

STATE OF MICHIGAN
COURT OF APPEALS

BARTON M. BERMAN,

Plaintiff/Counterdefendant-
Appellant,

v

COMERICA BANK and VRB, INC.,

Defendants/Counterplaintiffs-
Appellees.

UNPUBLISHED

March 29, 2002

No. 224845

Oakland Circuit Court

LC No. 99-014131-CK

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

In this contract dispute plaintiff appeals as of right the trial court's order dismissing his complaint pursuant to a grant of summary disposition in favor of defendants under MCR 2.116(C)(10).¹ We affirm.

In his complaint plaintiff alleged that he had a right of first refusal, pursuant to a September 26, 1990 Amended and Restated Shareholders' Agreement (hereinafter "1990 shareholders' agreement"), and that defendants breached that right when they sold shares of Amurcon Corporation stock without affording plaintiff the option of exercising his purported right of first refusal. Before the completion of discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), which the trial court granted on the basis that plaintiff had waived any right of refusal he may have had when he signed a 1993 waiver letter.

We review the trial court's grant of summary disposition de novo to determine if defendants were entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because defendants' motion was brought under MCR 2.116(C)(10), we must evaluate the substantively admissible evidence presented to the trial court in determining if a genuine issue of a material fact was shown. *Id.* at 121.²

¹ Defendants' countercomplaint was voluntarily dismissed, without prejudice, subject to reinstatement if plaintiff's claims are reinstated.

² Although not dispositive to the appeal, we note in passing that plaintiff has cited a host of cases, including *Rizzo v Kretschner*, 389 Mich 363; 207 NW2d 316 (1973), for the proposition
(continued...)

Because the 1990 shareholders' agreement plainly contains a right of first refusal provision, not a redemption provision, we hold that the trial court erred in concluding, as a matter of law, that the right of first refusal was waived by plaintiff's statement in the October 15, 1993, letter that, "I hereby waive any rights to redeem the stock." Indeed, we find that the October 15, 1993, letter, examined as a whole, is supportive of plaintiff's position that the letter was addressing the redemption of collateral under MCL 440.9506,³ rather than the right of first refusal contained in the 1990 shareholders' agreement. In general, "where terms having a definite legal meaning are used in a written contract, the parties to the contract are presumed to have intended such terms to have their proper legal meaning, absent a contrary intention appearing in the instrument." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999), quoting *Nationwide Mut Fire Ins Co v Detroit Edison Co*, 95 Mich App 62, 64; 289 NW2d 879 (1980). The term "redeem" has a specific legal meaning that does not include a contractual right of first refusal. See Black's Law Dictionary, p. 1278 (6th Ed., 1990). We therefore conclude that the trial court incorrectly viewed the 1990 shareholders' agreement as the only possible source for plaintiff to acquire the stock and in thereafter concluding that any right under that agreement was clearly and unambiguously waived by the October 15, 1993, letter. Accordingly, defendants were not entitled to summary disposition under MCR 2.116(C)(10) on the basis of this waiver theory.

Nonetheless, defendants advance several arguments on appeal, which they maintain constitute an alternative basis upon which to affirm the trial court's decision. A defendant may urge alternative grounds for affirmance without filing a cross-appeal. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). We find two of these arguments persuasive, and therefore, affirm the trial court's decision granting defendants' motion for summary disposition.

Defendants argue that the trial court erred in finding that there was a genuine issue of material fact relative to whether plaintiff had a right of first refusal under the 1990 shareholders' agreement after he no longer owned the subject stock. We agree. Although the trial court correctly observed that inconsistencies or contradictions in a contract may create an ambiguity, *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984), a court should read the contract as a whole and attempt to apply the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). Technical or strained constructions of contract language are to be avoided. *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996) "If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Whether contract language is ambiguous is a question of law for the court. *Port Huron Ed Assoc v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996).

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that a motion under that subrule is only properly granted when it is impossible for the claim to be supported by evidence at trial. However, *Rizzo* and its progeny no longer sets forth the proper standard for summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121.

³ We note that this article was repealed and amended by 2000 PA 348, effective July 1, 2001. However, the pre-amendment statutory provisions are applicable to the case at bar.

We hold that the 1990 shareholders' agreement fairly admits of only one interpretation and, hence, is not ambiguous. Examined as a whole, the 1990 shareholders agreement cannot reasonably be construed as permitting nonshareholders to exercise a right of first refusal. On its face, the agreement reflects that it was entered into with the corporation by its only two shareholders at that time, plaintiff and Fred Erb (Erb). The agreement's reference as to what constitutes the "Berman Group" is found within Section 2, the directors provision, and provides:

So long as Berman and his Permitted Transferees (the "Berman Group") own the Berman Stock and Erb and his Permitted Transferees (the "Erb Group") own the Erb Stock, there shall be only two (2) directors of Amurcon, and the Berman Group and the Erb Group shall each vote their shares of the Stock such that one person selected by a Majority In Interest (defined below) of the Berman Stock and one person selected by a Majority In Interest of the Erb Stock shall each be elected a director of Amurcon.

It is undisputed that at the time the 1990 shareholders agreement was entered into plaintiff was one of two shareholders, and that to be a "permitted transferee," the person or entity would have to have had Amurcon shares transferred to them. Compare Section 2 and Section 6. Furthermore, under Section 2, the number of directors remains at two so long as plaintiff owns stock.

The right of first refusal which plaintiff seeks to enforce is contained in Section 7 of the 1990 shareholders' agreement. Section 7(a) provides in clear and unequivocal terms that only Amurcon and "each of its other shareholders" are entitled to notice of a bona fide offer to purchase stock:

(a) In the event any members of the Berman Group or the Erb Group receives a bona fide written offer (the "Offer") for all or any portion of the Stock (the Stock subject to the Offer being referred to as the "Subject Stock") from a third party which such shareholder (the "Selling Shareholder") desires to accept, the Selling Shareholder shall deliver written notice (the "Offer Notice") of such Offer to Amurcon *and each of its other shareholders*, together with a copy of the Offer. Delivery of the Offer Notice shall be deemed a representation by the Selling Shareholder that, to the best knowledge of the Selling Shareholder, the Offer is bona fide in all respects. [Emphasis added.]

Thus, contrary to plaintiff's argument and pursuant to Section 7(b), only those persons who receive the Offer Notice under Section 7(a) can exercise the right of first refusal.

In light of the foregoing clear and unambiguous language, and the undisputed material facts presented to the trial court, we hold that plaintiff did not hold any contractual right of first refusal. It was undisputed that plaintiff was not a shareholder at the time defendants received the offer to purchase the stock, and hence plaintiff was not entitled to an Offer Notice under Section 7(a). Accordingly, plaintiff had no right of first refusal, and his complaint asserting a breach of such a right was properly dismissed.

Furthermore, even if we were to conclude that plaintiff held a contractual right of first refusal under the 1990 shareholders' agreement, he waived that right when he signed the October

15, 1993, promissory note, which was executed as part of the conveyance of plaintiff's shares of Amurcon stock to defendants in exchange for the cancellation of plaintiff's debt. The promissory note states, in pertinent part, that:

upon the occurrence of any of these events (each a "Default"), [Comerica Bank] may at its option and *without prior notice to the undersigned* (or any of them), declare any or all of the Indebtedness to be immediately due and payable (notwithstanding any provisions contained in the evidence of it to the contrary), *sell or liquidate all or any portion of the Collateral* [Emphasis added.]

Thus, under the language of this document, plaintiff acknowledged and agreed that defendants were entitled to "sell or liquidate all or any portion of the [stock]" without prior notice to plaintiff.

Lastly, because the 1990 shareholders' agreement is unambiguous, we hold that summary disposition was not premature. Plaintiff failed to show that further discovery stood a fair chance of uncovering support for his position on this issue, *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), particularly when the contract language in dispute was not ambiguous. Hence, while we disagree with the trial court's reasoning, we affirm the grant of summary disposition under MCR 2.116(C)(10) because the right result was reached. *Ireland v Edwards*, 230 Mich App 607, 625 n 16; 584 NW2d 632 (1998).

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray