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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0106**

Enduracon Technologies, Inc.,  
Appellant,

vs.

Northshore Mining Company, et al.,  
Respondents.

**Filed December 23, 2008  
Reversed and remanded  
Worke, Judge**

Lake County District Court  
File No. 38-CV-05-62

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Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and  
Worke, Judge.

**UNPUBLISHED OPINION**

**WORKE**, Judge

On appeal from the entry of stipulated judgments on appellant's breach-of-contract claim and respondents' counterclaim for breach of the parties' contractual profit-sharing

provision and misrepresentation, appellant argues that the district court erred in (1) ruling that the evergreen provision contained in the parties' agreement was unenforceable; (2) ruling that the parties had formed a partnership and then refusing to allow appellant to pursue its claim on the basis of partnership law; and (3) striking appellant's claim for breach of the covenant of good faith and fair dealing. Respondents argue that the district court erred in (1) denying their motion for summary judgment; and (2) ruling that respondents waived their right to profit sharing for 2003. Because the district court erred in finding that the evergreen provision was unenforceable, we reverse and remand for determinations on whether respondents were entitled to refuse to extend the agreement and whether respondents waived their right to profit sharing for 2003. Because the district court erred in finding that the parties formed a partnership, we reverse that ruling and vacate the stipulated judgment.

## **FACTS**

Appellant Enduracon Technologies, Inc. markets and sells additives to concrete companies. Respondent Silver Bay Power Company is a subsidiary of respondent Northshore Mining Company. Respondents operate a coal-burning power plant and mine iron ore. Respondents' power plant produces a by-product called fly ash, which is a valuable additive in concrete.

In April 2002, the parties entered into an "Ash Marketing/Use Agreement" (agreement) that required appellant to market and sell fly ash produced by respondents and to evenly split the profits with respondents. In October 2004, appellant attempted to extend the agreement based on the agreement's term-extension and evergreen provisions.

In December 2004, respondents terminated the agreement due to appellant's actions that were deemed detrimental to respondents.

Appellant filed a complaint alleging that respondents breached the agreement and breached the covenant of good faith and fair dealing. Respondents filed a counterclaim alleging that appellant breached the agreement by failing to pay profit sharing and engaging in other unethical business practices. Both parties moved for summary judgment. Following a hearing, the district court found that the agreement expired on December 31, 2004, and that the evergreen provision was unenforceable. The district court also determined that the parties had formed a partnership. The district court denied both summary-judgment motions.

Appellant filed notice of appeal with this court but because it was unclear whether the underlying proceedings were complete, this court remanded to the district court to make such a determination. In response to this court's order, the district court conducted a status-review conference and issued an order finding that "what remains for trial are those claims . . . for an accounting and payment of [respondents'] share of the proceeds for the period of the agreement, calendar years 2003 and 2004." The district court also found that appellant could present for the jury a claim based in partnership law for damages because of respondents' termination of the agreement.

A jury trial was scheduled to begin in October 2007. On the first day of trial, the district court attempted to resolve the remaining issues. One issue was whether respondents had waived profit sharing for 2003. While conceding that the parties discussed delaying profit sharing until 2004, respondents argued that if profit sharing had

been waived, it was “un-waived” because appellant made a profit-sharing contribution. The district court ruled that 2003 was “out” based on emails between the parties waiving profit sharing for 2003. Appellant argued that, based on partnership law, the business had to be liquidated and that it was entitled to recover its costs. Respondents argued that appellant forfeited this claim because it failed to plead the partnership-liquidation theory. Appellant contended that it did not have to allege its theory in the pleadings because of the court’s order that the parties formed a partnership. The court determined that appellant’s claim to recover costs was not an issue for trial.

Based on the district court’s pretrial rulings and the desire to preserve issues for appeal, the parties reached an agreement that would allow for the entry of judgment. The order for judgment provides that: “[Respondents] are entitled to judgment against [appellant] on their counterclaim in the amount of \$13,001.00. [And] [appellant] is entitled to judgment on its claims against [respondents] in the amount of \$1.00.” Judgment was entered on December 20, 2007. This appeal follows.

## **DECISION**

### ***Evergreen Provision***

Appellant first argues that the district court erred in ruling that the evergreen provision of the agreement was unenforceable. Appellant contends that the agreement allows for automatic renewal. Respondents argue that the evergreen provision does not automatically renew the agreement, but triggers the obligation to renegotiate, which is the equivalent of an agreement to agree. The crux of this appeal is the meaning of the renewal provision.

“The construction and effect of a contract presents a question of law, unless an ambiguity exists.” *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Whether a contract provision is ambiguous is a legal determination. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982). A contract is ambiguous if its language “is reasonably susceptible of more than one meaning,” and if a provision is ambiguous, “courts may resort to extrinsic evidence of intent to construe the contract.” *Id.* Absent ambiguity, however, a court cannot interpret a contract and the maxims of contract interpretation are inapplicable to that contract. *See Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999) (stating “[u]nambiguous contract language must be given its plain and ordinary meaning”); *Colangelo v. Norwest Mortgage, Inc.*, 598 N.W.2d 14, 18 (Minn. App. 1999) (stating that because relevant language was clear, “resort to the maxims of contract construction is not available to create ambiguity”), *review denied* (Minn. Oct. 21, 1999).

The agreement provides that it shall terminate on December 31, 2004. Under the term-extension provision, “[f]or future years, the agreement [] shall be negotiated annually, based on this initial agreement, and per the Evergreen provision.” The evergreen provision states:

[Appellant] has the option of exclusive annual extension after the initial term of the [agreement] with [respondents][.]

....

[Respondents] may [] terminate the agreement under the minimum performance standard requirement as defined or for other reasons such as unethical business practice or other causes and actions that are detrimental to [respondents] in [their] sole discretion.

In October 2004, appellant exercised its option to extend the agreement. In December, respondents terminated the agreement “due to causes and actions that have proven detrimental to [respondents].”

The district court concluded:

The automatic renewal or ‘evergreen’ provision, which reserves a power to renew in [appellant] ‘subject to annual negotiations,’ is unenforceable. Any continuation of the agreement would trigger ‘negotiations,’ which does not create a basis for determining the existence of a breach or for giving an appropriate remedy.

An agreement to agree is not enforceable. *See Ohio Calculating, Inc. v. CPT Corp.*, 846 F.2d 497, 501 (8th Cir. 1988) (stating mere agreement to agree is not enforceable in Minnesota); *see also Lindgren v. Clearwater Nat’l Corp.*, 517 N.W.2d 574, 574 (Minn. 1994) (concluding that “letter of intent” was unenforceable agreement to negotiate); *Mohrenweiser v. Blomer*, 573 N.W.2d 704, 707 (Minn. App. 1998) (referring to “letter of agreement” as “an unenforceable agreement to agree in the future”), *review denied* (Minn. Feb. 19, 1998).

But read as a whole, the evergreen provision gives appellant the option of an exclusive annual extension *based on the initial agreement* and the evergreen provision. Read in conjunction, the agreement can be extended annually based on the initial agreement or be renegotiated. Because the district court erred in finding that the evergreen provision was unenforceable, we reverse and remand for a determination on whether respondents properly terminated the agreement.

## *Partnership*

The parties argue that the district court erred in ruling that they formed a partnership and that all future claims were to be based in partnership law. The district court concluded:

While the agreement has a clause entitled ‘no partnership’ that states that [appellant] ‘shall at all times be an independent contractor,’ the Court finds that there is no dispute of material fact that the relationship between the parties is a joint venture or partnership.

To establish a joint venture there must be (1) contribution of resources by both parties; (2) joint proprietorship and control; (3) sharing of profits, but not necessarily losses; and (4) a contract, express or implied, showing that a joint venture was, in fact, entered into. *Rehnberg v. Minn. Homes*, 236 Minn. 230, 235-36, 52 N.W.2d 454, 457 (1952). Each factor must be established or a joint venture will not be found. *Id.* The finding of the formation of a partnership is based on the facts of each case. *Id.*

The district court did not make any findings supporting the conclusion that the parties formed a partnership, despite the clauses in the agreement that there is “no partnership” and that appellant “shall at all times be an independent contractor.” The district court did find that respondents agreed to sell appellant all of the fly ash generated by the power plant. It would seem appropriate to define appellant as an independent contractor rather than a partner if the fly ash is being sold because when the fly ash is sold there is no property in common as it is transferred from one party to the other. Thus, the district court erred in concluding that the parties formed a partnership and that all future claims be based in partnership law.

### ***Covenant of Good Faith and Fair Dealing***

Appellant also argues that the district court erred in striking its breach-of-the-covenant-of-good-faith-and-fair-dealing claim. Appellant contends that respondents' summary-judgment motion addressed only the breach-of-contract claim and that the district court struck the second count, which was not before the court. Respondents argue that appellant's cause of action requires a contract and because the district court ruled that the agreement terminated, appellant's claim fails.

The district court ruled that the agreement terminated because the evergreen provision was unenforceable and the agreement was not extended. Because we have concluded that the district court erred in determining that the evergreen provision was unenforceable and remand for a determination of whether respondents properly terminated the agreement, appellant may proceed with its breach-of-the-covenant-of-good-faith-and-fair-dealing claim on remand.

### ***Respondents' Summary-Judgment Motion***

Respondents argue that the district court should have granted their summary-judgment motion. Because the court concluded that respondents terminated the agreement, respondents' summary-judgment motion was denied as moot. Because we have concluded that the district court erred in ruling that the evergreen provision was unenforceable, there are genuine issues of fact remaining for trial as to whether respondents properly terminated the agreement. *See State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990) ("On an appeal from summary judgment, we ask two



questions: (1) whether there are any genuine issues of material fact and (2) whether the [district court] erred in [its] application of the law.”).

### ***Waiver of Profit Sharing***

Finally, respondents argue that the district court erred in finding that respondents waived their right to profit sharing for 2003. Respondents contend that the parties agreed to reinstate the original agreement terms after an oral modification and that appellant then made a payment in accordance with those terms. The district court determined that respondents waived profit sharing for 2003 based on emails. Waiver is a voluntary relinquishment of a known right. *Flaherty v. Indep. Sch. Dist. No. 2144*, 577 N.W.2d 229, 232 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). Waiver is mainly an issue of intent, and intent may be inferred from conduct. *Id.* When conduct is so inconsistent with an intent to assert one’s rights as to leave no room for a reasonable inference to the contrary, waiver is determined as a matter of law. *Id.* The record here is insufficient to show intent based on conduct that can be determined as a matter of law. Thus, there is a genuine issue of material fact regarding whether respondents waived profit sharing for 2003.

Based on our foregoing conclusion that the evergreen provision was enforceable, we reverse and remand to the district court for further proceedings on whether respondents (1) properly terminated the agreement based on appellant’s alleged detrimental conduct; (2) breached the covenant of good faith and fair dealing, if they were not entitled to terminate the agreement in 2004; and (3) waived profit sharing for 2003. Because the district court erred in finding that the parties formed a partnership, we

reverse that ruling. Finally, it appears that the parties stipulated to the entry of judgment simply to have the case reviewed by this court. While we do not condone this procedural tactic, we vacate the judgment and remand for further proceedings.

**Reversed and remanded.**