STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. STRICKLER, THOMAS G. McINTYRE, WILLIAM D. McINTYRE, JR., E. DAVID ROLLERT, and JOHN A. MacNEAL,

Plaintiffs-Appellees,

V

RAO GROUP, INC., f/k/a ELLIS TIRE CENTERS, INC., f/k/a RAO WHOLESALE TIRE CENTERS, INC.,

Defendant-Appellant.

UNPUBLISHED
August 2, 2002

No. 225821
Grand Traverse Circuit Court
LC No. 97-015735-CK

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's September 3, 1998 judgment for plaintiffs. We affirm in part, reverse in part and remand.

Defendant first contends that the trial court erred in granting plaintiffs' pretrial motion for summary disposition. We disagree. This Court reviews de novo a trial court's ruling on a party's motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Interpretation of contractual language is a question of law subject to de novo review. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). The primary goal in contract interpretation is to determine and enforce the intent of the parties to the contract. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). This Court may, if a contract is ambiguous, construe the agreement in an effort to ascertain the parties' intent. *Id*. Where a contract fails to provide a definitive outcome for a contemplated breach, the contract is ambiguous. See, e.g., *Petovello v Murray*, 139 Mich App 639, 642-645; 362 NW2d 857 (1984).

A party's obligation to perform on a contract may depend on the fulfillment of a condition precedent – the happening of some fact or event on which the parties intended to condition their respective performances. *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). Where a contract clearly conditions performance on the occurrence of some fact or event and that fact or event does not take place, a party to the contract may not

initiate action against the other party for failure to perform. *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 420; 533 NW2d 838 (1995).

On July 1, 1990 the parties entered into a stock purchase agreement wherein defendant agreed to purchase plaintiffs' remaining shares in American Tire Reclamation, Inc (ATR). Paragraphs 8.1 through 8.6 specify the somewhat complicated methods of setting the price of and payment for plaintiffs' shares. While the purchase price for the shares was set at $362,500, paragraph 8.1 of the contract provides that defendant would be deemed to have paid for the shares in full if it paid plaintiffs $275,000 on or before December 15, 1990. Paragraph 8.2 states that if defendant did not pay $275,000 by December 15, 1990, the purchase price would be $362,500, (i) payable by a cash payment of $20,000 on or before March 31, 1991, (ii) plus the remaining unpaid balance, at annual interest of six percent, payable in monthly installments "at such time, if ever" defendant constructed "a facility . . . to commercially exploit the procedures developed by the Company . . . ." Paragraph 8.2(ii) further specifies that "in any event, all interest and principal shall be paid in full, no later than December 1, 1995," and that defendant's failure to pay the agreed-to installments gives plaintiffs the right to declare the entire unpaid balance immediately due and payable. The provisions of paragraph 8.2(ii) are clarified by paragraph 8.4, which states in relevant part:

> ***Notwithstanding anything contained in this Agreement to the contrary***, ***and provided that the [defendant] shall have timely paid . . . the $20,000 payment contemplated under 8.2 hereof***, in the event there has not occurred a "Commencement of Operations" on or before November 30, 1995, payment of any obligations . . . which have not yet become due and payable shall be deferred . . . [until defendant sells ATR or] until there has occurred a Commencement of Operations subsequent to November 30, 1995. [(Emphasis added).]

Defendant did not pay $275,000 before the required date, so the payment price was set at $362,500. Defendant did not pay plaintiffs $20,000 by March 31, 1991 as required by paragraph 8.2 of the stock purchase contract. In a signed letter agreement dated August 4, 1992, the parties agreed that defendant could make this initial $20,000 payment in two payments of $10,000. The first $10,000 payment would be made no later than August 11, 1992 and the second $10,000 payment would be made no later than 60 days following August 11, 1992 (October 10, 1992). Although defendant made the first $10,000 payment on time, it never made the second $10,000 payment.

Paragraphs 8.2 and 8.4 of the stock purchase agreement are quite wordy but, when read together their meaning is clear and unambiguous. While paragraph 8.4 permits defendant to defer additional payment of the principal owed until such time as commercially viable operations have begun, such deferment is clearly conditioned upon timely payment of the initial $20,000 installment required by paragraph 8.2(i). The express language of paragraph 8.4 clearly states that its provisions control "[n]otwithstanding anything contained in this agreement to the contrary." Moreover, even if defendant was able to take advantage of the deferment provision contained in paragraph 8.2(ii) without reference to the language of paragraph 8.4 or 8.2(i), the deferment provided by paragraph 8.2(ii) is of limited duration, since that paragraph clearly states that "in any event, all interest and principal shall be paid in full, no later than December 1, 1995 . . . ." The circuit court did not err by granting partial summary disposition in favor of

plaintiffs. There was no genuine issue of material fact that payment of the initial $20,000 installment was a necessary condition precedent to any deferment of the balance due under the stock purchase agreement.

Defendant next asserts that the trial court erred in ruling that plaintiffs were not barred by laches from bringing suit against defendant on the contract. Again, we disagree. "The application of the doctrine of laches requires the passage of time combined with a change in conditions that would make it inequitable to enforce the claim against [the] defendants." *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). In determining whether a party is guilty of laches, each case must be decided based upon its particular facts. *Id*. at 97. The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Id*. Mere passage of time is not sufficient; the defendant must prove that this passage of time resulted in prejudice to him. *Id.* The trial court's application of laches is reviewed for clear error. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 492-493; 608 NW2d 531 (2000).

While it is true that defendant did not make the agreed-to payment when due on October 10, 1992, and that plaintiffs waited until 1997 to file their complaint, defendant has not shown that some change of circumstances during this delay resulted in prejudice to defendant. While it is true that defendant continued to invest money in ATR's operations during the interim, there is no reason to believe that it did so merely because plaintiffs did not attempt to collect the money owed them. As the majority owner of ATR, defendant had a strong economic incentive to invest money in ATR in order to make it a profitable operation. Because defendant did not pay plaintiffs the second $10,000 installment by October 11, 1992, plaintiffs were entitled to payment in full regardless of whether ATR ever became a commercially viable business. The fact that plaintiffs held off suing defendant in an effort to permit it to make ATR commercially viable should not be held against them via the doctrine of laches.

Defendant next argues that the trial court erred in finding that the written contract was not modified by an oral agreement between the parties to excuse the $10,000 remaining on the $20,000 initial payment. We disagree.

The clear language of paragraph 9 of the stock purchase agreement states that it cannot be orally modified, but must be amended solely by a writing signed by the party against whom the amendment would be enforced. This clear and unambiguous contractual language should be enforced as written. *Meagher v Wayne State University*, 222 Mich App 700, 721; 565 NW2d 401 (1997). Accordingly, the trial court's rejection of the oral modification is properly affirmed, notwithstanding the different reasoning employed below. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

Finally, defendant contends that the trial court erred in awarding plaintiffs six percent interest, as provided by the contract, on the full purchase price beginning in October 1992. We agree.

Paragraph 8.2(ii) of the stock purchase agreement contains the following relevant language regarding the accrual of interest on the balance of the purchase price after payment of the initial $20,000 installment: "buyers will pay . . . to sellers the remaining unpaid balance of the purchase price ($342,500) plus interest on such amount ***from and after the Commencement***

of Operations at a rate of 6% per annum . . . ." (Emphasis added). A review of the rest of the stock purchase agreement reveals no provision that would require defendant to pay interest on the purchase price prior to the commencement of operations. Since it is not disputed that operations never commenced, the circuit court erred by assessing six percent interest under the contract.

We affirm in part and reverse as to the application of the contractual interest provision. We remand for entry of an amended judgment in favor of plaintiffs. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra