

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS F. WIEDER,

Plaintiff-Appellant,

v

GERALD SPEARS,

Defendant-Appellee.

UNPUBLISHED

November 15, 2012

No. 306805

Washtenaw Circuit Court

LC No. 10-000528-NZ

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting judgment in favor of defendant and dismissing plaintiff's complaint with prejudice. For the reasons set forth below, we reverse the trial court's decision and remand for an entry of judgment in favor of plaintiff.

I. BASIC FACTS

In 2006, plaintiff purchased a 10 percent interest in Main & Madison, LLC, a real estate development company. In late 2007, plaintiff and defendant entered into a purchase agreement for the sale of plaintiff's interest in Main & Madison to defendant. The purchase agreement provides in relevant part as follows:

In consideration of the mutual promises, representations, warranties, and covenants contained in this Agreement, the Parties agree as follows:

1. Purchase and Sale of Membership interest. Subject to the terms and conditions of this Agreement, Purchaser agrees to purchase from Seller, and Seller agrees to sell to Purchaser, Seller's Membership Interest in the Company for the total amount of \$105,000, plus interest at the rate of 6% per annum from and after April 18, 2006. The sale of the Membership Interest shall be completed in two installments. Promptly following the signing of this Agreement, Seller shall deliver an assignment of half the Membership interest to the Purchaser by an Assignment substantially in the form of Exhibit 1, attached, and the Purchaser shall pay to the Seller the amount of \$58,000. On or before February 29, 2008, the Seller shall deliver an Assignment for the balance of his Membership Interest to Purchaser upon Purchaser's payment of the remaining balance due hereunder, including all accrued interest to the date of payment.

Defendant made the first installment payment to plaintiff, and plaintiff assigned one-half of his ownership interest to defendant. However, defendant failed to make the second installment payment, so plaintiff never assigned his remaining interest to defendant. Thereafter, plaintiff filed his complaint.

Shortly before trial, the parties agreed to submit the case to the trial court for a decision on briefs. On October 28, 2011, the trial court entered an opinion and order finding in favor of defendant and dismissing plaintiff's complaint with prejudice.

II. STANDARD OF REVIEW

The parties dispute the proper standard of review. Plaintiff argues that the trial court's decision is the equivalent of a decision on a summary disposition motion, and should accordingly be reviewed de novo by this Court.¹ Defendant argues that the trial court's decision is akin to a bench trial verdict, and should therefore be reviewed for clear error.² We agree with plaintiff. First, the trial court decided this case by reference to the parties' affidavits and other documentary evidence—precisely the type of evidence a court considers when deciding a motion for summary disposition under MCR 2.116(C)(10).³ Second, the material facts of this case were not in dispute at the time the parties asked the trial court to decide this case. Defendant concedes as much in his appellate brief when he notes that “the [trial court's] decision depended primarily on construing the parties' agreement.” The proper construction and interpretation of a contract is an issue of law reviewed de novo.⁴ Accordingly, we review the issues in this case de novo.

III. ANALYSIS

When interpreting a contract, the examining court must “determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning.”⁵ If the language is clear and unambiguous, it must be enforced as written “because an unambiguous contract reflects the parties' intent as a matter of law.”⁶ “A court may not rewrite clear and unambiguous language under the guise of interpretation. Rather, courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would

¹ See *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 817 (1999) (summary disposition motions reviewed de novo).

² See *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003) (results of bench trial reviewed for clear error).

³ *Maiden*, 461 Mich at 120.

⁴ *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

⁵ *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

⁶ *Id.*

render any part of the contract surplusage or nugatory.”⁷ “Dictionary definitions may be used to ascertain the plain and ordinary meaning of terms undefined in an agreement.”⁸

Defendant argues, and the trial court held, that the purchase agreement is ambiguous. We disagree. “A contract is ambiguous when two provisions irreconcilably conflict with each other, or when [a term] is equally susceptible to more than a single meaning.”⁹ Phrased another way, “[a] contract is ambiguous when its words may be reasonably understood in different ways.”¹⁰ However, “[i]f the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous.”¹¹

Here, the purchase agreement is susceptible to but one reasonable interpretation. The agreement provides that “Purchaser agrees to *purchase* from Seller, and Seller agrees to *sell* to Purchaser, Seller’s Membership Interest in the Company for the total amount of \$105,000, plus interest.”¹² “Sell” means “to transfer (goods or property) or render (services) in exchange for money.”¹³ “Purchase” means “to acquire by the payment of money or its equivalent; buy.”¹⁴ Thus, under the unambiguous terms of the contract, plaintiff agreed “to transfer” his ownership interest to defendant “in exchange for money.” And defendant agreed “to acquire by the payment of money” plaintiff’s ownership interest. The only condition on the transaction was how and when the money and ownership interest would be exchanged.

The agreement states that “[t]he *sale* of the Membership Interest shall be completed in two installments.”¹⁵ “Sale” means the “transfer of property for money or credit.”¹⁶ The term “shall” is a mandatory rather than a permissive term.¹⁷ Therefore, the unambiguous terms of the contract provide for the transfer of plaintiff’s membership interest for \$105,000 to be completed in two installments. This first installment was made after the purchase agreement was executed. Thus, the only issue is the second installment.

⁷ *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010) (citations and quotations omitted).

⁸ *Coates v Bastian Bros, Inc*, 276 Mich App 498, 504; 741 NW2d 539 (2007).

⁹ *Id.* at 503 (citations and quotations omitted).

¹⁰ 5A Mich Civ Jur Contracts § 157.

¹¹ *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

¹² Emphasis added.

¹³ *Random House Webster’s College Dictionary* (1992).

¹⁴ *Id.*

¹⁵ Emphasis added.

¹⁶ *Random House Webster’s College Dictionary* (1992).

¹⁷ See *Lignons v Crittenton Hosp*, 490 Mich 61, 72; 803 NW2d 271 (2011).

The agreement provides that “[o]n or before February 29, 2008, the Seller shall deliver an Assignment for the balance of his Membership Interest to Purchaser upon Purchaser’s payment of the remaining balance due hereunder, including all accrued interest to the date of payment.” In its opinion, the trial court stated that

the agreement can be construed as a condition, where [plaintiff] had a duty to relinquish his remaining interest upon payment. If the interest still remained within the plaintiff’s control, the defendant did not have a duty to pay the remaining balance by the specific date. Conversely, since [defendant] did not make payment by the date stated in the Agreement, [plaintiff] can still retain his five percent (5%) interest.

The trial court’s interpretation is contrary to plain and unambiguous language of the contract. The agreement provides for the assignment of plaintiff’s remaining membership interest “upon [defendant’s] payment of the remaining balance due hereunder.” Plaintiff’s duty to assign his membership interest was contingent upon defendant tendering payment on the remaining balance due. However, nothing within the plain language of the agreement made defendant’s payment of the remaining purchase price conditional upon plaintiff’s assignment of his membership interest. Plaintiff’s duty would only arise upon defendant’s payment, which did not occur.

The trial court also concluded that defendant did not have an obligation to tender the second installment. Specifically, the trial court stated: “If [plaintiff] wanted the language to be an express promise where [defendant] would tender the remaining financial balance, he could have inserted language to do so.” The trial court’s interpretation examines the contract terms related to the second installment in isolation from the rest of the paragraph. When those terms are read in context it is clear that the defendant had an affirmative obligation to tender payment on or before February 29, 2008. Defendant agreed to purchase plaintiff’s membership interest for \$105,000, plus interest, and defendant agreed to complete the sale in two installments. Completion of the sale required defendant to tender the remaining balance on or before February 29, 2008. Defendant did not make the second installment payment; therefore, plaintiff retained his ownership interest in the LLC. Plaintiff’s retention of his ownership does not negate defendant’s breach. Defendant had an obligation to pay, and he failed to do so. Therefore, the trial court erred when it entered judgment in favor of defendant.¹⁸

¹⁸ We note that our result would be the same even under the clear error standard, which defendant argues applies. Under that standard, a trial court clearly errs, and reversal is appropriate, when this Court is left with a “definite and firm conviction that a mistake has been committed” *Hollis v Zabowski*, 101 Mich App 456, 458; 300 NW2d 597 (1980). Because the contract is unambiguous, and the trial court’s interpretation of the contract is contrary to the plain language of the contract, we are left with a “definite and firm conviction that a mistake has been committed” here. *Id.*

Reversed and remanded for entry of judgment in favor of plaintiff. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro