the foregoing notice contained certain technical deficiencies (e.g., inadequate notice, no discussion of a remedy), but Ameris's primary argument is that the October 21, 2018 e-mail did not constitute a termination of Mr. Villari's employment; rather, at best it simply triggered the process for termination by an employee outlined in Section 6(b) of the Employment Agreement.

The process for termination of the Employment Agreement by the Employee for Good Reason is stated clearly in Paragraph 6(b) of the Employment Agreement. The Employee must first provide the Employer with notice of the condition which Employee contends is Good Reason and then the Employer must have a period of thirty days to remedy the condition. If the condition is not remedied within such thirty-day period, the Employee must then provide a Notice of Termination within thirty days of the end of the Employer's remedy period.

Even assuming that the October 21, 2018 e-mail substantially complied with Mr. Villari's obligation to provide notice of the Good Reason conditions, the record is clear that Mr. Villari did not provide Ameris with the required Notice of Termination until December 4, 2018. By that date, Ameris had already terminated Mr. Villari's employment pursuant to its Notice of Termination dated November 26, 2018. In light of the all of the foregoing, the Arbitrator rules that Mr. Villari's Notice of Termination for Good Reason dated December 4, 2018 was ineffective because by that time Mr. Villari's employment had already been terminated by Ameris for Good Cause.

Because Mr. Villari did not terminate the Employment Agreement for Good Reason, he is not entitled to any additional payments from Ameris. This includes any minimum compensation under the P1 MLA.

In summary, the Arbitrator rules that Ameris had Good Cause to terminate Mr. Villari and properly exercised its termination right. Mr. Villari is therefore not entitled to any additional payments under the Employment Agreement, the P1 MLA or any other agreement.

The parties shall bear their respective attorney's fees.

The fees of the American Arbitration Association, totaling $2,950.00, and the fees of the Arbitrator, totaling $20,475.00, shall be borne as incurred.

This Order and Award resolves all issues submitted for decision as proceeding. Any claim that is not directly addressed in the Order and Award is deemed denied.

This 20th day of November, 2019.

Kenneth G. Menendez
Arbitrator

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