

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL HOROWITZ,

Plaintiff-Appellant,

v

BURTON FARBMAN and MARTIN
STONEMAN, Personal Representative of the
ESTATE OF LEON D. STEIN, a/k/a LEE D.
STEIN, Deceased,

Defendants-Appellees.

UNPUBLISHED

March 30, 2001

No. 219850

Oakland Circuit Court

LC No. 98-007692-CK

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition. We affirm.

I

Facts

Defendant Burton Farbman and Leon Stein established a partnership, Fernine Associates, by an agreement dated May 4, 1981. The business of the partnership concerned the purchase and management of certain real property in Ferndale. A second document executed that same day recognized plaintiff as joining in the venture as a partner of equal interest. After a fourth such partner sold his interest to the remaining three, each remaining partner owned a one-third interest in the partnership. Leon Stein died, and his interest in the partnership transferred to defendant Martin Stoneman acting as personal representative of the estate. Farbman, over plaintiff's objections, purchased Stein's interest from Stein's estate, leaving Farbman with a two-third's interest and plaintiff with a one-third interest.

Plaintiff brought suit alleging that defendants' transaction was in breach of the partnership agreement, as well as their fiduciary duties to plaintiff. Defendant moved the trial court for summary disposition, pursuant to MCR 2.116(C)(8) (failure to state a claim), and (C)(10) (no question of material fact). The trial court granted the motion, and plaintiff now appeals.

II

Holding

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). In this case, the trial court ruled that plaintiff's pleadings had succeeded in stating a legally cognizable claim, thereby indicating that the court denied defendants' motion under MCR 2.116(C)(8). Thus, we will review the court's decision under principles applicable to a (C)(10) motion.

A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the action in the light most favorable to the nonmoving party. *Id.*

A. Contract

This appeal hinges primarily on the question of whether the trial court correctly interpreted ¶ 9 of the partnership agreement as unambiguously restricting a partner's options in selling his partnership interest *only* while that partner is still alive, leaving a deceased partner's estate free to alienate that interest at will.

Whether contract language is ambiguous is a question of law, calling for review de novo. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). The interpretation of clear contract language likewise presents a question of law, subject to review de novo. *Pakideh v Franklin Commercial Mortgage Group, Inc.*, 213 Mich App 636, 640; 540 NW2d 777 (1995). A written contract is ambiguous if, after reading the entire document, its language can reasonably be understood in differing ways. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991), quoting *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). In resolving contract disputes, a court's task is to ascertain and enforce the intent of the contracting parties. *SSC Assocs Ltd Partnership v General Retirement System*, 210 Mich App 449, 452; 534 NW2d 160 (1995). Where possible, "[c]ontractual language is construed according to its ordinary and plain meaning, and technical and constrained constructions are to be avoided." *Id.* To the extent possible, the various parts of a contract should be read together. See, e.g., *First Baptist Church v Solner*, 341 Mich 209, 215; 67 NW2d 252 (1954), and *JAM Corp v AARO Disposal, Inc.*, 461 Mich 161, 170; 600 NW2d 617 (1999).

Paragraph 9 of the partnership agreement includes the following: "Except as otherwise provided in paragraph 8 above, a partner shall not sell or in any other way transfer his partnership interest during his lifetime without first offering such interest for sale to the partnership" Paragraph 8 begins, "During the life of a partner," and then prescribes procedures for a partner's transferring his interest "for the benefit of his spouse and/or any of his descendants"

Plaintiff asserts that the sole purpose for the qualifier "during his lifetime" was to permit the transfer of a deceased partner's interest to that partner's estate, arguing that, without it, ¶ 9

would grant the partnership itself priority over the deceased partner's estate in acquiring that partner's interest. We reject this artful reading of the contract. Paragraph 14 of the agreement specifically provides for transfer of a deceased partner's interest to that partner's estate, rendering plaintiff's strained attempt to interpret ¶ 9 to achieve that purpose gratuitous.

Plaintiff further argues that ¶ 9 required Stein's personal representative to offer Stein's interest for sale to the partnership itself before selling it to any one partner, on the ground that the personal representative himself acquired the status of partner under the terms of the agreement and was thus subject to the limitations of that provision. Plaintiff points to ¶ 14 which states that the partnership will continue notwithstanding a partner's death and that "the interest of such deceased partner shall be held by and through the deceased partner's personal representative." We cannot agree that this language transformed the deceased partner's personal representative into a full partner himself. The wording concerns the "interest" in the partnership, suggesting beneficial and ownership interest, not the specific status of partner itself. Under the agreement, defendant Stoneman did not become a partner as an incident to becoming personal representative of Stein's estate; instead, Stoneman became the administrator of Stein's partnership *interest* as an asset of the estate.

Plaintiff additionally argues that defendants confirmed that Stoneman, as personal representative of the Stein estate, is himself a partner, citing language in the instrument through which Stoneman transferred Stein's partnership interest to Farbman. We disagree. Examination of that document reveals, first, that the instrument is titled, "ASSIGNMENT OF PARTNERSHIP *INTEREST*" (emphasis added). Second, the only line on which plaintiff might have been relying refers to "the Estate of Leon D. Stein, a/k/a Lee D. Stein, Deceased ("Assignor"), a partner in **FERNINE ASSOCIATES**, a Michigan co-partnership (the "Partnership"), hereby transfers and assigns . . ." (bold in original). This language is best read simply as identifying "Leon D. Stein, a/k/a Lee D. Stein, Deceased," as a partner in Fernine Associates. Had the agreement intended to confer the status of partner to the estate itself, and thus its personal representative, simply identifying the estate as the estate of a partner hardly made that clear. No such interpretation is warranted by the contractual language on which plaintiff relies.

Plaintiff similarly asserts that because Farbman contacted plaintiff to ask if plaintiff would "waive" his rights and allow Farbman's purchase of Stein's partnership interest from Stein's estate, Farbman thus conceded that plaintiff indeed had rights under ¶ 9 to waive in the matter. However, assuming the truth of the assertion, Farbman's initial negotiating posture does not create evidence of a material question of fact. "Evidence of conduct or statements made in compromise negotiations is . . . not admissible" in subsequent litigation concerning the matter of the negotiations. MRE 408.

Plaintiff protests that the trial court's interpretation of the contract is illogical because a partner is required to comply with ¶ 9, but a deceased partner's estate is not. We agree with the trial court that this was precisely what the agreement provided, and we do not share plaintiff's sense that there is something logically flawed in such a contractual scheme.

For these reasons, we conclude that the trial court properly gave force and effect to the plain wording of the partnership agreement and properly concluded that the constraints on

alienation set forth in ¶ 9 applied to a partner only while that partner was alive. Stein's estate was free to sell Stein's interest to Farbman without offering the partnership itself the right of first refusal.

B. Fiduciary Duties

Plaintiff also asserts that defendants "secretly" arranged for Farbman to purchase Stein's partnership interest for less than market value and characterizes those actions as a breach of defendants' fiduciary duties to plaintiff. We disagree.

"Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner" MCL 449.20; MSA 20.20. This legislation "has been broadly interpreted as imposing a duty to disclose all known information that is significant and material to the affairs or property of the partnership." *Band v Livonia Assocs*, 176 Mich App 95, 113; 439 NW2d 285 (1989). Additionally, "[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." MCL 449.21(1); MSA 20.21(1). "The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs." *Band, supra* at 113-114, citing 59A Am Jur 2d, Partnership, § 425.

In this case, defendants' transaction of which plaintiff complains concerned an ownership interest in the partnership, not any asset or profit of the partnership itself. That transfer of interest did not concern the formation or liquidation of the partnership because the partnership was neither formed nor liquidated upon Stein's death and its aftermath. Nor was defendants' transaction in furtherance of the conduct of the partnership business. For these reasons, plaintiff's characterization of Stein's estate's sale of Stein's interest to Farbman as misappropriation of a partnership opportunity is inapt.

Plaintiff repeatedly asserts that defendant's transaction took place in secret, implying that this secrecy constituted a breach of the duty of full and frank disclosure. However, plaintiff's brief on appeal indicates that plaintiff did in fact learn of the transaction, including the sale price, and plaintiff nowhere argues that he did not learn of these things in reasonable time. Instead, plaintiff seems to suggest that he was entitled to notice in advance of the transaction. However, plaintiff cites no authority for the proposition that the general duty to inform a partner of an important matter concerning the partnership, over which that partner has no right to interfere, is a duty to provide notice in advance of the matter in question.

Because there was no contractual, statutory, or common-law restraint on the Stein estate's sale of Stein's partnership interest to Farbman, the trial court correctly held that plaintiff's allegations cannot, as a matter of law, support the conclusion that the transaction at issue constituted a breach of defendants' fiduciary duties to plaintiff.

Because we conclude that the trial court correctly ascertained that defendants acted in compliance with the partnership agreement and breached no fiduciary duties to plaintiff, we also conclude that the trial court correctly refused plaintiffs' requests to order an accounting and remove Farbman as managing partner.

We affirm. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Brian K. Zahra