COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2829 **Cir. Ct. No. 2005CV318**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

EP-DIRECT, INC., F/K/A ECONO-PRINT CENTERS, INC.,

PLAINTIFF-APPELLANT,

V.

VIRGINIA FELLMAN, GREGORY FELLMAN, CARRIE FELLMAN-GUSTIN, KATHERINE FELLMAN, AND MEGAN FELLMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Reversed and cause remanded*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 BROWN, C.J. This is a contract dispute. The contract at issue calls for EP-Direct, Inc. to purchase shares of its own stock from the Fellmans. The purchase price for these shares is determined by a formula involving the

shareholder equity of the company, to be calculated "without the effect of any treasury stock." The central dispute in the case is whether certain stock previously bought by the company is "treasury stock." The circuit court held that it is, by the plain language of the contract. The court further held that even if the contract was ambiguous, there was no genuine issue of material fact and the stock was "treasury stock." It therefore granted summary judgment to the Fellmans.

¶2 We reverse and remand. We find it impossible to determine whether the stock at issue is "treasury stock" simply by analyzing the four corners of the contract. The question cannot be answered without resort to extrinsic evidence and, as such, presents an issue of fact. Contrary to the circuit court, we hold the factual question to be genuine because there is some evidence supporting EP-Direct's claim about the parties' intent. Summary judgment is therefore inappropriate.

¶3 Robert Fellman cofounded EP-Direct's predecessor company in 1969. Initially, Robert was the only stockholder in the company, but over the succeeding years, he sold some shares to two company employees and gifted some to his wife, Virginia. On December 31, 1990, Robert retired and signed an agreement to sell his 1855 shares of stock to the company for approximately $2,000,000. The parties dispute whether the stock sale actually occurred on this date; EP-Direct argues that it did, while the Fellmans argue that the transaction closed after the new year on February 11, 1991.

¶4 In any case, it is undisputed that on February 11, 1991, EP-Direct and its stockholders (then including Virginia and the two employees) entered into a stock agreement. This agreement, as subsequently amended, allowed Virginia to

sell her stock back to EP-Direct in 2001. The stock's price was to be calculated according to a formula detailed in an attachment titled "Exhibit A."

¶5 In 1994, Virginia gifted some of her stock to her children. Pursuant to a 1997 amendment to the stock agreement, the children are each entitled to sell up to ten percent of their stock back to the corporation each year. The price for these sales is also to be determined by the formula in Exhibit A.

¶6 Virginia sold her stock back to the company in 2001, and each of the Fellman children sold ten percent of his or her stock to the company in 2002 and 2003. In 2005, EP-Direct contacted Virginia and the children and represented to them that it had erroneously paid more for the stock than Exhibit A dictated. The Fellmans disagreed, and EP-Direct brought this action seeking a judicial determination of the proper purchase price of the stock.

¶7 The dispute in this appeal is thus about the meaning of the pricing formula in Exhibit A and, in particular, one portion of one sentence. The price formula outlined in Exhibit A depends partly on "book value." This is defined as the stockholders' equity in the company, which is to be determined "in accordance with generally accepted accounting principles, but without the effect of any treasury stock (i.e., stockholders' equity excluding any subtraction for treasury stock)." The circuit court agreed with the Fellmans that the phrase "without the effect of any treasury stock" unambiguously meant that the stock EP-Direct bought from Robert should not be subtracted from total stockholder equity in determining book value. The court further held that even if the language at issue were ambiguous, EP-Direct had failed to demonstrate that there was a genuine

issue of material fact with respect to its proper interpretation. The court therefore granted summary judgment to the Fellmans. EP-Direct appeals.[1]

¶8 We review a grant of summary judgment de novo, using the same methodology as the trial court. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is appropriate only if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶59, 261 Wis. 2d 4, 660 N.W.2d 666. The issue in this case is the meaning of a contract. The goal of contract interpretation is to give effect to the parties' intent. ***J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan***, 2002 WI App 183, ¶11, 256 Wis. 2d 807, 649 N.W.2d 694. To discern this intent, a Wisconsin court first looks only to the plain meaning of contractual language, ignoring any extrinsic evidence. *See* ***id.*** If the court can discern a "plain meaning" within the four corners of the contract, the inquiry ends and no extrinsic evidence of the parties' intent may be considered. *See* ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. Whether a contract has one "plain meaning" (and is thus unambiguous) is a question of law, *see* ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990), as is the question of what that meaning is. *See* ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976). Thus, if the contractual language at issue in this case has a "plain meaning," summary judgment is appropriate.

[1] EP-Direct initially sought to adjust the price paid in the already-completed transactions in 2001, 2002 and 2003. It has abandoned this request on appeal.

¶9 Whenever a court finds ambiguity in a contract and moves on to consider extrinsic evidence, the question of the parties' intent becomes one of fact. ***Id.*** at 353. An issue of fact may not be resolved on summary judgment unless the facts are such that no reasonable jury could find for the opposing party. *See* ***Nielsen v. Spencer***, 2005 WI App 207, ¶10, 287 Wis. 2d 273, 704 N.W.2d 390. If the summary judgment materials are subject to conflicting interpretations or reasonable persons might differ as to their significance, then summary judgment cannot be granted. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). Thus, in this case, if we conclude that the relevant language of Exhibit A is susceptible of more than one meaning, summary judgment is inappropriate unless we find that no view of the evidence can support one party's preferred meaning.

¶10 Turning to the first step of the analysis, both parties identify the phrase "without the effect of any treasury stock" as the crucial language. Webster's defines "treasury stock" as "issued stock reacquired by a corporation and held as an asset." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2434 (1993). According to the parties and their accountants, ordinarily, in calculating stockholder equity, only the value of outstanding shares is considered. Thus, if a company reacquires some of its own stock from a stockholder, that stock is no longer outstanding and the company's stockholder equity (and book value) is reduced by the value of the reacquired stock.

¶11 Thus, the Fellmans argue, the meaning of the statement that shareholder equity is to be calculated "without the effect of any treasury stock" is that the stock the corporation purchased from Robert is to be treated as if it were still outstanding in calculating book value. Further, the Fellmans note, the "effect" of treasury stock is ordinarily to diminish the book value of a company. It is this

"effect" that Exhibit A directs must be disregarded, and so the Fellmans urge that it does not matter if the stock that Robert sold back to the company is subsequently cancelled; we must still treat it as if it were outstanding in calculating the book value of the corporation for the purposes of determining the price for the shares that the Fellman children sell back to the company.

¶12 In response, EP-Direct notes that on December 31, 1990, the day that Robert signed the agreements to sell his shares back to the company, WIS. STAT. § 180.58(1) (1987-88)[2] was on the books (it was repealed effective the next day as part of a wholesale recreation of WIS. STAT. ch. 180, *see* 1989 Wis. Act 303, §§ 13 and 88). That statute read:

> **Cancellation of shares by redemption. (1)** When shares of a corporation are redeemed by the corporation, *the redemption shall effect a cancellation of such shares* and such shares shall be restored to the status of authorized but unissued shares. The stated capital of the corporation shall be deemed to be reduced by that part of the stated capital which was, at the time of such cancellation, represented by the shares so canceled.

Sec. 180.58(1) (emphasis added). EP-Direct claims that by virtue of this statute, the stock sold by Robert was never "treasury stock" to begin with, because it was extinguished at the moment the company purchased it. The phrase "without the effect of any treasury stock" thus does not mandate that the value of Robert's shares continues to be considered as part of the company's book value when calculating the purchase price of the Fellman children's shares.

¶13 EP-Direct alternatively argues that even if Robert's shares were considered treasury stock after they were purchased, the corporation may later

[2] All references to the Wisconsin Statutes are to the 1987-88 version.

cancel them, so that they no longer have any "effect" to disregard; in that case, their value would not need to be considered in determining the company's book value.

¶14 The Fellmans in turn reply that, though the documents effecting Robert's retirement and the selling of his shares back to EP-Direct were signed and dated December 31, 1990, the transaction did not actually occur until the new year when WIS. STAT. § 180.58(1) had been repealed (all parties agree that under the law as it has existed since 1991, the shares Robert sold back to EP-Direct *were* treasury stock). Further, they note that the statute by its terms governed only a company's acquisition of shares by "redemption," and argue for various reasons that the transaction between Robert and EP-Direct was not a redemption, rendering the statute inapplicable.

¶15 Both parties support their arguments about the precise legal consequences of the disputed language with further argument concerning case law, statutory construction, and generally accepted accounting principles. We will not delve into the details here and will simply say that the parties have convinced us that the contract is susceptible of at least two reasonable meanings with respect to the intended treatment of Robert's shares.[3] It must be remembered that, in our search for "plain meaning," courts are not at liberty to consider the factual

[3] For example, EP-Direct argues that WIS. STAT. § 180.58(1) controls the case because, by its operation, Robert's shares were cancelled on repurchase and never became treasury stock. But even if we ignore the Fellmans' contrary (and reasonable) arguments about the effect of the statute and accept that the shares were cancelled by operation of law and thus never existed as "treasury stock," that does not answer the ultimate question in this case: did the parties intend to include the value of Robert's shares in "shareholder equity" for determining the sale price of the Fellmans' stock? The actual existence or nonexistence of the shares is not the issue, because the shares need not exist under Wisconsin law for the parties to have intended to include their value in the calculation of shareholder equity.

circumstances surrounding the sale. *See* ***J.G. Wentworth S.S.C.***, 256 Wis. 2d 807, ¶11. Thus, for example, the fact that EP-Direct consistently treated Robert's shares as "treasury stock" on its books and in its dealings with the Fellmans until 2004, though it is evidence in favor of the Fellmans, is not properly part of the inquiry into "plain meaning." The same is true of the fact that, at the time the parties added the provision on treasury stock to Exhibit A, Robert's shares were the only stock in existence that might possibly be considered "treasury stock."

¶16 We may look only to the disputed language itself, and its context within Exhibit A and the stock agreement as a whole. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶¶28-29, 264 Wis. 2d 617, 665 N.W.2d 857. The language itself, "without the effect of treasury stock," does nothing to help us decide whether Robert's shares were "treasury stock." Having examined Exhibit A and the rest of the stock agreement, we do not find anything that further contextualizes the disputed language. Even the statement that Exhibit A (with the exception of the treatment of treasury stock) is to be construed in accordance with generally accepted accounting principles is of no help, since there is nothing in the record that would allow us to discern what the relevant principles are. We hold the language of the contract ambiguous.

¶17 As such, the issue of whether the parties meant to include Robert's shares within the definition of "treasury stock" becomes one of fact requiring extrinsic evidence. *See* ***Patti***, 72 Wis. 2d at 353. The Fellmans argue that even accepting the ambiguity of Exhibit A, they are still entitled to summary judgment because both parties acted in accord with the Fellmans' interpretation of the contract in the years before this lawsuit. The circuit court also relied on this fact in holding that even if Exhibit A is ambiguous, there is no genuine issue of fact as to the parties' intent. But a party does not prevail on summary judgment simply

by marshalling the evidence in support of its position on an issue of material fact. Rather, the question is whether the evidence can reasonably be interpreted to support the *opposing* party's factual claim; if it can, the issue of fact is genuine and must be decided by factual findings, which cannot be made on summary judgment.[4] *See* ***Kraemer Bros.***, 89 Wis. 2d at 567. The affidavit of Ronald Langacker, the president of the company and one of the signatories of the stock agreement, states that he had a different idea of the meaning of Exhibit A than the one the Fellmans advocate. Although the weight of the evidence mustered by the Fellmans may make tough going for EP-Direct on remand, it is for the trier of fact to determine which interpretation reflects the intent of the parties at the time of contracting.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[4] It may be acceptable for parties to stipulate that the trial court may make findings of fact based upon competing affidavits without benefit of a trial. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 690, 550 N.W.2d 134 (1996) (Brown, J., concurring). Having examined the record, we see no indication that this was done here.