STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH AQUILINA and JOHANNA AQUILINA, Plaintiffs-Appellants,	UNPUBLISHED April 24, 2012
v FIFTH THIRD BANK, Defendant-Appellee.	No. 300712 Ingham Circuit Court LC No. 09-000711-CZ
and FIFTH THIRD BANK INVESTMENT ADVISORS, FIFTH THIRD BANK WESTERN MICHIGAN, FIFTH THIRD PRIVATE BANK, GLEN JOHNSON, JOSEPH MURPHY, JEFFREY STEEBY, SUSAN VOGEL VANDERSON, and JAMES WARD, Defendants.	

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the August 20, 2010, granting of defendant's motion for summary disposition under MCR 2.116(C)(10). The trial court found that there was no issue of material fact as to defendant's duty, and that defendant did not have a duty to follow plaintiffs' instructions, based on the managed IRA agreements. We affirm in regard to which document controlled the parties' relationship, and reverse and remand in regard to defendant's duty to follow plaintiffs' instructions.

I

Joseph Aquilina is an avid and knowledgeable investor. He reads books on the subject, is involved in several investment organizations, and consistently performed above average in his investments. In October of 2002, plaintiffs opened two managed Individual Retirement Accounts (IRA) with defendant In creating these accounts, plaintiffs signed a managed IRA account agreement and selected an option that stated that defendant would have "full investment

discretion . . . without any restrictions whatsoever, statutory or otherwise." Plaintiffs understood this to mean that they could still provide input into the investments and that defendant could not unilaterally refuse to follow their instructions. Defendant's representatives gave conflicting testimony regarding whether or not plaintiffs could direct their account.

On July 15, 2004, plaintiffs signed an agency agreement with defendant, which stated that plaintiffs "reserve the right to direct [defendant] as to any specific purchases or sale of property." Plaintiffs did not know what this agency agreement was or why they had signed it. The trial court stated that the agency agreement governed a separate account that plaintiffs had with defendant, and that that account was closed on April 10, 2008. Other than the agency agreement itself, there is nothing in the record regarding what the agency agreement may govern.

Joseph became frustrated with defendant's investment style, but felt that he was stuck with defendant because defendant held several of plaintiffs' loans. Joseph stated that he attempted to direct the investments in the managed IRA accounts but defendant did not comply. James Ward, a portfolio manager, stated that there was a history of plaintiffs directing purchases in their managed IRAs. On June 8, 2005, defendant established self-directed IRAs for plaintiffs so that they could directly control their investments.

On June 12, 2008, Joseph emailed defendant and told them to liquidate the managed IRAs and to hold them as cash. Ward replied by email to confirm which specific accounts Joseph wanted to liquidate, and Joseph confirmed which accounts to liquidate by email. Later that day, Ward and Glen Johnson called Joseph to discuss his request. The contents of that phone call are not known. Joseph testified that Ward and Johnson refused to allow him to liquidate his investments. Ward and Johnson testified that Joseph agreed with their recommendation not to liquidate. Ward further testified that, if Joseph had not agreed, he would have followed the demand to liquidate. Defendant did not follow Joseph's instruction to liquidate the managed IRAs. The following day, Johnson emailed Joseph to confirm that defendant was not going to liquidate the accounts, but that email did not clarify whether this was because an agreement was reached or defendant was refusing to do it. Johnson sent internal company emails and made entries in the company phone log in which he said that Joseph had agreed not to liquidate.

On October 16, 2008, Joseph and Ward met to discuss Joseph's investments and Joseph signed an investment policy statement that again stated that defendant had full investment authority, but Joseph testified that he does not remember the events of this meeting because he was so frustrated that they would not let him plug in his computer.

On October 20, 2008, Joseph wrote a letter to defendant's president, explaining that defendant refused to liquidate as he had requested and as a result he lost a lot of money. Defendant responded with a letter in which it stated that it did not need to follow his request. On January 13, 2009, Joseph sent another letter to Ward, in which he explained that defendant's refusal to liquidate had bankrupted him and sent him into a psychotic spin requiring treatment, and as a result he threatened suicide.

In May, 2009, plaintiffs sued defendant. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), finding no issue of material fact regarding

defendant's duty. It found that defendant did not have a duty to obey plaintiff's request to liquidate, based on the original managed IRA agreements.

II

Plaintiffs first argue that Joseph never retracted his order to liquidate the managed IRAs; therefore, when the trial court found that he had, it erred by improperly resolving a factual issue that should have been left for a jury. We disagree. This Court reviews summary disposition decisions de novo. *Auto Club Group Ins v Booth*, 289 Mich App 606, 609; 797 NW2d 695 (2010). Summary disposition is appropriate if the record contains no material factual issues and the moving party is entitled to judgment as a matter of law. *Id.;* MCR 2.116(C)(10). This Court considers the entire record, examining the evidence in the light most favorable to the nonmoving party. *Id.*

When the trial court granted defendant's motion for summary disposition, it stated, "the agreements which were executed in 2002 I do find controlling . . . I find that defendant's duty was governed by the account - - the agreement of 2002 . . . I find that [defendant] had no duty to follow the liquidate and hold for cash instructions of [plaintiffs]." These conclusions do not depend on a finding that Joseph withdrew his instruction to liquidate and hold cash. In fact, these conclusions could not have been reached if the court had found that Joseph had withdrawn his instruction, because withdrawing the instruction would have been a good enough reason in itself to find that defendant did not have a duty to follow the instruction. By stating that defendant had no duty to follow plaintiffs' instruction, the court would have to have been assuming that there was an instruction to follow. Thus, the trial court did not find that Joseph withdrew his instruction. Accordingly, we find that this is not a source of error requiring reversal.

III

We next consider plaintiffs' third argument, because the second argument is dependent upon the outcome of the third. Plaintiffs argue that the agency agreement controlled the managed IRAs; therefore, the trial court erred when it found that the managed IRA agreement controlled the managed IRAs. We disagree. This Court reviews summary disposition decisions de novo. *Auto Club Group Ins*, 289 Mich App at 609. Summary disposition is appropriate if the record contains no material factual issues and the moving party is entitled to judgment as a matter of law. *Id.;* MCR 2.116(C)(10). This Court considers the entire record, examining the evidence in the light most favorable to the nonmoving party. *Id.*

Plaintiffs' first argument in favor of using the agency agreement is that the managed IRA agreement was not authenticated by any witness, it does not state which account it applies to, and so there was a legitimate question about whether it applied to the managed IRA. The document is an application for an IRA, and while it does not specifically state that it applies to the two accounts in question, it is fairly obvious from the form that it does. The form is clearly marked "Individual Retirement Account Application." It is dated the same date that the managed IRAs were opened and it is for a "direct transfer" from another IRA just like the managed IRAs. It is for an amount over $3 million, just like the managed IRAs. While it may lack an identifying account number, the managed IRA agreement clearly did govern the managed IRAs at least until the signing of the agency agreement.

Plaintiffs' next argument in favor of using the agency agreement is that it was the most recent, and that it was a general directive governing all of plaintiffs' accounts, not some specific account. The trial court found that the agency agreement governed a separate account that plaintiffs had with defendant, and that that account was closed on April 10, 2008. There is no evidence in the record to support this conclusion. Aside from the agency agreement itself, there is nothing in the record to show which account or accounts the agency agreement was meant to govern, or if those accounts were closed. The agency agreement states that it manages an account, but what that account is is not in the record. This is not to suggest that the agency agreement does control the managed IRAs, only that it is entirely unknown what the agency agreement controls.

Defendant argues that the agency agreement cannot govern the managed IRAs because it is a joint agency agreement and an IRA may not be jointly held. Defendant cites IRC 408, which states that "the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries." IRC 408(a). Plaintiff argues that the document is not a "joint agency agreement," but an agency agreement, and plaintiff is correct. The document is titled "agency agreement" and not "joint agency agreement." However, it is a joint "agency agreement." It is an agency agreement that is jointly held; both Johanna Aquilina and Joseph are owners of the account. That is to say, whatever account or accounts the agency agreement controls, that account is jointly held by Johanna and Joseph. The managed IRAs are individually held. One is held by Johanna, and one is held by Joseph. Because the managed IRAs are individually held, and the agency agreement controls an account that is jointly held, we must conclude that the agency agreement does not govern the managed IRAs. Thus, because the agency agreement does not govern the managed IRAs we conclude that the managed IRA agreement from 2002 governs the managed IRAs. Accordingly, we affirm the trial court's granting of summary disposition on which document controlled the parties' relationship.

IV

Finally, we consider plaintiffs' second argument. Plaintiffs argue that the trial court erred when it found that defendant did not have a duty to follow plaintiffs' instruction to liquidate and hold as cash. We agree. This Court reviews summary disposition decisions de novo. *Auto Club Group Ins*, 289 Mich App at 609. Summary disposition is appropriate if the record contains no material factual issues and the moving party is entitled to judgment as a matter of law. *Id.;* MCR 2.116(C)(10). This Court considers the entire record, examining the evidence in the light most favorable to the nonmoving party. *Id.*

The managed IRAs were trusts, and were required to be by law. Treasury Regulation 1.408-2(a). The Michigan Prudent Investor Rule states that a fiduciary must take into account "other circumstances of the fiduciary estate." MCL 700.1502(1). This could arguably include oral instructions. However, this rule may be restricted or altered by the governing instrument. MCL 700.1502(2). Thus, the managed IRA agreements controlled defendant's duty to follow plaintiffs' instructions.

The managed IRA agreement stated that defendant had "full investment discretion . . . without any restrictions whatsoever, statutory or otherwise." It does not specifically state whether or not that discretion allowed defendant to refuse to follow plaintiffs' specific

instructions. Both defendant and plaintiffs give conflicting statements as to whether defendant was required to follow plaintiffs' instructions. Ward stated that there was a history of plaintiffs directing purchases on the managed IRAs and that had Joseph not agreed to withdraw his instruction to liquidate, he would have followed those instructions. A letter from defendant to plaintiffs states, and defendant's current position is, that defendant did not have to follow plaintiffs' instructions because of the managed IRA agreement. Plaintiffs both testified that they understood the managed IRA agreement to mean that defendant had full discretion when investing, but would still have to follow instructions. Plaintiffs also point out that defendant sought plaintiffs' permission to invest more conservatively, and that plaintiffs refused, and so defendant continued to invest aggressively. The need to request permission regarding a change in investment strategy, and then following the instruction given not to change the investment strategy, would be a limitation on full discretion. Finally, Joseph testified that he attempted to direct the investments in the account and defendant did not comply with his requests and said that they did not have to. Thus, it is unclear whether or not plaintiff could give instructions regarding the managed IRAs, and it is also unclear whether or not there was a history of doing so.

Where the provisions of a contract are clear and unambiguous, the contract language is to be construed according to its plain sense meaning. *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 90; 360 NW2d 876 (1984). If the provision is clear and unambiguous, then the past dealings of plaintiffs and defendant are irrelevant unless widely acknowledged and mutually accepted. *Butler v Wayne Co*, 289 Mich App 664, 676; 798 NW2d 37 (2010). Whether contract language is ambiguous is a question of law. *Port Huron Ed Assn, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

The trial court did not make a determination regarding the ambiguity of the managed IRA agreements. The discretion provision in the managed IRA agreements does not address whether or not instructions must be followed. Plaintiffs understood it to mean that instructions did have to be followed. Meanwhile, defendant's representatives understood it both to mean that instructions did have to be followed and that instructions did not have to be followed. Thus, the provision in the managed IRA agreements is not clear and unambiguous.

Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Port Huron*, 452 Mich at 323. Evidence of practical interpretation by the parties is admissible as an aid in the determination of the meaning to be given legal effect. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 478; 663 NW2d 447 (2003), quoting *Davis v Kramer Bros Freight Lines, Inc,* 361 Mich 371, 375; 105 NW2d 29 (1960). How the drafting party has interpreted the contract in the past is also relevant to what the language means. *Id.* We have concluded that the contract language is not clear and unambiguous, and so the question of whether defendant had a duty to follow plaintiffs' instructions is a question of fact. *Port Huron*, 452 Mich at 323. Whether, in the past, defendant had followed plaintiffs' instructions, or thought that it had to, is relevant to deciding this question of fact. *Klapp*, 468 Mich at 478.

Summary disposition is appropriate if the record contains no material factual issues. *Auto Club Group Ins*, 289 Mich App at 609. It is not clear whether defendant had followed plaintiffs' instructions, or thought that it had to. Thus, there is an unresolved, material factual issue

regarding the interpretation of the managed IRA agreement. Accordingly, we reverse the trial court's grant of summary disposition regarding whether defendant had a duty to follow plaintiffs' instructions.

Affirmed in part, reversed in part and remanded in part. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Michael J. Kelly