STATE OF MICHIGAN

COURT OF APPEALS

HOLTZMAN INTERESTS 23, L.L.C., Plaintiff-Appellant,	UNPUBLISHED February 14, 2012
v	No. 298430 Oakland Circuit Court
FFC SUGARLOAF, L.L.C., SRP-FFC SUGARLOAF, L.L.C., VP AUBURN HOLDINGS, L.L.C., and VILLAGE PARK OF AUBURN HILLS, L.L.C., Defendants-Appellees.	LC No. 2009-105108-CK

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

In this contract action, plaintiff appeals by right the circuit court's order denying its motion for partial summary disposition and granting summary disposition in favor of defendant FFC Sugarloaf, L.L.C. Plaintiff also challenges the circuit court's grant of summary disposition in favor of SRP-FFC Sugarloaf, L.L.C., VP Auburn Holdings, L.L.C., and Village Park of Auburn Hills, L.L.C., dismissing these three defendants from the action. We affirm.

The parties to this action are limited liability companies that owned and managed an apartment community ("the Property"). Defendant Village Park of Auburn Hills, L.L.C. ("Village Park") held title to the Property. Defendant VP Auburn Holdings, L.L.C. ("Auburn Holdings") was the sole member of Village Park. Defendant SRP-FFC Sugarloaf, L.L.C. ("SRP") was the sole member of Auburn Holdings. Defendant FFC Sugarloaf, L.L.C. ("FFC") was the managing member of SRP, and plaintiff was also a member. SRP had another corporate member as well, FFC Sugarloaf, Inc., which is not a party to this action.[1]

Resolution of the issues raised in this appeal requires us to construe sections of two contracts: (1) the Second Amended and Restated Operating Agreement of SRP-FFC Sugarloaf,

[1] Plaintiff is the assignee of all the membership interest of Holtzman Interests 13, L.L.C., an original party to the Operating Agreement.

L.L.C. (hereinafter the "Operating Agreement"), and (2) an agreement entered into between defendant Village Park and nonparty Village Green Management Company ("Village Green"), an entity controlled by plaintiff (hereinafter the "Management Agreement").

I. THE OPERATING AGREEMENT

Section 6.3 of the Operating Agreement provides that Village Park and Village Green entered into the Management Agreement for management of the Property on the effective date of the Operating Agreement. In pertinent part, § 6.7 of the Operating Agreement gives plaintiff the right to initiate the purchase of the Property if managing member FFC caused SRP to "terminate" the Management Agreement "other than as provided for under Section 21.1 of the Management Agreement (hereinafter referred to as 'Deadlock')." According to § 10.6, the SRP members could sell the Property by unanimous consent, the managing member could sell the Property, "or, in the event of Deadlock," plaintiff could "at any time" force a sale of the Property. The section further provides a method and deadline for negotiating a mutually agreeable price, and gives plaintiff the right to purchase the Property for the negotiated price (or, if no price could be agreed upon, the right to purchase the property at an offering price).

II. THE MANAGEMENT AGREEMENT

Section 1.3 of the Management Agreement provides for an "Initial Term" of one year, which "thereafter shall be automatically renewed for successive one (1) year terms (each a 'Renewal Term') unless either party gives to the other party written notice of its intent not to renew at least sixty (60) days prior to the end of the Initial Term or then current Renewal Term." Section 21.1 of the Management Agreement, which is referenced in § 6.7 of the Operating Agreement, allows for termination of the Management Agreement for cause under circumstances that are not applicable in this case. Section 21.2 of the Management Agreement gives either party the right to terminate the Management Agreement "at any time without cause after the Initial Term upon ninety (90) days' written notice to the other party."

III. DEFENDANTS' NONRENEWAL NOTICE

In a letter dated August 21, 2009, an "authorized representative" of defendants and FFC Sugarloaf, Inc. notified the chief operating officer of Village Green, in relevant part, as follows:

> In accordance with Section 1.3 of the Management Agreement, the Owner hereby provides you, as Agent, with this notice of the Owner's intent not to renew the Management Agreement at the end of the current Renewal Term, which expires on October 31, 2009. Accordingly, the Management Agreement will expire on October 31, 2009.

Plaintiff's managing member responded with plaintiff's position that, "[u]nder applicable law, the non-renewal of the Management Agreement constitutes a termination of such agreement." Plaintiff maintained that, under § 6.7 of the Operating Agreement, SRP's managing member, FFC, had caused SRP to terminate the Management Agreement; therefore, plaintiff had the right, and was exercising its right, to initiate purchase of the Property. The letter also stated that plaintiff was "ready, willing and able" to begin the attempt to negotiate a mutually agreeable price during the 15-day period following its notice. Defendants contended that a nonrenewal of

the Management Agreement was not a "termination" of the agreement, and that plaintiff therefore had no contractual right to purchase the Property.

IV. CIRCUIT COURT PROCEEDINGS

Plaintiff filed this action seeking a declaration of its right to purchase the Property and an order enforcing the appraisal and purchase process outlined in § 10.6 of the Operating Agreement. Plaintiff also claimed that FFC and SRP had materially breached the Operating Agreement by refusing to participate in the purchase process.

Defendants Village Park, Auburn Holdings, and SRP moved to dismiss the complaint because they were not parties to the Operating Agreement and any enforcement action against them was not ripe for review. The circuit court agreed and dismissed plaintiff's claim for declaratory relief against these defendants under MCR 2.116(C)(4), ruling that the claim was not ripe for review as it related to these defendants and, therefore, that the court lacked subject-matter jurisdiction.

Before the court dismissed the three moving defendants, plaintiff had moved for partial summary disposition against all defendants with regard to its claim for declaratory judgment and its request for a court order enforcing the appraisal and purchase process outlined in the Operating Agreement. The circuit court denied plaintiff's motion and instead granted summary disposition in favor of defendant FFC in accordance with MCR 2.116(I)(2). The circuit court ruled that the nonrenewal notice did not effect a *termination* of the Management Agreement, and that plaintiff therefore never acquired any right to purchase the Property under the Operating Agreement.

V. STANDARD OF REVIEW

We review de novo the circuit court's interpretation of a contract. *Butler v Wayne Co*, 289 Mich App 664, 671; 798 NW2d 37 (2010). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). "If the contract language is clear and unambiguous, its meaning is a question of law." *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). "Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Id.* "Where one writing references another instrument for additional contract terms, the two writings should be read together." *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). A contract should be read as a whole and contractual terms should be given their common and ordinary meaning. *Genesee Foods Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649, 656; 760 NW2d 259 (2008). The circuit court's grant or denial of a motion for summary disposition is also reviewed de novo. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

VI. THE MEANING OF "TERMINATE"

We cannot conclude that the circuit court erred by granting summary disposition in favor of defendant FFC with respect to plaintiff's claim for a declaratory judgment concerning its purchase rights under the Operating Agreement.

The Operating Agreement gives SRP's managing member, FFC, broad powers to conduct SRP's business, including control of the Property. However, § 6.7 tempers the managing member's power by providing, in pertinent part:

> [I]n the event that the Managing Member causes the Company to terminate the Management Agreement other than as provided for under Section 21.1 of the Management Agreement (hereinafter referred to as "Deadlock") then [plaintiff] shall have the right to initiate the purchase of the . . . Property as set forth in Section 10.6. . . .[2]

The Operating Agreement does not further explain or define the phrase "to terminate the Management Agreement."

Three sections of the Management Agreement describe circumstances under which the contract may come to an end: (1) § 1.3, "Term," (2) § 21.1, "Termination with Cause," and (3) § 21.2, "Termination without Cause." These sections provide, in pertinent part:

> **1.3 Term**
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> The terms of this Agreement shall be for an initial period of one (1) year (the "Initial Term") from the Effective Date to and including the first anniversary of the Effective Date, and thereafter shall be automatically renewed for successive one (1) year terms (each a "Renewal Term") unless either party gives to the other party written notice of its intent not to renew at least sixty (60) days prior to the end of the Initial Term or then current Renewal Term.
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> * * *
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> **21.1 Termination for Cause**
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> Notwithstanding the foregoing, this Agreement shall terminate in any event, and all obligations of the parties hereunder shall cease (except as to liabilities or obligations which have accrued or arisen prior to such termination, or which accrue pursuant to paragraph 21.3 as a result of such termination, and obligations to insure and indemnity), upon the occurrence of any of the following events:
>
> (a) BREACH OF AGREEMENT . . . .
>
> (b) EXCESSIVE DAMAGE . . . .

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[2] Section 6.7 also provides other circumstances in which plaintiff's purchase rights may be triggered. However, these other circumstances are not applicable in the present case.

(c) BANKRUPTCY . . . .

(d) Upon the occurrence of any breach of the obligations of Agent's affiliates under the SRP-FFC Operating Agreement . . . .

21.2 Termination without Cause

Notwithstanding the foregoing, either party may terminate this Agreement at any time without cause after the Initial Term upon ninety (90) days written notice to the other party.

Plaintiff argues that defendants' nonrenewal letter constituted a termination of the Management Agreement within the meaning of § 6.7 of the Operating Agreement and consequently triggered its right to initiate the purchase process. In response, defendants contend that the letter only provided notice of their intent not to renew the Management Agreement at the end of the current Renewal Term, and that it was not a *termination* sufficient to give rise to plaintiff's purchase rights under the Operating Agreement.

Resolution of this appeal hinges on the meaning of "to terminate" as that phrase is used in § 6.7 of the Operating Agreement. Plaintiff has consulted several dictionaries for the meaning of "terminate," and notes that most dictionaries essentially define "terminate" as "to bring to an end" or "to cause to cease." Plaintiff argues that, under definitions such as these, the Management Agreement was *brought to an end*, or terminated, by defendants' nonrenewal notice, thereby triggering plaintiff's contractual right to purchase the Property.

Citing *Advo-Systems, Inc v Dep't of Treasury*, 186 Mich App 419, 425; 465 NW2d 349 (1990), defendants maintain that the dictionary definitions cited by plaintiff are overly broad and that their usefulness is limited in construing the terms of the parties' agreements. Defendants argue that the managing member did not chose to end the contract under the "Termination"[3] section of the Management Agreement, Article 21, and did not use the words "terminate" or "termination," but instead opted to pursue nonrenewal of the Management Agreement under § 1.3. Defendants assert that, under the plain terms of the agreement, *nonrenewal* and *termination* are two separate things.

Because the Management Agreement is specifically referenced in the Operating Agreement, the two writings should be read together and as a whole, *Forge*, 458 Mich at 207; *Genesee Foods*, 279 Mich App at 656, and the terms used therein must be given their common and ordinary meanings, *id*.

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[3] We note that § 23 of the Management Agreement specifically states that "[a]ll headings and subheadings employed within this Agreement are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement." Nonetheless, the word "terminate" is specifically used in the text of both § 21.1 and § 21.2 of the Management Agreement.

Section 1.3 of the Management Agreement provides that the Management Agreement will automatically renew at the end of each one-year Renewal Term unless a party provides written notice of its intent not to renew the agreement within 60 days of the end of the term. Section 1.3 contains no requirement that a party give a reason or cause for not renewing the agreement; therefore, nonrenewal could be without cause, as apparently occurred here. In contrast, as explained earlier, §§ 21.1 and 21.2 of the Management Agreement provide mechanisms for "terminat[ing]" the agreement. Defendants maintain that their nonrenewal notice under § 1.3 allowed the then-current renewal term to simply expire, and that *expiration* and *termination* are distinct events under the Management Agreement. Plaintiff, on the other hand, contends that the terms *termination* and *expiration* are used interchangeably within the Management Agreement. Plaintiff further contends that the Management Agreement would never simply expire, but that some affirmative action is required by one of the parties to bring the agreement to an end. According to plaintiff, such an affirmative action will always constitute a "termination" of the agreement. For the reasons that follow, we agree with defendants that expiration or nonrenewal of the Management Agreement under § 1.3 is distinct from termination of the Management Agreement under §§ 21.1 and 21.2. We further agree with defendants that the phrase "to terminate the Management Agreement other than as provided for under Section 21.1" in § 6.7 of the Operating Agreement refers *only* to termination under § 21.2 of the Management Agreement.

As the parties correctly point out, there are three different provisions under which the Management Agreement may be brought to an end: (1) nonrenewal under § 1.3, (2) termination with cause under § 21.1, and (3) termination without cause under § 21.2. However, as the circuit court accurately observed at oral argument, only two of these provisions, § 21.1 and § 21.2, actually use the word "terminate." Moreover, contrary to plaintiff's argument, the terms "termination" and "expiration" are *not* used interchangeably within the Management Agreement. Indeed, as the language of § 21.5(a) of the Management Agreement makes clear, "expiration" of the agreement and "termination" of the agreement are two distinct concepts. Indeed, if the terms expiration and termination were synonymous as plaintiff contends, the drafters of the Management Agreement would not have used the two words disjunctively in § 21.5(a); it would have been sufficient for the drafters to use merely one of the two terms. See *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994) (opinion by GRIFFIN, J.); *American Fidelity Co v R L Ginsburg Sons Co*, 187 Mich 264, 276; 153 NW 709 (1915); see also *Holler v Hartford Life & Accident Ins Co*, 737 F Supp 2d 883, 906-907 (SD Ohio, 2010); *City of Glendale v Aldabbagh*, 189 Ariz 140, 142; 939 P2d 418 (1997); *McMillan v Puckett*, 678 So 2d 652, 656 (Miss, 1996). Stated another way, if *expiration* were truly synonymous with *termination*, the word "expiration" in § 21.5(a) would have no meaning and would amount to mere surplusage. It is well settled that a "contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005); see also *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467-468; 663 NW2d 447 (2003). We conclude that the terms "expiration" and "termination" describe two separate and distinct means of bringing the Management Agreement to an end.

As already explained, § 6.7 of the Operating Agreement permits plaintiff to initiate the process of purchasing the Property if "the Managing Member causes the Company to *terminate* the Management Agreement *other than as provided for under Section 21.1* . . . ." (Emphasis

added.) Because § 21.1 and § 21.2 are the only two sections that provide for "terminat[ion]" of the Management Agreement, and because § 6.7 of the Operating Agreement expressly references terminations "other than as provided for under Section 21.1," it necessarily follows that § 6.7 of the Operating Agreement refers to terminations under § 21.2 of the Management agreement only.

In this case, defendants did not terminate the Management Agreement under § 21.2. Instead, they merely sent notice of nonrenewal under § 1.3. In other words, the Management Agreement expired—it *did not* "terminate . . . other than as provided for under Section 21.1 . . . ." Because the phrase "terminate . . . other than as provided for under Section 21.1" refers only to termination under § 21.2 of the Management Agreement, the circuit court properly determined that the agreement had not "terminate[d]" within the meaning of § 6.7 of the Operating Agreement. The circuit court did not err by granting summary disposition in favor of defendant FFC.[4] We affirm the circuit court's order granting summary disposition in favor of defendant FFC and denying plaintiff's motion for partial summary disposition.

VII. DISMISSAL OF THREE DEFENDANTS

Plaintiff also argues that the circuit court erred by granting summary disposition under MCR 2.116(C)(4) with respect to defendants SRP, Auburn Holdings, and Village Park, dismissing these three defendants from the action on the ground that they were not parties to the Operating Agreement and the issue of declaratory relief was therefore unripe as it related to them. As we have already concluded, the circuit court properly ruled as a matter of law that defendants' notice of nonrenewal under § 1.3 did not "terminate" the Management Agreement within the meaning of § 6.7 of the Operating Agreement. Thus, even if the circuit court's dismissal of defendants SRP, Auburn Holdings, and Village Park was somehow erroneous, it was plainly harmless. Given that the court's ultimate ruling was based on the purely legal question of contract interpretation, it was not necessary that SRP, Auburn Holdings, and Village Park remain parties to the litigation; the continued presence of these three defendants was not required in order to allow the court to properly and fully adjudicate the issues.

Affirmed. As the prevailing party, defendants may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

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[4] Both parties have offered caselaw that is not on point. For instance, the cases cited by plaintiff, *Sanders v Delton Kellogg Schools*, 453 Mich 483, 487-488; 556 NW2d 467 (1996), *Roberts v Beecher Community School Dist*, 143 Mich App 266, 269; 372 NW2d 328 (1985), and *Wessely v Carrollton School Dist*, 139 Mich App 439, 443-444; 362 NW2d 731 (1985), involve provisions of the former School Code and do not hold that the nonrenewal of a private contract is a form of termination. Plaintiff also relies on other cases that were decided on the basis of contract language that differs from the nonrenewal language of the Management Agreement. We find these decisions unpersuasive.