STATE OF MICHIGAN

COURT OF APPEALS

JAMES JULIANO, MICHAEL BROCK, JOSEPH NIRTA, AND THE SCOTT A. CIPA TRUST,

Plaintiffs-Appellees,

UNPUBLISHED
December 17, 2013

v

No. 308296
Oakland Circuit Court
LC No. 2010-110121-CB

JOHN B. SMITH, a/k/a JB SMITH,

Defendant-Appellant,

and

EQUITY 11, LTD., a Michigan corporation, EQUITY 11 HOLDINGS, LLC, a Michigan limited liability company, RICHARD SMITH, and KELLIE KERN DeMERITT,

Defendants.

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant John B. Smith (Smith) appeals as of right the trial court's final order resolving all pending claims and challenges the trial court's (1) order appointing a receiver and denying defendants'[1] motion for preliminary injunction and (2) order enforcing the "Memorandum of Understanding" (MOU) as the final settlement between the parties. We affirm, but remand to the trial court for the ministerial task of amending the November 18, 2010 order.

I. FACTS

A. BACKGROUND

[1] "Defendants" will be used to refer to the defendants below collectively, whereas defendant Smith will be referred to as "Smith."

This case involves two venture capital management companies, their officers, and their investors. The two venture capital companies are (1) a closely held corporation, Equity 11, Ltd (Equity 11) and (2) a limited liability company, Equity 11 Holdings, LLC (Equity 11 Holdings). Equity 11 is either "a" or "the" manager of Equity 11 Holdings. Equity 11 and Equity 11 Holdings own stock—venture capital investments—for the benefit of their shareholders/members in several companies, including: Ecology Coatings, iSekurity, Inc., WM Reign, Ltd., and JOCO Brands, LLC. Plaintiffs are all investors in the capital management companies—James Juliano, Michael Brock, and the Scott A. Cipa Trust own shares of Equity 11, and Joseph Nirta owns membership units of Equity 11 Holdings. Smith, the only defendant involved on appeal, held positions as an officer[2] and the sole director of Equity 11 and as an officer and director of iSekurity and Ecology Coatings.

According to Smith, he has maintained a 45% share of Equity 11's stock. Juliano owns 231,000 shares of Equity 11 stock and was to maintain a 33% interest in Equity 11. According to plaintiffs' complaint, Brock owns a total of 251,500 shares. However, defendants contended that Brock was only to obtain, and was aware that he was only obtaining, a total of 2,500 shares, and the document plaintiffs relied on contained a clear mistake. The Scott A. Cipa Trust owns 71,435 shares of Equity 11. Nirta owns three membership units of Equity 11 Holdings. Plaintiffs Juliano, Brock, and Nirta also owed beneficial shares of companies whose stock was owned by Equity 11 or Equity 11 Holdings, respectively, including iSekurity and Ecology Coatings.

B. PROCEDURAL HISTORY

Plaintiffs Juliano, Brock, and Nirta filed a complaint for injunctive and other relief on May 11, 2010 out of concern that actions by defendants had imperiled Ecology Coatings' ability to continue operations and, ultimately, the value of plaintiffs' investments. Plaintiffs alleged that Juliano and Brock did not know that Equity 11 Holdings existed when they made their investment; likewise, Nirta was not aware Equity 11 existed. Plaintiffs alleged violations of federal and state securities laws due to massive irregularities in the way that Equity 11's and Equity 11 Holdings' private placements were marketed. Plaintiffs contended that they did not receive the private placement memorandum (PPM), required under state and federal securities laws, prior to subscribing to the offerings.

According to plaintiffs' amended complaint, plaintiffs collectively have invested a total of $7,578,785, plus the Nirta loans, roughly $4,500,000 of which are unaccounted for, and defendants have refused to provide financial statements and reports regarding plaintiffs' investments. Plaintiffs asserted that Ecology Coatings has written contracts that put it on the verge of potentially becoming "very commercially viable." However, defendants suddenly refused to supply Ecology Coatings with further capital, and Equity 11 announced that it intended to sell 4.3 million shares of Ecology Coatings stock. Plaintiffs were concerned that Smith had divested himself of most, if not all, of his Equity 11 shares and that Smith had "misappropriated, mismanaged[,] or wasted their investments."

[2] Smith has been referred to in documents as both the CEO and managing partner of Equity 11.

The complaint included seven counts, only one of which is relevant on appeal. In count three, plaintiffs alleged that Juliano did not sign an irrevocable proxy agreement purporting to give Smith the right to vote his shares because his initial subscription agreement that contained an irrevocable proxy provision was superseded by the subsequent Founder Stock Purchase Agreement, which contained no such provision, and though plaintiffs admitted that the subscription agreement signed by Brock contained a provision for an irrevocable proxy, plaintiffs sought a declaratory judgment that the irrevocable proxies held by Smith or anyone else with regard to plaintiffs' interests in Equity 11 or Equity 11 Holding are either void ab initio or are not irrevocable pursuant to Michigan law.

On May 12, 2010, plaintiffs filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin defendants from selling assets owned by Equity 11 and Equity 11 Holdings, from having defendants' nominees on the board of Ecology Coatings vote to take any actions outside the ordinary course of business, and from destroying corporate records, as well as seeking authorization to expedite discovery. The trial court granted this motion.

Defendants eventually filed an answer and included a four-count counterclaim. Defendants asserted that plaintiffs were conspiring against defendants to deprive them of their rights with regard to, and to undermine defendants' interest in, Ecology Coatings and iSekurity by effectively blocking beneficial transactions in pursuit of a personal vendetta.

On or around June 25, 2010, Juliano and other shareholders signed documents purporting to revoke their shareholder proxies, and in an action by written consent, in lieu of a shareholder meeting, made changes to the Equity 11 corporate bylaws to remove Smith as the director of Equity 11, replacing him with Juliano, and removed Smith from his positions with iSekurity and Ecology Coatings.

On July 14, 2010, defendants filed an emergency motion for a preliminary injunction to maintain the status quo ante pending determination of the irrevocable proxy issue and for an order declaring plaintiffs' revocation of their irrevocable proxies before judicial determination void and prohibiting plaintiffs from attempting to revoke their irrevocable proxies before judicial determination of the issue.

Plaintiffs eventually filed a response to defendants' emergency motion for preliminary injunction pending determination of the proxy issue, arguing that Smith failed to establish a likelihood of success on the merits and alleging that Smith had unclean hands. A motion hearing was held on July 21, 2010, and the trial court issued an order denying defendants' motion for preliminary injunction and appointing a receiver, Henry M. Nirenburg, to run the corporation.

On October 26, 2010, Juliano, on behalf of plaintiffs, and Smith signed a document entitled "Memorandum of Understanding" (MOU). The document asserted that "[t]he parties have reached an agreement resolving the [i]ssues among them[,]" stated that "[t]he parties agree to resolve the Shareholder Litigation on the following terms to be incorporated into a Settlement Agreement to be signed no later than November 2, 2010[,]" and listed the terms.

The Settlement Agreement was never signed. Thus, plaintiffs filed a motion for enforcement of the MOU, and Smith responded. On November 17, 2010, after a hearing on the motion, the trial court issued an order granting plaintiffs' motion for enforcement of the settlement MOU, later entering an order and judgment that specifically detailed the contents of the MOU it was enforcing. On December 8, 2010, Smith filed a motion to alter or amend the judgment and/or for reconsideration and rehearing, which the trial court denied the same day. The judgment was subsequently amended in response to motions by plaintiffs and the receiver. On January 9, 2012, the trial court issued a stipulated order regarding an additional judgment by consent against Smith and dismissing the case. Smith appealed this order as of right to this Court.

II. ANALYSIS

A. ENFORCEMENT OF THE MOU

Smith argues that the trial court erred by enforcing the MOU as the final settlement agreement, and alternatively, even if it was a final settlement agreement, it should have been voided because it was procured by fraud, mistake, or unconscionable conduct and was not enforceable under Michigan law, particularly given the fiduciary relationship between plaintiffs and Smith and the resulting fiduciary duties owed. Smith asks this Court to reverse the judgment against Smith and its subsequent amendments and remand for further proceedings.

"An agreement to settle a pending lawsuit is a contract, 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). "Construction and interpretation of a contract are questions of law that we review de novo, meaning that we do so without deference to the trial court's decision." *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Construction of contracts with clear contractual language is a question of law for the trial court, and where contract language is unambiguous, it "should be given its ordinary and plain meaning." *Id.* at 12-13 (quotation marks and citation omitted).

"There are five elements of a valid contract: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Blue Cross Blue Shield Michigan*, 297 Mich App at 13 (quotation marks and citation omitted). Underlying these elements is the requirement that there must be mutual assent—often referred to as a "meeting of the minds"—for a contract to exist. *Id.* at 13, n 6. Whether the parties have mutually assented is an objective determination, made by "looking to the express words of the parties and their visible acts, not their subjective states of mind." *Id.* at 13 (quotation marks and citation omitted). Further, MCR 2.507(G) provides:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

Plaintiffs moved to enforce the MOU pursuant to MCR 2.507(G). On November 17, 2010, the trial court held a hearing regarding plaintiffs' motion and heard arguments from counsel, as well as Nirenburg, the receiver. The trial court, without explanation, stated that it was going to grant plaintiffs' motion to enforce the MOU and would sign the order proposed by plaintiffs. In the order, the trial court stated that it found “that the [MOU] . . . adequately describes the terms of a settlement of this action, was negotiated in the presence of and with the assistance of the Court-appointed receiver, Henry Nirenberg, and was signed by [Smith] after consultation with his counsel, and . . . that the [MOU] is a fully enforceable agreement to settle this matter under MCR 2.507(G)[.]”

1. CONTRACT TO MAKE A CONTRACT

First, Smith argues that the MOU is not enforceable as a final settlement agreement because the MOU, by its own terms, envisioned that a settlement would be created in the near future; thus, there was never a meeting of the minds—the MOU was at best a contract to make a contract, with some final terms left to be determined.

Contracts to make future contracts are “not per se unenforceable; in fact, [they] may be just as valid as any other contract.” *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 819; 428 NW2d 784 (1988). “Like any other contract, a contract to make a contract can fail for indefiniteness if the trier of fact finds that it does not include an essential term to be incorporated into the final contract.” *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). “[J]udicial avoidance of contractual obligations because of indefiniteness is not favored under Michigan law, and so when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness.” *Blue Cross Blue Shield Michigan*, 297 Mich App at 14. “Similarly, if the agreement is conditioned on the happening of a future event that, through no fault of the parties, never happens, liability does not attach.” *Opdyke Investment Co*, 413 Mich at 359. In order for a “contract to contract” to be enforceable, it must include all the material terms of the agreement, leaving nothing for future negotiations. *Hansen v Catsman*, 371 Mich 79, 82; 123 NW2d 265 (1963).

Therefore, the question is whether there were any material terms missing and whether anything was left for further negotiations. The language of the MOU does not contain any references to, or indications that there was intended to be, a due diligence period, as Smith claims the parties intended, or that further negotiations would follow. Instead, the agreement explicitly states, “The parties have reached an agreement resolving the issues among them[,]” and “[i]n the event that Smith does not make the payment described in Paragraph 6 above, Plaintiffs will have the option to either *seek enforcement of this Memorandum* or, in the alternative, to declare this Memorandum null and void.” (Emphasis added.) Thus, by its own terms, the agreement indicates that there was a meeting of the minds. *Blue Cross Blue Shield Michigan*, 297 Mich App at 13.

Smith argues that there were essential terms left open because it was unclear at the time whether persons and entities not parties to the agreement would agree to give up their stock for no additional consideration per the MOU. However, what Smith identifies are conditions of the contract, not open terms. The agreement being contingent upon specified future occurrences does not automatically render the contract unenforceable or constitute terms that have been left open; instead, if such conditions do not occur, liability will not attach. *Opdyke Investment Co*, 413 Mich at 359. Therefore, the language of the MOU indicates that there was a meeting of the minds between the parties and does not indicate that any material terms have been left open or that anything has been left to be determined by future negotiations.

2. FRAUD, MISTAKE, OR UNCONSCIONABLE CONDUCT

Second, Smith contends that he produced a great deal of evidence demonstrating that the MOU was procured by fraud, mistake, or other unconscionable conduct on the part of Juliano such that there was no meeting of the minds. Smith argued that he was duped into believing that iSekurity was a worthless company, when in fact it was in the middle of finalizing a transaction that would make the company quite valuable. Smith contends that at a minimum, the trial court should have conducted an evidentiary hearing regarding whether the MOU was procured by fraud, mistake, or other unconscionable conduct on the part of Juliano and argues that the trial court did not address the evidence presented by Smith.

"Judgments entered pursuant to the agreement of the parties are of the nature of a contract, rather than a judicial order entered against one party. . . . Absent a showing of factors such as fraud or duress, courts act properly when they enforce such agreements." *Massachusetts Indemnity and Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994). "Under usual contract principles, plaintiff is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage." *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). A party may not be bound by a contract where there is "mutual mistake or unilateral mistake induced by fraud." *Windham v Morris,* 370 Mich 188, 193; 121 NW2d 479 (1963). To set aside a contract, a party must produce clear evidence of fraud. *Mosher v Sawyer-Weber Tool Mfg Co*, 224 Mich 303, 307; 194 NW 979 (1923); *Buck v Sherman*, 2 Doug 176, 182 (Mich, 1845).

A party claiming fraud must demonstrate:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012) (quotation marks and citations omitted).]

Regarding the reliance requirement, the Michigan Supreme Court has recognized that "fraud is not perpetrated upon one who has full knowledge to the contrary of a representation." *Id.* at 555 n 4 (quotation marks and citation omitted). While there is no common law duty to investigate or corroborate a representation, a party cannot, when presented with or possessing information, simply choose to ignore it. *Id.* And, importantly, the allegedly fraudulent misrepresentations "must be considered in the light of the conditions attending their utterance, and the relations of the parties to each other and to the project, as well as their interest or lack of interest in the final culmination of the entire plan." *Fyan v McNutt*, 266 Mich 406, 411; 254 NW 146 (1934).

At the motion hearing, Smith argued that the contract was unenforceable due to fraud or mistake and submitted his and Reginald Ball's[3] affidavits in opposition to the motion to enforce the MOU. For his part, Nirenburg indicated at the motion hearing that he was aware of the issues raised by Smith by stating, "These side issues of selling stock and value of the company and everything else, . . . I've heard it all before. None of these things are new to me . . . . They've all been addressed. It was a good deal for both sides. Both sides gave up a lot." The trial court, in making its ruling, simply stated that it was granting the motion to enforce.

By enforcing the MOU, the trial court implicitly found that Smith failed to present a sufficient showing of fraud or mistake to prevent enforcement of the MOU. In light of the circumstances leading up to and at the time of signing the MOU, we cannot conclude that the trial court erred in granting the motion to enforce. At the motion hearing it was undisputed that (1) there was equal bargaining power between Smith and plaintiffs—all parties being sophisticated business people represented by counsel, (2) there was a one month window between the first settlement meeting and the final meeting in which the MOU was signed, providing both parties ample opportunity to investigate issues and consider their positions, and (3) Smith had been in charge of, or highly active in managing, Equity 11, Equity 11 Holdings, and iSekurity a mere four months before the MOU was signed. Whether Ball still held (or ever held) actual shares of iSekurity, or whether iSekurity shares 1-17 were currently outstanding (or ever were outstanding) was unquestionably addressed between the parties leading up to the MOU, and most importantly, something Smith either knew or could have known prior to entering the MOU. As such, we cannot conclude that the trial court erred in granting the motion to enforce, as Smith presented insufficient evidence of fraud. *Massachusetts Indemnity and Life Ins Co*, 206 Mich App at 268.

Smith argues that his fraud argument is "more compelling" because the parties had a fiduciary relationship, given Juliano's role as CEO of Equity 11. MCL 450.1541a(1) provides, in relevant part, "A director or officer shall discharge his or her *duties as a director or officer* including his or her duties as a member of a committee . . . ." (Emphasis added.) MCL 450.1489(1), which "creates a statutory cause of action . . . to shareholders of closely held corporations[,]" *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 278; 649 NW2d 84 (2002), provides, in relevant part:

> A shareholder may bring an action . . . to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

This Court has recognized that "because the shareholders participate in the management of the corporation, the relationship among those in control of a closely held corporation requires a higher standard of fiduciary responsibility, a standard more akin to partnership law." *Estes*, 250 Mich App at 281 (quotation marks and citation omitted). The Court went on to state, regarding the language of MCL 450.1489, "This language does not indicate that a shareholder would be successful on a suit based on one instance of misconduct; rather, a shareholder who would be

[3] Reginald Ball co-founded iSekurity with Smith.

likely to prevail under this statute is one who presented an ongoing pattern of oppressive misconduct." *Id.* (quotation marks and citation omitted). The Court further explained, "A § 489 suit seeks to redress oppression that injures either the corporation or the shareholder, whereas a § 541a suit seeks to redress wrongs to the corporation." *Id.* at 282.

At the time the MOU was signed, the receiver, Nirenburg, was running the corporation—not Juliano or Smith. The MOU was signed by Juliano "on behalf of Plaintiffs," not on behalf of the corporation and not in his capacity as an officer or director. Because Smith only claims that he, as a shareholder, was injured, he would have to demonstrate some kind of "ongoing pattern of oppressive misconduct" on the part of Juliano *acting in a capacity as an officer or director* of the corporation in order to demonstrate a breach of fiduciary duties. *Estes*, 250 Mich App at 281. Smith cannot do so; therefore, Smith could not have demonstrated that Juliano owed Smith fiduciary duties during the settlement negotiations.

Regarding mistake, because Smith did not prove fraud and, therefore, cannot argue unilateral mistake, Smith needed to present proof of mutual mistake. Smith has not presented evidence that plaintiffs were mistaken regarding whether stock certificates 1 through 17 had been issued or were otherwise valid. Smith merely asserted, without providing proof, that he discovered that some of these stock certificates were validly issued. Smith relied on Ball's affidavit for his claim, but this affidavit never indicated that Ball was issued any of the stock certificates at issue, and the emails Smith attached to his memorandum in opposition to the motion to enforce the MOU indicate Ball was never given *any* paperwork regarding his alleged 10% interest. Therefore, Smith failed to make an adequate showing of mistake. *Massachusetts Indemnity and Life Ins Co*, 206 Mich App at 268.

3. IMPOSSIBILITY

Third, Smith argues that the doctrine of impossibility of performance applies to prohibit enforcement of the MOU because the MOU: (1) requires Smith's family members and any entity Smith owns to transfer their shares, and (2) requires Smith to incorrectly represent that iSekurity stock certificates 1 through 17 had not been issued and were not covered by a valid subscription agreement, given that Smith discovered that one of those certificates was issued to Ball.

"Figuratively speaking, the law inserts into contracts a clause providing legal excuse from strict performance of the contractual promise in the event that unanticipated circumstances beyond the contemplation of the contracting minds and beyond their immediate control make strict performance impossible." *Bissell v LW Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). "A promisor's liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007). Impossibility may be either original or supervening. *Id.* at 74. "[S]upervening impossibility develops after the contract in question is formed." *Id.* This Court has explained:

> The question whether a promisor's liability is extinguished in the event his contractual promise becomes objectively impossible to perform may depend upon whether the supervening event producing impossibility was or was not reasonably foreseeable when he entered into the contract. Risk of nonperformance of a

> contract should not fairly be thrown upon the promisor, if an unanticipated circumstance had made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. [*Vergote v K Mart Corp (After Remand)*, 158 Mich App 96, 110; 404 NW2d 711 (1987).]

While it is true that "a contract cannot bind a nonparty[,]" *AFSCME Council 25 v Wayne County*, 292 Mich App 68, 80; 811 NW2d 4 (2011) (quotation marks and citation omitted), the challenge here is not from Smith's family members, the nonparties; the challenge of impossibility is from Smith himself. Nonetheless, the promise Smith made in the MOU was essentially to *convince* his family members to give up their shares (to the extent they had any), which is not originally impossible to perform (though it may ultimately be impossible to achieve). However, given that the individuals Smith needed to convince were his family members, whether these individuals had stock and would refuse to give it up was clearly foreseeable to Smith. *Vergote*, 158 Mich App at 110.

Additionally, as a matter of law, it is not objectively *impossible* to contractually agree to make a representation that turns out to be false. This is particularly true here because it was foreseeable, given Smith's history with iSekurity, that Smith could have believed the assertion to be true at the time, or, as we have stated before, he was in a position to know whether the representation was correct at the time. Simply because Smith could ultimately learn that these certificates were validly issued or otherwise covered by a valid subscription agreement does not make it impossible to agree to such a statement in a contract. Therefore, the defense of impossibility was not available to Smith.

4. DISCREPANCIES BETWEEN THE MOU TERMS AND ORDER TERMS

Fourth, Smith contends that because the trial court improperly entered a judgment that incorporated some, but not all of the terms of the MOU, this Court should reverse the November 18, 2010 judgment against Smith and remand the case with instructions. On December 8, 2010, Smith filed a motion to alter or amend the judgment and/or for reconsideration and rehearing, which the trial court denied the same day.

"[C]ourts are not to rewrite the express terms of contracts." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008). Courts must instead "enforce the clear and unambiguous language of a contract as it is written." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).

Smith asserts that there were three points regarding which the trial court's order deviated from the MOU. First, Smith contends the MOU contained in paragraph 14 a full release in favor of Richard Smith and Kelly DeMeritt; however, the order altered this language and provided only for the release of Smith. Smith asserts that obtaining a full release for Richard Smith and DeMeritt was critical to Smith. Plaintiffs argue that because Smith made it clear that the settlement applied only to him, the releases for Richard Smith and DeMeritt were removed.

Smith argued in opposition to plaintiffs' motion to enforce the MOU that "the MOU did not involve all the parties to this litigation, but rather was signed only by Mr. Smith and Mr.

Juliano. Mr. Smith did not sign on behalf of the other Defendants/Counter-Plaintiffs, nor did he represent at any time that he had authority to sign on their behalf." It is a "well-established maxim that a party may not properly create error in a lower court and then claim on appeal that the error requires reversal." *Clohset v No Name Corp (On Remand)*, __Mich App__; __ NW2d__ (2013), slip op at 2. Because Smith created this error in the lower court, he is barred from asserting this issue as an error on appeal. *Id.*

Regarding Smith's other arguments that the order changed the terms of the agreement, we emphasize that trial courts are to enforce unambiguous contracts as written. *Greenville Lafayette, LLC*, 296 Mich App at 291. In its November 18, 2010 order, the trial court found that the MOU was "a fully enforceable agreement." Rather than attempt to set forth the terms of the agreement that were already in writing in the MOU, the preferable route would have been to simply order enforcement of the MOU, and dismiss whatever pleadings required dismissal as a result of enforcing the MOU. Essentially that was done in paragraphs one and 20 and 21 of the November 18, 2010 order. Because there are some discrepancies between the remainder of that order and the MOU, we remand this case for the trial court to either (1) vacate those portions of the November 18, 2010 order that contain provisions also contained in the MOU, or (2) to review and revise the contents of the order's provisions to ensure that, with the exception noted in the preceding paragraph of this opinion, the order is entirely consistent with the wording of the MOU.

B. APPOINTMENT OF A RECEIVER

Smith's challenges to the appointment of a receiver and the denial of the motion for preliminary injunction are moot given our conclusion that the MOU is enforceable.[4] We nevertheless address Smith's remaining issues.

Smith argues that the trial court abused its discretion by sua sponte appointing a receiver instead of ruling on the merits of Smith's motion for preliminary injunction. Smith contends that appointment of a receiver is a harsh remedy only to be used in extreme cases and that an evidentiary hearing is usually necessary before appointment of a receiver. Smith asks this Court to vacate the order appointing a receiver.

This Court reviews a trial court's decision to appoint a receiver for an abuse of discretion. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 273; 761 NW2d 761 (2008). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.* "A court-appointed receiver is a ministerial officer of the court, charged with the task of preserving property and assets during ongoing litigation." *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 528; 730 NW2d 481 (2007), modified in part

[4] Smith argues in his brief that the trial court's decision to appoint a receiver is not a moot issue or a harmless error because had the trial court addressed the irrevocable proxy issue instead of appointing a receiver, Smith never would have been in the position of signing the MOU. However, Smith provides no caselaw or analysis for this argument. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

on other grounds 480 Mich 910 (2007). "It is the duty of the receiver to preserve and protect the property in his hands as receiver and to turn it over to the true owner at the termination of the litigation." *Westgate v Westgate*, 294 Mich 88, 93; 292 NW 569 (1940). A receiver may also be appointed to ensure implementation of a court's orders. *Wayne Co Jail Inmates v Wayne Co Chief Executive Officer*, 178 Mich App 634, 651; 444 NW2d 549 (1989).

Pursuant to MCL 600.2926,

> [c]ircuit court judges in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law. . . . In all cases in which a receiver is appointed the court shall provide for bond and shall define the receiver's power and duties where they are not otherwise spelled out by law. Subject to limitations in the law or imposed by the court, the receiver shall be charged with all of the estate, real and personal debts of the debtor as trustee for the benefit of the debtor, creditors and others interested.

Moreover, "[t]he power to appoint receivers is inherent in courts of equity."[5] *Band v Livonia Assoc*, 176 Mich App 95, 104; 439 NW2d 285 (1989). "[A]s used in the statute, the phrase 'allowed by law' refers to (1) those cases where appointment of a receiver is provided for by statute and (2) those cases where the facts and circumstances render the appointment of a receiver an appropriate exercise of the circuit court's equitable jurisdiction." *Petitpren v Taylor School Dist*, 104 Mich App 283, 293-294; 304 NW2d 553 (1981). A receiver may only be appointed "as an ancillary remedy to other relief sought." *Id.* at 296. "A receiver is not appointed as the agent of, or for the benefit of, one party or the other; rather he or she is appointed to protect and benefit both parties equally." *Ypsilanti Fire Marshall*, 273 Mich App at 528. Receivership is considered "a remedy of last resort, and should not be used where another, less drastic remedy exists. . . . Because the appointment of a receiver is an extraordinary remedy, a receiver will not be appointed when there exists an adequate remedy at law." *Id.* at 530 (citation omitted). With regard to corporations, "[t]he court, for sufficient cause, may remove directors and order an election; may appoint a receiver, and enjoin dissipation of corporation assets . . . ." *Nay v Mid-West Petroleum Corp*, 268 Mich 578, 582-583; 256 NW 554 (1934).

After hearing the parties' arguments in the motion hearing, the trial court denied defendants' motion for preliminary injunction. The trial court stated:

> [I]t is clear that there is much confusion and chaos occurring as a result of the dispute between the parties. The Court is going to appoint a receiver to run the corporation until the legal issues in this matter can be resolved.

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[5] Smith seems to take issue with the fact that the trial court sua sponte appointed a receiver. However, the general rule is that "if the facts justify the appointment of a receiver to preserve or protect property of the fund in litigation, the trial court may on its own motion appoint the receiver without application by any party." 16 Fletcher Cyclopedia Corporations, Receivers, § 7671, p 38.

One of the central issues of the suit was whether the alleged irrevocable proxies existed and were valid, i.e., whether plaintiffs or defendants had the authority to manage the corporation. However, plaintiffs unilaterally asserted that their proxies were invalid or otherwise revoked and took corporate action. An injunction to return the situation to the status quo—Smith acting as the sole director of Equity 11—though a less drastic measure than appointing a receiver, would not have been an adequate remedy. Instead, the trial court reasonably concluded that given the chaos of the situation—Smith and plaintiffs both vying for power and authority over the corporation—a third party should manage the corporation until the underlying lawsuit could be resolved. An evidentiary hearing was not required because the conditions that necessitated the appointment of a receiver—plaintiffs purported revocation of their proxies, plaintiffs taking corporate action, and Smith's assertions that he remained the sole director of the corporation—were established and not disputed. *Band*, 176 Mich App at 106. The trial court did not abuse its discretion in appointing a receiver in lieu of granting defendant's motion for preliminary injunction.

C. DENIAL OF MOTION FOR PRELIMINARY INJUNCTION

Smith argues that the trial court should have granted a motion for preliminary injunction to maintain the status quo—Smith acting as the sole director of Equity 11—until the validity of the irrevocable proxies signed by plaintiffs could be determined by the trial court after proper litigation. Smith argues that the trial court did not provide any reasoning or analysis of the substantive issues and failed to address Smith's substantive arguments, and had it done so, it should have granted the motion, given that the court already granted a preliminary injunction in plaintiffs' favor that prevented Smith from transferring company assets, which would have prevented harm from occurring until the proxy issue could be resolved on the merits. Smith asks this Court to reverse the trial court's order denying Smith's motion for a temporary restraining order, order the trial court to set aside the corporate actions taken by plaintiffs, and determine that the irrevocable proxies were valid and enforceable, rendering plaintiffs' corporate actions invalid. Alternatively, Smith asks this Court to set aside the order denying Smith's motion and remand for the trial court to conduct hearings to address the issue of the irrevocable proxies on the merits.

It is within the trial court's discretion to grant or deny a motion for preliminary injunction, and this Court reviews such decisions for an abuse of discretion. *Davis v City of Detroit Financial Review Team*, 296 Mich App 568, 612; 821 NW2d 896 (2012).[6] "An abuse of discretion exists when the decision is outside the range of principled outcomes[,]" and "may arise from the court's misunderstanding of controlling legal principles." *Id.* at 612-613. This Court reviews "the facts on which the court relies in exercising its discretion for clear error." *Id.* at 613.

[6] Smith incorrectly asserts that because interpretation of contracts is an issue of law, this Court should review the trial court's decision to deny Smith's motion for preliminary injunction de novo.

This Court has recognized that "injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Davis*, 296 Mich App at 613-614 (quotation marks and citation omitted). This Court has established four factors to determine whether granting a preliminary injunction is appropriate:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* at 613 (quotation marks and citations omitted).]

In their motion for a preliminary injunction to maintain the status quo ante pending determination of count three of plaintiffs' complaint (declaratory judgment regarding the irrevocable proxies), defendants argued: (1) defendants would suffer irreparable harm, for which money cannot provide compensation, if the injunction was not issued because Smith was being denied his right to make business decisions and Equity 11 had been "thrown into chaos" due to plaintiffs' actions, (2) harm to defendants if the injunction does not issue would outweigh the harm to plaintiffs if it does issue because earlier in the proceedings, plaintiffs obtained a temporary restraining order and preliminary injunction to prevent Smith from selling Equity 11 assets, (3) defendants had a likelihood of success on the merits because the irrevocable proxies were coupled with an interest, making them valid, and (4) the public interest will not be harmed by the injunction because the dispute involves purely private corporations.

The trial court denied the motion for preliminary injunction to maintain the status quo, but engaged in no analysis of any of the appropriate factors. Instead, as already noted, the court merely stated that due to the chaos resulting from the dispute, "[t]he Court is going to appoint a receiver to run the corporation until the legal issues in this matter can be resolved." Our review of the record, however, reveals that denial of the motion was not an abuse of discretion.

Regarding the first factor—the likelihood of prevailing on the merits—the underlying question is whether the irrevocable proxies were valid. Smith argues that the irrevocable proxies were valid because they were irrevocable on their face and coupled with an interest, given that Smith created Equity 11 and has run the company since its founding.

MCL 450.1421(1) provides: "A shareholder entitled to vote at a meeting of shareholders or to express consent or dissent without a meeting may authorize other persons to act for him or her by proxy." Pursuant to MCL 450.1421(5), "[a] proxy is revocable at the pleasure of the shareholder executing it, except as otherwise provided in this section and sections 422 and 423." MCL 450.1422—section 422—provides:

> A proxy which is entitled "irrevocable proxy", and which states that it is irrevocable, is irrevocable when it is held by any of the following or a nominee of any of the following:
>
> (a) A pledgee of or other holder of a security interest in the shares.

> (b) A person who has purchased or agreed to purchase the shares.
>
> (c) A creditor of the corporation who extends or continues credit to the corporation in consideration of the proxy.
>
> (d) A person who has contracted to perform services as a director, officer, or employee of the corporation, if a proxy is required by the contract of employment.
>
> (e) A person designated by or under an agreement under section 461 [regarding voting agreements].
>
> (f) *A holder of any other proxy coupled with an interest*. [Emphasis added.]

A proxy is "'coupled with an interest when the power forms part of a contract, and is a security for money or for the performance of any act which is deemed valuable, and is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law.'" *Ecclestone v Indialantic*, 319 Mich 248, 257; 29 NW2d 679 (1947), quoting *Lane Mortgage Co v Crenshaw*, 93 Cal App 411, 428; 269 P 672 (1928).

Plaintiffs correctly point out that Smith did not produce adequate evidence of the irrevocable proxies. Documentation was only attached to defendant's motion with regard to Juliano and Brock; there was no documentation with regard to Apex Holdings, the Scott A. Cipa Trust, or John DiLaura, all of whom purported to revoke their proxies. However, the documents regarding Juliano and Brock were also insufficient.

The Equity 11 subscription agreement,[7] signed by Juliano on July 22, 2008 for 17,241 shares, states in pertinent part:

> By execution hereof, the Subscriber agrees to become a party to, and be bound by, the terms and conditions of a Stockholder Agreement and Irrevocable Proxy in the form included as <u>Exhibit B</u> to the Memorandum (the "<u>Agreement and Proxy</u>"). **In order to facilitate the execution of the Agreement and Proxy and for no other purpose, the Subscriber hereby appoints any officer of the Company as the Subscriber's attorney-in-fact to execute and deliver the Agreement and Proxy in the place and stead of the Subscriber and on the Subscriber's behalf.** <u>The Agreement and Proxy contains an irrevocable proxy to vote your shares</u>. **Please read the Agreement and Proxy in its entirety and discuss it with your legal advisor prior to purchasing shares.**

[7] "A subscription to the stock of a corporation is a contract by which the subscriber agrees to take a certain number of shares of the capital stock of a corporation, paying for the shares, or expressly or implicitly promising to pay for them." 6 Michigan Civil Jurisprudence, Corporations, § 67, pp 158-159.

The Stockholder Agreement and Irrevocable Proxy, which was signed by Smith on July 22, 2008 "on behalf of the stockholders," provides:

> Each Stockholder does hereby grant to JB Smith, jointly, an irrevocable proxy, with full power of substitution, to vote all the Shares of the Company currently owned by such Stockholder at all meetings of the shareholders of the Company, and for purposes of all consents to be given by or required of the shareholders of the Company, and to otherwise exercise all other rights and powers represented by such Shares. The signature of Mr. Smith shall be required in order to exercise the rights granted by this irrevocable proxy.
>
> This proxy is irrevocable and is intended to have the effect of an "irrevocable proxy" under Section 422 of the Michigan Business Corporation Act, as amended (the "<u>MBCA</u>"). This proxy is coupled with an interest and is and shall be binding, effective and valid as to each Stockholder, and each Stockholder's heirs, personal representatives, guardians, conservators, other legal representatives, successors and assigns, and notwithstanding the death, incompetence or mental illness of such Stockholder or the sale or transfer of any or all of the Shares owned by such Stockholder, <u>until the earlier of</u> (a) the date the Company's stock becomes traded on a national securities exchange or NASDAQ and (b) 10 years from the date of this Agreement.

Therefore, there appears to be an irrevocable proxy with regard to 17,241 of Juliano's shares. However, plaintiffs attached a document to their original complaint, the Founder Stock Purchase Agreement, which was signed by Juliano on August 1, 2008 for 161,000 shares, after the Subscription Agreement, which was signed on July 22, 2008 for 17,241 shares. Plaintiffs allege that the Subscription Agreement was superseded by the Founder Stock Purchase Agreement. Moreover, the subscription agreement attached to defendant's motion that was signed by Brock did not include any reference to an irrevocable proxy or give authority for an officer of the corporation to sign the Stockholder Agreement and Irrevocable Proxy on his behalf. Therefore, Smith did not provide adequate proof of the existence of the alleged irrevocable proxies with regard to the total number of shares of any of the shareholders.

Moreover, Smith did not transfer his stock and retain the irrevocable proxy pursuant to an agreement; plaintiffs purchased the stock from the *corporation*, not from Smith. Further, nothing in the Subscription Agreement or the Stockholder Agreement and Irrevocable Proxy indicated that the proxy was serving as a security for performance of a valuable act by defendant, such as acting as the CEO, managing director, or sole director. Smith was *already* otherwise obligated to serve as an officer and director of the corporation, and he was not so obligated by virtue of these agreements. While the Stockholder Agreement and Irrevocable Proxy that defendants attached to their motion states that the proxy was coupled with an interest, nothing in the language of MCL 450.1422 indicates that this is sufficient. "When construing a statute, we consider the statute's plain language and we enforce clear and unambiguous language as written." *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). The statute states that a proxy is irrevocable when "it is held by . . . . [a] holder of any other proxy coupled with an interest[,]" MCL 450.1422, not merely when the document *states* that it is coupled with an interest. Additionally, the contract at issue was between Juliano and Equity 11; Smith signed the

Subscription Agreement and the Stockholder Agreement and Irrevocable Proxy in his official capacity as the CEO of Equity 11. Thus, given the documents in the record, it does not appear that Smith had a likelihood of success on the merits regarding the irrevocable proxy issue.

Regarding the second factor—the danger of irreparable harm—and the third factor—the risk that the party seeking injunction will be harmed more by the lack of an injunction than the opposing party would be by issuing the injunction, Smith argues that the harm to him if the injunction was not issued outweighed the harm to plaintiffs if it was issued. Smith explains that not issuing the injunction caused harm to the businesses and to Smith's reputation, given that Smith was deprived of his corporate positions, whereas plaintiffs cannot credibly argue that they would have suffered harm from preservation of the status quo because there was a preliminary injunction in place to prevent Smith from selling Equity 11 assets without court approval.

We acknowledge that because the corporation was in chaos at the time of the motion hearing, there was a danger of irreparable harm. However, given the trial court's appointment of a receiver in lieu of issuing a preliminary injunction, the trial court addressed this danger.

Regarding the fourth factor—harm to the public interest—Smith argues that the public interest would not have been harmed by the injunction because the entities at stake are purely private corporations. Given that the corporations involved were purely private, closely held corporations, issuing a preliminary injunction would have presented little risk of harm to the public interest.

Despite the trial court's failure to address the substance of the motion for preliminary injunction, after a review of the arguments, we cannot conclude that the trial court abused its discretion by deciding to appoint a receiver in lieu of granting defendant's motion for a preliminary injunction.

Affirmed, but remanded for the ministerial task of amending the November 18, 2010 order. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan