IN THE COURT OF APPEALS OF IOWA

No. 6-433 / 05-1674
Filed October 25, 2006

IN THE MATTER OF THE ESTATE OF MAURICE F. FRINK, Deceased,

FLOWERAMA OF AMERICA, INC., an Iowa Corporation,
Plaintiff-Appellee,

vs.

REGIONS BANK, f/k/a UNION PLANTERS BANK, N.A., Successor Executor for the Estate of Maurice F. Frink, Deceased,
Defendant-Appellant,

EVELYN FRINK, TAMARA DAWN THORNTON and CATHY JANE KIMM,
Defendants.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Defendants appeal from the district court's order granting plaintiff's motion for summary judgment. **AFFIRMED.**

Edward J. Gallagher of Gallagher, Langlas & Gallagher, PC, Waterloo; Theresa E. Hoffman of Beecher, Field, Walker, Morris, Hoffman & Johnson, PC, Waterloo; and Paul P. Morf of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellant.

Kevin J. Visser and MacKenzie A. Barton, Moyer & Bergman, P.L.C., Cedar Rapids, for appellee.

Heard by Huitink, P.J., Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

Regions Bank, executor of the Estate of Maurice F. Frink ("executor"), appeals from a ruling of the district court granting summary judgment in favor of Flowerama of America, Inc. ("Flowerama" or "the corporation") in an action for declaratory judgment and specific performance of a buy-sell agreement. We affirm.

I. Background Facts and Proceedings

Maurice F. Frink was the majority shareholder of Flowerama when he died in 2004. The dispute before us concerns a 1974 amendment to the corporate by-laws, restricting the transfer of corporate stock upon the death of a shareholder.

Maurice and his brother Herbert co-founded Flowerama in 1966. The articles of incorporation, signed on April 21, 1966, restricted the transfer of corporate stock. A stock purchase agreement was signed by Maurice and Herbert, the sole shareholders, on May 10, 1966, for the stated purpose of "provid[ing] for the purchase by the Corporation of the decedent stockholders' stock interest therein." The stated value per share was $100.

The May 10, 1966 stock purchase agreement was rescinded on October 4, 1974 in a revocation document signed by all shareholders.[1] On October 7, 1974, the articles of incorporation were amended to include the following language:

> The corporation shall have the power to restrict the transfer of shares of common stock by provision in its By-Laws. Any such restrictions shall be printed on each certificate of common stock.

[1] By 1974 the corporation had five shareholders: Maurice Frink, Herbert Frink, Clifton Kelley, Kenneth Cutsforth, and Bryan Patzisowski.

The same day, the shareholders and directors signed an "Informal Action"[2] (hereinafter "1974 Agreement") amending the by-laws to restrict the transfer of stock as follows:

> Certain regulations and restrictions on the sale and encumbrance of the stock of the corporation are as follows:
> No shareholder shall encumber or dispose of any of his stock in said corporation held by him, whether issued to him following the incorporation of said corporation or thereafter acquired, except under the following terms and conditions:
> . . . .
> In the event of the death of a shareholder, the corporation, upon demand made on the legal representative of the deceased shareholder, shall have the right and first option within five (5) months of the last day of publication of notice of the appointment of the legal representative to purchase all of the shares of stock owned by the deceased shareholder as of the date of his death. *The purchase price for such stock shall be the book value as of the date of death as determined by the accountant who regularly prepares the Balance Sheets and Profit and Loss Statements for the corporation.*

(Emphasis added.) The restrictions remained in place at the time of Maurice's death in 2004.

In 1986 shareholder Clifton Kelley died. The corporation, pursuant to the 1974 Agreement, purchased Kelley's stock from his estate for $1793.63 per share, the book value price per share. Similarly, following the 1988 death of Herbert Frink, the corporation repurchased Herbert's stock from his estate for the book value price, $1934.60 per share.[3]

In 1994 the board of directors resolved to purchase insurance on the life of Maurice Frink, president of the corporation, with a death benefit of $350,000.

---

[2] The corporate by-laws permit shareholders and directors to take informal action by written consent.

[3] Three shareholders left the company in the 1980s. The corporation negotiated to purchase their shares at prices below book value.

The stated purpose of the insurance was "to fund the stock redemption in the event of the death of Maurice F. Frink." Attached to the resolution is a calculation of the book value of Maurice's 113 shares, placing such value at $327,829.95, or $2901.15 per share.

At the time of his death on June 1, 2004, Maurice was the majority shareholder in the corporation, owning 144 2/3 shares of its stock. The corporation, acting through its directors and officers,[4] resolved to repurchase Maurice's shares from his estate pursuant to the 1974 Agreement. The corporation further resolved "[t]he purchase price will be the book value per share as of May 31, 2004." The corporation notified the executor of Maurice's estate in writing via certified mail of the corporation's intent to purchase the stock held by Maurice at the time of his death. Daniel Rubendall, shareholder and board member, as well as the corporation's regular accountant, determined the book value of Maurice's shares was $896,403.85, or approximately $6200 per share. Independent auditors confirmed Rubendall's calculation of the book value.

The corporation offered to Maurice's estate to tender the book value, $896,403.85, in exchange for the shares. The executor refused the offer, and the present action ensued.

Flowerama filed a petition for declaratory judgment and specific performance on November 24, 2004, asking the court to declare the 1974 Agreement a legally binding obligation on Maurice's estate, and to order the executor to transfer the 144 2/3 shares owned by Maurice at his death to the

[4] The remaining shareholders and board members are Charles E. Nygren and Daniel L. Rubendall. Rubendall also serves as Flowerama's accountant and regularly prepares the balance sheets and profit and loss statements for the corporation.

corporation in exchange for payment of $896,403.85. The executor filed an answer on January 13, 2005. On June 20, 2005, the executor filed a motion to compel discovery, requesting the court compel Flowerama to produce certain financial information "so that the [executor's] expert can testify as to the actual value of the stock and other matters." The district court granted the motion to compel on July 18, 2005.

On June 27, 2005, Flowerama filed a motion for summary judgment, which the executor resisted. The district court granted summary judgment in favor of Flowerama on September 13, 2005, and ordered the executor to tender all 144 2/3 shares of stock to Flowerama for $896,403.85.[5]

The executor raises the following issues on appeal:

> I. The district court erred in holding the 1974 agreement unambiguous as a matter of law.
> II. A genuine issue of material fact exists as to whether the buy-sell covenant in the 1974 agreement, as interpreted by Flowerama, is "manifestly unreasonable" under Iowa Code section 490.627(4) (2003).
> III. A genuine issue of material fact exists as to whether the buy-sell covenant in the 1974 agreement, as interpreted by Flowerama, is unconscionable.
> IV. The district court erred in failing to find a genuine issue of material fact as to whether the purported exercise of the option by Mr. Nygren and Mr. Rubendall on behalf of Flowerama constituted a breach of fiduciary duty.
> V. The district court's grant of summary judgment was premature.

II. Standard of Review

We review a ruling on a motion for summary judgment for errors at law. *Farmers Nat'l Bank of Winfield v. Winfield Implement Co.*, 702 N.W.2d 465, 465-66 (Iowa 2005). Summary judgment must be granted "if the pleadings,

[5] The judge who granted Flowerama's motion for summary judgment was not the same judge who granted the executor's motion to compel.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). A factual issue is "material" only if "the dispute is over facts that might affect the outcome of the suit." *Kolarik v. Cory Intern. Corp.*, __ N.W.2d __, __ (Iowa 2006) (citation omitted).

The moving party has the burden of proving the facts are undisputed. *Id.* "In ruling on a summary judgment motion, the court must look at the facts in light most favorable to the party resisting the motion." *Id.* (citation omitted). The court considers on behalf of the nonmoving party "every legitimate inference that can be reasonably deduced from the record." *Id.* However, the nonmoving party "may not rest upon the mere allegations of his pleading but must set forth specific facts showing the existence of a genuine issue for trial." *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005); *see also* Iowa R. Civ. P. 1.981(5). Speculation is insufficient to generate a genuine issue of fact. *Hlubek*, 701 N.W.2d at 96.

Summary judgment is appropriate "if the only conflict concerns the legal consequences of undisputed facts." *Farmer's Nat'l Bank of Winfield*, 702 N.W.2d at 466. "We therefore concern ourselves with two questions: whether there is a genuine issue of material fact and whether the district court correctly applied the law." *Wilson v. Farm Bureau Mut. Ins. Co.*, 714 N.W.2d 250, 255 (Iowa 2006).

III. Interpretation of the 1974 Agreement

The central issue the executor raises is the meaning of the term "book value" in the 1974 Agreement. The executor attached to its resistance to Flowerama's motion for summary judgment the affidavit of Yale Kramer, an

attorney and CPA specializing in the valuation of closely-held businesses. In the affidavit, Kramer stated, "Based on my education, knowledge, and experience, I know that many years ago, including the period in 1974, it was common for the term 'book value' to be used in place of the term 'fair market value.'" The executor argues Kramer's affidavit creates a genuine issue of material fact, thereby precluding summary judgment.

We apply ordinary contract principals to the 1974 Agreement. *See Lange v. Lange*, 520 N.W.2d 113, 117 (Iowa 1994) (applying contract principals to interpret the term "any" in a buy-sell agreement); *see also* 17 Richard A. Lord, *Williston on Contracts* § 51:69, at 814-15 (4th ed. 2000) ("Agreements imposing restrictions on the transfer of shares are subject to the same rules of interpretation and construction as ordinary contracts."). Where, as here, the dispute centers on the meaning of certain terms in the 1974 Agreement, "we engage in the process of *interpretation*, rather than *construction*." *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001). "Interpretation involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect." *Dental Prosthetic Servs., Inc. v. Hurst*, 463 N.W.2d 36, 39 (Iowa 1990) (citation omitted). When interpreting contracts, our primary goal

> is to determine the parties' intentions at the time they executed the contract. Interpretation involves a two-step process. First, from the words chosen, a court must determine what meanings are reasonably possible. In so doing, the court determines whether a disputed term is ambiguous. *A term is not ambiguous merely because the parties disagree about its meaning.* A term is ambiguous if, after all pertinent rules of interpretation have been considered, a genuine uncertainty exists concerning which of two reasonable interpretations is proper.
>
> Once an ambiguity is identified, the court must then choose among possible meanings. If the resolution of ambiguous language

> involves extrinsic evidence, a question of interpretation arises which is reserved for the trier of fact.

Walsh, 622 N.W.2d at 503 (internal quotation marks and citations omitted) (emphasis added). The disputed language and the parties' conduct "must be interpreted 'in the light of all the circumstances' regardless of whether the language is ambiguous." *Id.* (quoting *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999)). "[A]lthough other evidence may aid the process of interpretation, the words of the contract remain the key to determining whether the [terms of the 1974 Agreement] are ambiguous." *Id.*

The 1974 Agreement states the purchase price for a deceased shareholders stock "shall be the book value . . . as determined by the accountant who regularly prepares the Balance Sheets and Profit and Loss Statements for the corporation." The 1974 Agreement does not further define "book value." The term is commonly defined as "the value of capital stock as indicated by the excess of assets over liabilities—distinguished from *market value*." Webster's Third New International Dictionary 253 (2002) (emphasis in original);[6] *see also* Black's Law Dictionary 195, 1456 (8th ed. 2004) (defining "book value" as "the value at which an asset is carried on a balance sheet," and "book-value stock" as "stock offered to executives at a book-value price, *rather than at its market value* (emphasis added)); 6 Matthew G. Doré, *Iowa Practice Business Organizations* § 31:9, at 231 (2006) (listing several mechanisms by which the parties to a share

[6] It does not appear the common definition of "book value" has changed in the last thirty or forty years. *See, e.g.,* Webster's New World Dictionary, Second College Edition 162 (1972) (defining "book value" as "the value of any of the assets of a business as shown on its account books," or "the net worth of a business, or the value of its capital stock, as shown by the excess of assets over liabilities"); Webster's Seventh New Collegiate Dictionary 97 (1967) (defining "book value" as "the value of capital stock as indicated by the excess of assets over liabilities").

transfer restriction agreement choose to value shares for purposes of the restriction, including "(a) a fixed amount . . . ; (b) *book value*; (c) a formula, . . . ; [or] (d) *market value* . . . ." (emphasis added)).

The executor has failed to generate a fact issue that the parties intended "book value" to mean something other than "book value" at the time the 1974 Agreement was executed. The term "book value" is unambiguous and distinct from "fair market value." Moreover, the undisputed facts show the corporation, through its board and shareholders—including Maurice—consistently applied the 1974 Agreement to assess the value of deceased shareholders' shares at "book value." The "book value" was consistently determined "by the accountant who regularly prepares the Balance Sheets and Profit and Loss Statements for the corporation." The corporation, in its application of the 1974 Agreement over the course of thirty years, never confused or otherwise substituted "book value" and "fair market value."

We agree with the district court's further assessment that

> although none of the parties disagree that there is a gross disconnect between the book value of the corporation and its actual economic value, the shareholders and directors were entitled to adopt any benchmark they chose for the corporation's purchase of its stock, and if they chose to weight the benchmark in favor of the corporation instead of the individual shareholders, it was not only within their discretion to do so but there are substantial reasons why the shareholders and directors of a closely held corporation would choose to do so.

See, e.g., 17 *Williston on Contracts* § 51:68, at 811 (stating that among the reasons for using transfer restrictions "as a device, particularly in smaller or

family-owned enterprises, to control ownership and management of the corporation" is to "assure a continuity in management").[7]

The executor has failed to generate a genuine issue of fact as to the interpretation of the 1974 Agreement.

IV. Iowa Code section 490.627

The executor argues 1974 Agreement is "manifestly unreasonable," in contravention of Iowa Code section 490.627(4) "because the mechanism for determining price (as applied by Flowerama) bears no relationship whatever to the actual economic value of the company and is biased and confiscatory on the facts of this case." We conclude the executor's argument is based on a flawed reading of the statute.

Section 490.627(4) provides:

> A restriction on the transfer or registration of transfer of shares may do any of the following:
> a. Obligate the shareholder first to offer the corporation or other persons, separately, consecutively, or simultaneously, an opportunity to acquire the restricted shares.
> b. Obligate the corporation or other persons, separately, consecutively, or simultaneously, to acquire the restricted shares.
> c. Require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, *if the requirement is not manifestly unreasonable.*
> d. Prohibit the transfer of the restricted shares to designated persons or classes of persons, *if the prohibition is not manifestly unreasonable.*

(Emphasis added.)

Our rules of statutory construction are well-settled:

[7] In affidavits submitted with Flowerama's motion for summary judgment, the remaining shareholders stated that the restrictions "exist for the mutual benefit of all shareholders and provide consistency and stability of management with regard to corporate business operations" and "provide for continuity of ownership . . . and provide security to minority shareholders."

> When a statute is plain and its meaning clear, we need not search for meaning beyond its expressed language. We resort to rules of statutory construction only when the terms of the statute are ambiguous. We give precise and unambiguous language its plain and rational meaning as used in conjunction with the subject considered, absent legislative definition or particular and appropriate meaning in law. Thus, it is not for us to speculate as to the probable legislative intent apart from the wording used in the statute or to use legislative history to defeat the plain words of the statute. We must look to what the legislature said rather than what it should or might have said.

Stroup v. Reno, 530 N.W.2d 441, 443-44 (Iowa 1995). The plain language or plain meaning of a statute "is not limited to the meaning of individual terms, but rather, such inquiry requires examining the text of the statute as a whole by considering its context, object, and policy." *Forbes v. Hadenfeldt*, 648 N.W.2d 124, 126 (Iowa 2002).

It is clear from the plain language of the statute that its focus is on who may acquire shares, not the price or consideration for such an acquisition. Moreover, the "manifestly unreasonable" standard applies only to subsections (c) and (d). In other words, only those provisions which require a corporation to approve the transfer of restricted shares, or prohibit the transfer of restricted shares to certain persons, are subject to the "manifestly unreasonable" standard. The provision at issue in this case does neither. Indeed, the executor concedes subsection (a) best describes the provision at issue here.

The statute is clear an unambiguous. The "manifestly unreasonable" standard does not apply in this case. The executor's arguments to the contrary are without merit.

V. Unconscionability

The executor argues a fact issue exists as to whether the 1974 Agreement is unconscionable and thus unenforceable. An agreement is unconscionable if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979) (citation omitted). In examining a claim of unconscionability, the court considers the following factors: assent, unfair surprise, notice, disparity of bargaining power, and substantive unfairness. *Home Fed. Sav. & Loan Ass'n of Algona v. Campney*, 357 N.W.2d 613, 618 (Iowa 1984).

The executor fails to cite to specific facts in the record that would generate a genuine issue for trial. The undisputed facts show that Maurice Frink, a majority shareholder, assented to the 1974 Agreement and affirmed the terms of the agreement repeatedly over the thirty years during which it has been in effect. His heirs' dissatisfaction with the bargain he made does not rise to the level of unconscionability at the time the contract was executed.

VI. Breach of Fiduciary Duty

The executor argues the "purported 'exercise' of the purported option was a self-dealing transaction that violated fiduciary duties owned to the executor as majority shareholder," and therefore "should be voided by the court." We disagree.

The directors of a corporation must discharge their duties "[i]n good faith" and "[i]n a manner the director reasonably believes to be *in the best interests of the corporation.*" Iowa Code § 490.830(1)(a), (b) (emphasis added); *see also*

Midwest Janitorial Supply Corp. v. Greenwood, 629 N.W.2d 371, 375 (Iowa 2001) ("[D]irectors and officers of a corporation have a fiduciary duty to act in all things *wholly for the benefit of the corporation*." (emphasis added)). Pursuant to the corporation's by-laws, Rubendall and Nygren, as vice-presidents of the corporation, had the authority to "sign, execute and acknowledge, on behalf of the corporation, all . . . contracts, . . . and all other documents or instruments necessary and proper to be executed in the course of the corporation's regular business" upon the death of the president, Maurice Frink. The undisputed facts reveal that Rubendall and Nygren carried out the 1974 Agreement in accordance with its terms upon the death of Maurice Frink, thereby carrying out their duty to the corporation. The executor has failed to set forth specific facts to generate a genuine issue for trial.

VII. Consideration of Summary Judgment Motion

Finally, the executor argues the district court's grant of summary judgment was premature because discovery was ongoing. However, the executor never filed a motion requesting continuance to permit discovery, or a rule 1.981(6) affidavit.[8] *See Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 302 (Iowa 1996). Although a nonmoving party generally should be afforded the chance to conduct discovery before a summary judgment motion is resolved, "there is no

[8] Iowa Rule of Civil Procedure 1.981(6)

> comprises an "out" for a party who legitimately needs additional time to gather facts essential to justify its opposition when faced by a summary judgment motion. . . . The rule requires an affiant to state reasons why facts essential to justify a resistance cannot be presented. . . . [I]t is incumbent upon the resister to set forth by affidavit the reasons why it cannot proffer evidentiary affidavits and what additional factual information is needed to resist the motion.

Bitner v. Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295, 302 (Iowa 1996); *see* Iowa R. Civ. P. 1.981(6).

requirement in rule [1.981] that summary judgment not be entered until all discovery is completed." *Id.* Moreover, "[t]he failure to file a rule [1.981(6)] affidavit is sufficient grounds to reject the claim that the opportunity for discovery was inadequate." *Id.* We conclude the executor waived any claim that the district court's consideration of Flowerama's motion for summary judgment was premature in this case.

VIII. Conclusion

We affirm the district court's ruling granting Flowerama's motion for summary judgment.

AFFIRMED.