IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JOHN D. HOLLINGER, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN L. HOLLINGER AS TRUSTEE,

Appellant,

v. Case No. 5D19-2163

MICHAEL R. HOLLINGER, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF NOMINAL DEFENDANT REX ENGINEERING CORPORATION, RHONDA L. HINDS, AND RHONDA L. HINDS & ASSOCIATES CPA, PA,

Appellees.
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Opinion filed March 20, 2020

Nonfinal Appeal from the Circuit Court for Brevard County,
Charles Roberts, Judge.

David G. Larkin and Jesse L. Kabaservice, of Fallace & Larkin, L.C., Melbourne, for Appellant.

Michael R. Riemenschneider and Jeffrey L. DeRosier, of Riemenschneider, Wattwood & DeRosier, P.A., Melbourne, for Appellee Michael R. Hollinger, Individually and Derivatively on Behalf of Nominal Defendant Rex Engineering Corporation.

No Appearance for Other Appellees.

LAMBERT, J.

Appellant, John D. Hollinger, individually and as the personal representative of the estate of his father, John L. Hollinger, appeals the partial summary judgment divesting him of two shares of stock in the company known as Rex Engineering Corporation that had been previously gifted to him by his father. The trial court found that this stock transfer "failed" because the father had not complied with the terms of a Buy-Sell Agreement ("the Agreement") that Appellant; his brother, Michael R. Hollinger, ("Appellee"); and their father had entered into regarding the disposition of stock in this corporation. Determining that Appellee has failed to show that there was no disputed issue of material fact as to whether the terms of the Agreement applied to the father's gift of the two shares of his stock to Appellant, and, secondly, because Appellee did not conclusively refute Appellant's affirmative defenses to Appellee's complaint or show that they were legally insufficient, we reverse the partial summary judgment and remand for further proceedings.

Rex Engineering Corporation was founded in 1974 by the parties' father. The corporation, based in Titusville, Florida, specializes in the manufacture of gear motors, gear boxes, gear trains, and valve actuators. Over the years, this family business became very successful. Appellant and Appellee, along with their father, were officers and directors in this corporation. By 2018, each brother owned forty-nine shares of stock in the corporation, which equated to each having a 49% ownership interest. Their father owned the other two shares of the corporate stock or 2% of the company. Several years earlier, in order to "promote the successful and harmonious ownership and management of the corporation," the three of them and the corporation had executed the Agreement, setting forth certain restrictions regarding the transfer of shares of stock in the corporation.

Paragraph 2 of the Agreement is pertinent to these proceedings. It described the mechanism to be applied if a shareholder desired to dispose of any or all of his shares of corporate stock during his lifetime. The Agreement provided that the shareholder must first offer in writing to sell the shares to the corporation at a purchase price per share no greater than that set forth in Paragraph 4 of the Agreement, and on terms of purchase no less favorable than those described in Paragraph 5 of the Agreement. Upon receipt of an offer, the corporation then had thirty days to accept it in writing. Acceptance required the approval of a majority of the voting shares of stock outstanding, other than those held by the offering shareholder.

Paragraph 2 of the Agreement further provided that if the corporation failed to accept the offer within the thirty-day period, the shares may thereafter be disposed of during the next sixty days free of any of the restrictions for disposing of stock under the Agreement, with one caveat. If the corporation had not accepted the offer to purchase, any disposition of the stock by the shareholder within the following sixty-day period required that the purchase price for the stock being disposed "shall not be less than and the terms of purchase for such shares shall not be more favorable than the purchase price and the terms of purchase . . . that would have been applicable to the Corporation had it purchased the same." Lastly, Paragraph 3 of the Agreement provided that "[u]pon the death of any Shareholder, the deceased Shareholder's probate or trust estate shall sell to the Corporation . . . all Shares owned by the deceased Shareholder at his death."

The genesis of the dispute between the parties here began in 2018. That year, the father suffered a serious medical condition. Thereafter, on May 16, 2018, at Appellee's behest, the father signed a handwritten, notarized document, in which he

"assign[ed] [his] 2 shares of Rex Engineering stock to [Appellant and Appellee] each receiving one share." This purported disposition of the father's stock, engineered by Appellee, was done without Appellee attempting to comply with the aforementioned terms of Paragraph 2 of the Agreement.

During the following months, conflict developed between Appellee and his father and Appellant. At some point, Appellee's wife, who worked for the corporation, was fired from her job. Thereafter, on October 9, 2018, Appellee sued Appellant, as well as his father, the corporation, and the corporation's accountant, alleging causes of action for conspiracy, breach of fiduciary duty and conversion by the father, and the "wrongful distribution" of corporate funds, among others. Appellee also sought to dissolve the corporation, alleging that he and Appellant "are each the owner of 50% of the company's common stock" and that the company is now deadlocked.

Three days after he filed suit, Appellee's employment with the corporation was terminated. Then, approximately two weeks later, on October 24, 2018, the father, with the assistance of the attorney who prepared the Agreement, conveyed his two shares of stock in the corporation to Appellant by signing the actual stock certificate and delivering it to Appellant. On January 7, 2019, the father passed away.

The instant motion for partial summary judgment was filed by Appellee in April 2019. Although the operative complaint at the time alleged that Appellee and Appellant each owned 50% of the corporate stock, Appellee now sought a determination from the trial court that the father's October 2018 transfer of his two shares of stock to Appellant was void because he did not first offer in writing to sell the shares to the corporation under Paragraph 2 of the Agreement. Appellee asserted that this failure meant that Appellant

still owned only his original forty-nine shares of corporate stock and that the father remained the owner of his two shares of stock. However, as the father was no longer living, Appellee contended that under Paragraph 3 of the Agreement, the father's probate or trust estate must now sell the two shares to the corporation.

Shortly after filing his motion, Appellee filed a second amended complaint. Among other claims, Appellee pleaded to rescind his father's conveyance of his two shares of stock to Appellant based on the father's alleged incapacity to make this transaction, as well as Appellant having exerted undue influence over the father. Appellee also alleged various causes of action for damages, dissolution of the corporation, and the entry of a declaratory judgment that Appellant and the father had disregarded the Agreement when the father conveyed his two shares of stock in October 2018. Notably, Appellee no longer alleged that he and Appellant each owned 50% of the corporate stock.

Appellant, in his individual and representative capacities, filed an answer and affirmative defenses to Appellee's second amended complaint. Pertinent here, Appellant alleged that Appellee was estopped from claiming that the Agreement applied to their father's October 2018 gift of his two shares of stock because in May 2018, Appellee had caused their father to assign the same two shares of stock to both of them without attempting to comply with the terms of the Agreement that he now seeks to apply against Appellant. Appellant also asserted affirmative defenses of waiver and that Appellee's own breach of the Agreement precluded him from seeking relief against Appellant for the same purported breach. Appellee did not file a reply seeking to avoid these affirmative defenses. *See* Fla. R. Civ. P. 1.100(a) ("If an answer or third-party answer contains an

affirmative defense and the opposing party seeks to avoid it, the opposing party must file a reply containing the avoidance.").

Returning to the motion for partial summary judgment, Appellee filed summary judgment evidence with the court consisting of the Agreement, his affidavit averring that he was never notified as to the father's subsequent October 2018 transfer of the two shares of stock to Appellant and therefore was not given an opportunity to vote on the transfer, the father's May 2018 transfer document of the two shares of stock to the parties, plus a written valuation as to his 49% ownership interest in the corporation.

Appellant then filed summary judgment evidence opposing the motion,[1] including his own affidavit and that from the attorney who drafted the Agreement. These affidavits, though in somewhat different terms, each disputed Appellee's now-stated interpretation that the Agreement applied to gifts of the stock among family member shareholders. Appellant also filed the transcript of his deposition where he testified that he understood the terms of the Agreement applied to a shareholder's sale of the corporate stock to an "outsider," and not to gifts between family shareholders. Finally, Appellant filed excerpts from Appellee's deposition in which Appellee had testified that, in his view, the purpose of the Agreement was to ensure that the corporate stock stayed with existing shareholders and thus its terms would only apply "if you're going to try to get rid of the shares outside of the family members."

In the partial summary judgment now on review, the trial court found that the Agreement applied to gifts of the corporate stock, and that because the father did not first

[1] *See* Fla. R. Civ. P. 1.510(c) (permitting the adverse party to the summary judgment motion to provide notice of any summary judgment evidence on which the adverse party relies).

offer in writing to sell these two shares to the corporation consistently with the terms of the Agreement, his "attempted transfer" of the two shares to Appellant had "failed," resulting in Appellant and Appellee each owning forty-nine shares of stock in the corporation. The court ordered that the father's two shares of stock be sold to the corporation by his trust estate.

Prior to addressing the merits of the appeal, Appellee has raised the question of our jurisdiction to presently consider the partial summary judgment. Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii) provides that district courts of appeal have jurisdiction over nonfinal orders that determine "the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve, or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment." Here, the trial court's partial summary judgment divested Appellant of possession of the two shares of corporate stock that had been delivered to him, by gift, from his father. Thus, because "[s]hares of stock are personal property," *see Cruising World, Inc. v. Westermeyer*, 351 So. 2d 371, 373 (Fla. 2d DCA 1977), we have jurisdiction. *See also Sticky Holsters, Inc. v. Wagner*, 277 So. 3d 1067, 1068 (Fla. 2d DCA 2019) (exercising jurisdiction under rule 9.130(a)(3)(C)(ii) over nonfinal order granting partial summary judgment that set aside purported transfer of shares of stock).

When considering a motion for summary judgment, a trial court must resolve whether the pleadings and the summary judgment evidence on file show that there is no "genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law." *See* Fla. R. Civ. P. 1.510(c). Thus, the trial court's task when ruling on the motion is not to determine the issue of fact, but to ascertain whether a genuine

issue of any material fact exists. *See Jack Drury & Assocs., Inc. v. City of Fort Lauderdale*, 203 So. 2d 361, 363 (Fla. 4th DCA 1967). If a genuine issue of material fact exists, then summary judgment is inappropriate. *Id.* To that end, the burden is placed on the party moving for summary judgment "to prove conclusively the nonexistence of any genuine issue of material fact." *City of Cocoa v. Leffler*, 762 So. 2d 1052, 1055 (Fla. 5th DCA 2000) (citing *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966)). Furthermore, the party moving for summary judgment "must also disprove the affirmative defenses or establish that they are insufficient as a matter of law." *T-Quip of Fla., Inc. v. Tietig*, 207 So. 3d 958, 960 (Fla. 5th DCA 2016) (citing *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So. 2d 784, 786 (Fla. 5th DCA 2003)).

On appeal, when considering whether the moving party below has met its aforementioned burdens and summary judgment was thus properly entered, the reviewing court must "consider the evidence contained in the record in the light most favorable to the non-moving party." *See Aaron v. Palatka Mall, L.L.C.*, 908 So. 2d 574, 578 (Fla. 5th DCA 2005) (citing *Krol v. City of Orlando*, 778 So. 2d 490, 492 (Fla. 5th DCA 2001)). Our review of a summary judgment entered by the trial court is de novo. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

Under these principles, we conclude that the partial summary judgment should not have been granted. First, Appellee has not conclusively shown that the Agreement applied to the father's gift of the two shares of stock. While we recognize that "[w]hen the words of a contract are clear and unambiguous, the contract must be enforced as written," *Dames v. 926 Co.,* 925 So. 2d 1078, 1080 (Fla. 4th DCA 2006), a separate rule of construction relating to contractual terms requires "courts to read provisions of a contract

harmoniously in order to give effect to all portions thereof." *Lowe v. Winter Park Condo. Ltd. P'ship*, 66 So. 3d 1019, 1021 (Fla. 5th DCA 2011) (quoting *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (further citations omitted)). Stated slightly differently, courts, when possible, "should give effect to each provision of a written instrument in order to ascertain the true meaning of the instrument." *Velleff v. Velleff*, 236 So. 3d 1179 (Fla. 5th DCA 2018) (quoting *Inter-Active Servs., Inc. v. Heathrow Master Ass'n*, 721 So. 2d 433, 435 (Fla. 5th DCA 1998)). Applying these rules of construction to all of the provisions contained in Paragraph 2 of the Agreement leads us to conclude that the Agreement contains a latent ambiguity as to whether it is or could be applicable to gift transfers of corporate stock.

Admittedly, Paragraph 2 of the Agreement provides the mechanism for the disposal of stock by a living shareholder during his lifetime without limitation only to the sale, and not to a gift, of the corporate stock. In entering partial summary judgment, the trial court appeared to have applied the parol evidence rule in its interpretation of Paragraph 2 in concluding that it unambiguously applies to "any disposition of the stock, including gifts."

"The parol evidence rule provides that a complete and unambiguous written agreement may not be contradicted or modified by extrinsic evidence." *Whiting v. Whiting*, 160 So. 3d 921, 924 (Fla. 5th DCA 2015) (citing *Polk v. Crittenden*, 537 So. 2d 156, 159 (Fla. 5th DCA 1989)). There is, however, an exception to the parol evidence rule when an agreement contains a latent ambiguity. *Id.* (citing *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 55–56 (Fla. 1st DCA 2005)).

"A latent ambiguity exists where the language of an agreement is facially clear but an extrinsic fact or extraneous circumstance creates a need for interpretation or reveals an insufficiency in the contract of a failure to specify the rights or duties of the parties in certain situations." *Taylor v. Taylor*, 183 So. 3d 1121, 1122 (Fla. 5th DCA 2015). Under such circumstances, parol or extrinsic evidence is required to allow the trial court to interpret the writing properly. *Id.* at 1123 (citing *Riera v. Riera*, 86 So. 3d 1163, 1166 (Fla. 3d DCA 2012)).

The attempt to apply the terms of Paragraph 2 to the facts here show the latent ambiguity. Had the father first offered the two shares of stock to the corporation for purchase, as Appellee argues that he was required to do under Paragraph 2, then, under the Agreement, the corporation would have had thirty days to accept the offer to purchase the stock. But to do so would have required the approval of the majority of the voting shares outstanding, other than the father's two shares. Such a vote by the parties, as owners of the remaining shares of stock, would have resulted in a forty-nine shares to forty-nine shares deadlock. Since the corporation would not have purchased the father's two shares of stock, then, under Paragraph 2, the disposition of the father's two shares would have fallen outside of its restrictions, except for the requirement that a "purchase price" for the two shares of stock would be no less than the price for which the corporation could have purchased the stock. However, because the transfer was a gift to Appellant from his father and not a "purchase," there would have been no "purchase price," and the Agreement is unclear or ambiguous as to how, what, or whether Appellant would have had to pay anything or how the father could consummate this gift to Appellant.

Moreover, the summary judgment evidence itself also supports Appellant's argument that it was not the intent of the parties that the Agreement was to be applied to the gift of corporate stock that occurred here. First, the father, at Appellee's request, had assigned his two shares of stock to Appellee and Appellant without any effort by Appellee to comply with Paragraph 2 of the Agreement, evidencing that Appellee did not interpret the Agreement to apply to dispositions of corporate stock within the family without consideration. *See Danforth Orthopedic Brace & Limb, Inc. v. Fla. Health Care Plan, Inc.*, 750 So. 2d 774, 776 (Fla. 5th DCA 2000) ("[T]he actions of the parties may be considered as a means of determining the interpretation that they themselves have placed upon the contract." (quoting *Lalow v. Codomo*, 101 So. 2d 390, 393 (Fla. 1958))).

Second, in their depositions, both parties essentially testified that they understood that the Agreement was intended to apply only to stock transfers to non-family members, and did not restrict or apply to stock transfers between existing family member shareholders. This evidence that neither Appellant nor Appellee understood or intended the Agreement to apply to the type of transaction at issue, construed most favorably to Appellant as the non-moving party, militates against the entry of the partial summary judgment. At the very least, it raises a disputed material issue of fact. *See Menck v. Driscoll*, 531 So. 2d 1057, 1057 (Fla. 3d DCA 1988) ("[W]hen conflicting legal inferences, particularly concerning the intent of the parties, may be drawn from an ambiguous legal document, or as to the effect even of undisputed facts, the issue is not properly subject to summary adjudication, and may be resolved only after trial." (quoting *Kirsh v. Mannen*, 393 So. 2d 63, 64 (Fla. 3d DCA 1981))).

Lastly, Appellee failed to meet his burden to conclusively negate Appellant's affirmative defenses. The result of Appellee's decision not to file a reply to Appellant's affirmative defenses was that the affirmative defenses were denied. *See Roman v. Bogle*, 113 So. 3d 1011, 1014 (Fla. 5th DCA 2013) ("When a defendant files affirmative defenses and the plaintiff does not reply, the affirmative defenses are deemed denied and therefore false."). Under these circumstances, "[w]here the movant merely denies the affirmative defenses and the affidavit in support of summary judgment only supports the allegations of the complaint and does not address the affirmative defenses, the burden of disproving the affirmative defenses has not been met." *Mehdi*, 854 So. 2d at 786. Appellee's affidavit in support of his summary judgment motion only went to the allegations of the complaint, and neither it nor his other summary judgment evidence attempted to negate Appellant's affirmative defenses or demonstrate their legal insufficiency.

Accordingly, we reverse the partial summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

EVANDER, C.J., and EISNAUGLE, J., concur.