STATE OF MICHIGAN

COURT OF APPEALS

BETHANY LUTHERAN CHURCH a/k/a NORTHPORT LUTHERAN CHURCH,

Plaintiff-Appellee,

v

ALBERT PORTER and MARIE PORTER, Individually and Former Trustees of the JOHN W. SWENSON TRUST; NORTHWESTERN SAVINGS BANK, Successor Trustee; and CLINTON N. SWENSON,

Defendants-Appellees,

and

ALBERT PORTER, BRIAN PORTER, DOUG PORTER, GREG PORTER, JEFFREY PORTER and JEROME PORTER,

Intervening Defendants-Appellants.

UNPUBLISHED
September 28, 2010

No. 291742
Leelanau Probate Court
LC No. 06-010776-CZ

BETHANY LUTHERAN CHURCH a/k/a NORTHPORT LUTHERAN CHURCH,

Plaintiff-Appellee,

v

ALBERT PORTER and MARIE PORTER, Individually and Former Trustees of the JOHN W. SWENSON TRUST,

Defendants-Appellants,

and

No. 291762
Leelanau Circuit Court
LC No. 06-010776-CZ

NORTHWESTERN SAVINGS BANK, Successor Trustee, and CLINTON N. SWENSON,

Defendants-Appellees,

and

ALBERT PORTER,

Intervening Defendant-Appellee,

and

BRIAN PORTER, DOUG PORTER, GREG PORTER, JEFFREY PORTER and JEROME PORTER,

Intervening Defendants.

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

These consolidated appeals involve challenges to the trial court's order enforcing a settlement agreement between the parties and denying a motion to intervene, as well as the trial court's subsequent denial of a motion to set aside the settlement agreement under a theory of frustration of purpose or impossibility. We affirm in part and reverse in part.

This case involves a dispute related to the John W. Swenson trust. The trust was originally created in 1986, was subsequently amended in 1991, and then amended for a final time in 1994. Each version of the trust contained different instructions regarding final disbursement of the trust assets. The grantor passed away on August 9, 1997, rendering the provisions of the trust irrevocable.

Under the original provisions of the trust, the entire amount remaining in the trust was to be distributed to Mildred E. Swenson (hereinafter Mildred) upon the death of the grantor if she was then surviving. If Mildred did not survive the death of the grantor, the entire amount remaining in the trust was to be held for the benefit of Clinton N. Swenson[1] (hereinafter Clinton) during his lifetime. Upon the death of Clinton, the remaining trust assets were to be disposed of

---

[1] Clinton passed away while this appeal was pending.

by dividing and distributing 50% of the remaining assets to the then-surviving grandchildren of Wesley G. Holton and distributing the balance to plaintiff.

The first amendment to the trust also called for the entire amount remaining in the trust to be distributed to Mildred upon the death of the grantor, if she was then surviving, or alternatively held for the benefit of Clinton during his lifetime. However, under this version of the trust, plaintiff was to receive the entire trust assets remaining upon the death of Clinton.

The second, and final, amendment of the trust eliminated any mention of Mildred, who had predeceased the grantor, and ordered that the trust assets be held for the benefit of Clinton during his lifetime upon the death of the grantor. Then, upon the death of Clinton, or in the event that he predeceased the grantor, the entire remaining trust assets were to be distributed to "Albert Porter and Marie Porter, husband and wife or to the survivor thereof."[2] The second amendment of the trust also included the following provision: "In the event neither Albert Porter or Marie Porter shall survive me then to their issue by right of representation."

Plaintiff eventually filed suit challenging the validity of the second amendment to the trust agreement. On the day the matter was scheduled for trial, the parties engaged in lengthy settlement discussions and reached an agreement. Under the terms of the settlement, which were placed on the record, defendant parents would remain beneficiaries of the trust, but would execute an irrevocable assignment of their beneficial interest to the Leelanau Township Foundation (foundation) for the benefit of the Leelanau Commission on Aging, which would result in any funds remaining in the trust upon Clinton's death being immediately passed directly to the foundation. The settlement agreement called for an amendment to the Trust to facilitate the above-described irrevocable assignment. The recitation of the agreement on the record also included reference to defendant sons. Specifically, a statement was made that the settlement was contingent on the six Porter sons signing waivers and consents to the proposed settlement terms. Three of the sons were present at the hearing and indicated their assent to the agreement. Later, the sons as a group indicated that they were not in agreement with the proposed settlement. Thus, waivers and consents were not procured from each and every one of the defendant sons.

Defendant sons moved to intervene and filed a notice of non-settlement. The remaining parties filed motions advancing their positions relative to defendant sons' attempt to intervene and set aside the settlement agreement. Defendant parents and sons all argued that the settlement agreement was unenforceable because a condition precedent, i.e., the execution of waivers and consents by defendant sons, failed to occur. Following a hearing, the trial court denied defendant sons' petition to intervene and ordered the enforcement of the settlement agreement.

Defendant parents appealed, challenging the trial court's decision to enforce the settlement agreement and deny defendant sons' motion to intervene. Defendant sons filed a separate appeal raising the same issues. The two cases were administratively consolidated by

---

[2] For ease of reference, we refer to defendants Albert and Marie Porter collectively as "defendant parents" and refer to their six intervening sons collectively as "defendant sons."

order of this Court. See *Bethany Lutheran Church v Porter, et al*, unpublished order of the Court of Appeals, entered May 18, 2009 (Docket Nos. 291742 and 291762). In the interim, defendant sons, joined by defendant parents, moved for remand, asserting that the theories of frustration of purpose and impossibility precluded enforcement of the settlement agreement. This Court granted the motion for remand "to address impossibility and frustration of purpose relating to the purported settlement agreement." See *Bethany Lutheran Church v Porter, et al*, unpublished order of the Court of Appeals, entered November 23, 2009 (Docket Nos. 291742 and 291762). Following a hearing, the trial court denied the motion, finding that the settlement agreement was not frustrated and/or rendered impossible or impracticable to perform under Michigan law. Defendants now challenge the court's order denying defendant sons' motion to intervene, the order refusing to set aside the settlement agreement, and the finding that the agreement should not be set aside due to frustration of purpose or impossibility.

We first address the claim that the trial court erred in denying defendant sons' motion to intervene. This issue was preserved for review through the motion to intervene and the subsequent denial of that motion. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). This Court reviews a decision to deny a motion to intervene for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Motions to intervene are governed by MCR 2.209, which provides a right of intervention, in pertinent part, where a petitioner "claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." MCR 2.209(A)(3). The court rule also provides for permissive intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." MCR 2.209(B)(2). However, motions to intervene must be timely, whether intervention is sought by right or by permission, and failure to timely request intervention is a proper ground to deny a motion for intervention. MCR 2.209 ("On timely application . . . ."); *Davenport v City of Grosse Point Farms Bd of Zoning Appeals*, 210 Mich App 400, 408; 534 NW2d 143 (1995).

In the instant case, the trial court denied defendant sons' motion to intervene after determining that defendant sons did not have an interest in the trust or its assets, and it also concluded that the motion was untimely. On appeal, defendant sons fail to address the trial court's ruling that the motion to intervene was untimely, and instead limit their argument to the issue of whether they had an interest in the trust. If a party fails to dispute a basis of the trial court's ruling, this Court need not consider granting the relief sought. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

In addition, the death of Clinton during the pendency of this appeal has effectively rendered the argument of defendant sons moot and unavailing. The thrust of defendant sons' argument on appeal in support of their position that they have an interest in the trust sufficient to require intervention is found in the following passages in their brief:

> Under EPIC, in the event Albert and Marie Porter predecease Clinton N. Swenson, the anti-lapse provisions of MCL 700.2714 apply, creating a substitute gift in [defendant sons]. The RPC did not have any similar language. Absent a contrary intent in the Trust – which does not exist – the anti-lapse provision of EPIC should apply.
>
> * * *
>
> It does not matter how unlikely or remote it would be that Albert and Marie Porter predecease Clinton, the possibility exists and therefore, [defendant sons] have a protectable interest in the Trust and should have been allowed to intervene under MCR 2.209(A).

As Clinton has now died and defendant parents survive, the trust requires that any amount remaining in the trust "shall be disposed of" by way of a "100%" mandatory distribution to defendant parents. This distribution essentially closes out the trust, gifting the remaining trust assets to defendant parents.[3] Thus, even assuming that defendant sons' argument was sound during Clinton's lifetime, an issue we need not reach, the argument deflated on Clinton's death. Although defendant parents could potentially pass assets once contained in the trust to defendant sons through their own devices, assuming surviving assets and a failure of plaintiff's efforts challenging the validity of the final amendment to the trust, any conceivable interest held by defendant sons would be speculative and tenuous at best and insufficient to warrant their intervention into the suit.

We next address whether the trial court erred in ordering the enforcement of the settlement agreement. We review a trial court's ruling regarding whether the parties entered into an enforceable agreement for an abuse of discretion. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). However, this issue chiefly concerns interpretation of the settlement agreement, which is a question of law subject to de novo review where the agreement is unambiguous. *MacInnes v MacInnes*, 260 Mich App 280, 283; 677 NW2d 889 (2004).

MCR 2.507(G) governs settlement agreements and sets forth that such agreements are not enforceable unless made in open court or evidenced by a writing signed by the party to be charged. The terms of the settlement agreement in the instant case were delineated in open court. Hence, as general matter, a trial court would be obligated to uphold the agreement in the event of a challenge. *Columbia Assoc, LP v Dept of Treasury*, 250 Mich App 656, 668-669; 649 NW2d 760 (2002). However, settlement agreements are contracts and are "governed by the legal rules applicable to the construction and interpretation of other contracts." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 663; 770 NW2d 902 (2009). In contract law, a condition precedent "is a fact or event that the parties intend must take place before there is a right to performance." *Able*

---

[3] Any suggestion by defendant sons that assets from the trust still remaining at the death of defendant parents necessarily pass to them under the terms of the trust is meritless and inconsistent with the trust's language.

Demolition, Inc v City of Pontiac, 275 Mich App 577, 583; 739 NW2d 696 (2007) (internal citation omitted). The agreement in the instant case called for a condition precedent; namely, that the six sons of defendant parents approve the agreement by way of signing waivers and consents. There is no dispute that the condition was not satisfied.

Our Supreme Court's decision in *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663; 66 NW2d 92 (1954) is instructive in the instant matter. In that case, our Supreme Court determined that an agreement was not binding when a condition of the agreement was not met, even where the condition was not strictly necessary. *Id*. at 669-670. Here, the trial court disregarded a specifically enumerated condition of the parties' agreement because it determined that the term was not legally necessary. In doing so, the trial court failed to abide by the requirement that courts give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). Michigan recognizes the principle that competent parties are free to contract for whatever terms they wish. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). The fact that the sons may not have been interested parties and that their assent to the settlement agreement may not have been legally required does not negate the fact that the parties agreed to this term. Therefore, the trial court's order to enforce the settlement agreement in the face of a non-occurring condition precedent was improper.

In light of our conclusion that the trial court erred in enforcing the settlement agreement where a contingency did not occur, it is not necessary to address whether the settlement agreement was also unenforceable under a theory of frustration of purpose or impossibility.

We also decline plaintiff's invitation to impose sanctions pursuant to MCR 7.216(C) for a vexatious appeal. A successful appellant cannot be said to have brought a vexatious appeal.

Affirmed in part, and reversed and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction. No party having prevailed in full on appeal, taxable costs are not awarded under MCR 7.219.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens