STATE OF MICHIGAN

COURT OF APPEALS

LARRY BANE, JOHN E. THOMAS, and THOMAS M. PROSE,

Plaintiffs-Appellants,

v

JANET CHORKEY, KIM GUENTHER, WALTER MENARD, PAUL T. BOHLANDER, W. EDWARD WENDOVER, and SALLY REPECK,

Defendants-Appellees.

UNPUBLISHED
January 25, 2002

No. 224378
Wayne Circuit Court
LC No. 99-924382-CK

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

In this shareholder derivative action, plaintiffs appeal as of right the trial court's order granting defendants summary disposition under MCR 2.116(C)(5), finding that because plaintiffs' shares were redeemed before the action was commenced, plaintiffs were without standing to bring or maintain the action.[1] We affirm.

This Court reviews decisions regarding motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether a party has standing to bring an action is a question of law also reviewed de novo. *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 384; 600 NW2d 406 (1999). When reviewing a motion for summary disposition under MCR 2.116(C)(5), we review the record to determine whether the movant was entitled to judgment as a matter of law because the party asserting the claim did not have legal capacity to sue. *Kuhn v Secretary of State*, 228 Mich App 319, 332-333; 579 NW2d 101 (1998). In doing so, we consider affidavits, pleadings, depositions, and any

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[1] Although defendants' motion was premised on MCR 2.116(C)(5), (7), (8), and (10), the trial court did not specify which of these subsections it was relying on in granting the motion. Nonetheless, because the trial court determined that plaintiffs' shares had been redeemed by the corporation before commencement of this suit, we will construe the motion as having been granted under MCR 2.116(C)(5), which permits dismissal of a suit where the party asserting the claim lacks legal capacity to sue.

other documentary evidence submitted by the parties. *Id*. at 332.

Defendants are each either executives or members of the board of directors of the Plymouth Canton Community Crier, Inc. (the Crier), a local newspaper that has since initiation of this suit entered bankruptcy. Plaintiffs were at one time minority shareholders in the Crier. In challenging the trial court's grant of summary disposition, plaintiffs argue that defendants' attempt to redeem plaintiffs' shares under paragraph 4 of the Crier's stock redemption agreement was insufficient because actual payment was not made to plaintiffs within sixty days of the redemption notice as required by the redemption agreement. Therefore, plaintiffs argue, they were not without standing to sue at the time this action was filed. We disagree.

When contractual language is clear and unambiguous, its meaning is a question of law. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). The primary goal of contract construction is to honor the intent of the parties. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Contractual language should be construed according to its plain and ordinary meaning; "constrained constructions are to be avoided." *UAW-GM*, *supra* at 491-492.

In this case, paragraph 4 of the redemption agreement gives the Crier the right, "upon" sixty days written notice to a stockholder, to repurchase the stockholder's shares. Paragraph 2 of the agreement establishes a method for determining the value of the shares, including the appointment of arbitrators if the parties cannot agree on a value within sixty days. The express terms of the agreement do not require payment to be made within sixty days of the redemption notice, as argued by plaintiffs. In fact, the agreement contemplates that the shares' value may be unresolved during that time.

The redemption agreement is silent regarding the point in the redemption process after which the shares cannot be voted and are no longer considered outstanding shares. However, the Business Corporation Act, MCL 450.1101 *et seq*., addresses this issue. Shareholders lose their shareholder status and voting rights once written notice of redemption is mailed to the shareholders, and "a sum sufficient to redeem the shares [is] deposited with a bank or trust company with irrevocable instruction and authority to pay the redemption price. . . ." MCL 450.1448. Once the notice and escrow requirements are met, the shares shall no longer be deemed outstanding. *Id*.

In this case, defendants mailed plaintiffs notices of redemption and placed $15,000 into an escrow account to pay for the disputed shares. Plaintiffs' refusal to accept the money without further negotiation, request for an arbitrator, or specific objection to the amount offered cannot defeat defendants' redemption or create a genuine issue of material fact regarding sufficiency. See, e.g., *Tenney v Springer*, 121 Mich App 47, 55 n 2; 328 NW2d 566 (1982); *Karakas v Dost*, 67 Mich App 161, 167; 240 NW2d 743 (1976). Therefore, we find that as a matter of law plaintiffs' shares were redeemed on May 27, 1998, the date the funds were placed into escrow to repurchase the shares.

To have standing to bring a shareholder derivative suit, § 1492a of the Business Corporation Act requires that the plaintiffs be shareholders at the time the action is filed. MCL 450.1492a; cf. *Brachman v Hyman*, 298 Mich 344, 349; 299 NW 101 (1941). Because plaintiffs

did not file their complaint until August 4, 1999, they were not shareholders at the time the derivative action was filed, and they did not have standing to bring the action.

In reaching this conclusion, we reject plaintiffs' contention that summary disposition was not appropriate because there remained an issue of fact regarding whether the Crier was insolvent at the time of redemption, and thus statutorily prohibited from redeeming plaintiffs' shares. The Business Corporation Act prohibits certain distributions by a corporation if such distributions would render the business insolvent:

> A distribution shall not be made if, after giving it effect, the corporation would not be able to pay its debts as the debts become due in the usual course of business, or the corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution. [MCL 450.1345(3).]

A redemption is a distribution for purposes of the Business Corporation Act. MCL 450.1106(4). Therefore, insolvency could have prohibited the Crier from validly redeeming plaintiffs' shares. However, in order to avoid summary disposition on these grounds, plaintiffs were required to bring forth some evidence to establish a genuine issue of material fact regarding the Crier's solvency. *Smith v Globe Life Ins Co*, 460 Mich 446, 455, 597 NW2d 28 (1999). Although plaintiffs did present a balance sheet indicating that, as of August 31, 1998, the Crier's liabilities exceeded its assets, the relevant inquiry is whether the Crier was insolvent at the time of the disputed transaction. See *Pittsburgh Tube Co v Tri-Bend, Inc*, 185 Mich App 581, 587-588; 463 NW2d 161 (1990). Thus, plaintiffs had to bring forth evidence upon which it could be reasonably inferred that the Crier was insolvent at the time it redeemed plaintiffs' shares on May 27, 1998. Inasmuch as the evidence proffered by plaintiffs speaks only to the corporation's solvency some three months later, we find that plaintiffs did not meet their burden of establishing a genuine issue of material fact regarding the propriety of the Crier's redemption under MCL 450.1345(3).[2] Accordingly, summary disposition was properly granted and plaintiffs' requests for additional discovery and amendment of their complaint to include the Crier as a party plaintiff are moot. See, e.g., *Girvan v Fuelgas Co*, 238 Mich App 703, 716; 607 NW2d 116 (1999).

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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[2] We note that defendants seek to enlarge the record on appeal by attaching to their brief a copy of an affidavit from the Crier's accountant, attesting to the solvency of the company during the relevant time period. Because this document is not contained in the circuit court record, we do not consider it in reaching a conclusion on this matter. MCR 7.210(A); see also *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989).