STATE OF MICHIGAN

COURT OF APPEALS

990 INVESTORS, LLC,

Plaintiff-Appellant,

v

DAVID LEE COMMUNICATIONS, INC., and DAVID LEE SCHUEHRER,

Defendants-Appellees.

UNPUBLISHED
April 5, 2002

No. 227284
Genesee Circuit Court
LC No. 99-066553-CK

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying plaintiff summary disposition and granting defendants summary disposition in this action for specific performance. We reverse and remand.

I. Basic Facts and Procedure

At all times relevant to this action, WTRX 1330 AM was owned by defendant David Lee Communications, Inc. (DLC). Defendant David Lee Schuehrer is the sole shareholder in DLC. In 1991, WTRX ceased broadcasting due to financial difficulty. On January 19, 1994, DLC entered into a time brokerage agreement (the TBA) with Saginaw Bay Broadcasting Corp. (SBBC). Under the TBA, SBBC agreed to provide WTRX necessary funds to resume operation in exchange for the right to program the station. SBBC was also granted a right of first refusal (the RFR) with respect to the sale or transfer of WTRX. In general, the RFR granted SBBC the right to purchase the station for 18% below the price offered to defendants in a "bona fide offer[.]" The RFR was assignable and was to remain in effect until one year after termination of the TBA.[1]

[1] The RFR states, in part:

> **1. <u>Sale or Transfer of Station.</u>** During the term of this Right of Refusal, neither Lee nor Stockholder shall sell or transfer, or enter into any obligation to sell or transfer, the Station without first complying with the Right of Refusal

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provisions set forth in Section 2, below. As used in this section, the terms "sell" or "transfer" include any sale, gift, exchange, pledge, hypothecation, encumbrance, transfer in trust, or contract or option to sell or transfer any legal or equitable interest in and to the Station where such action or transaction involves either an assignment of the broadcast license of the Station, or a transfer of control of the corporate license of the Station requiring prior FCC approval by the filing of an FCC application on current FCC Form 314 or 315.

2. Right of First Refusal.

(a) Within twenty-four (24) hours of receipt by Lee or Stockholder of a bona fide offer (which term is defined below) for the sale or transfer of the Station which Lee or Stockholder plan to accept (the "Offer"), Lee and/or Stockholder shall give written notice to SBBC of such Offer (the "Sale Notice"). The Sale Notice shall state the name of the offeror (the "Offeror") and all of the essential terms of the Offer and shall be accompanied by a true copy of the Offer. A bona fide offer shall mean, for the purposes of this Right of Refusal, any offer submitted in writing and signed by a third person containing all of the following information:

(i) The third person's full name, address and agreement to purchase Lee's stock or any of the assets of the Station, including, but not limited to, the Station License and any assets used or useable in the operation of the Station; and

(ii) The total purchase price, the method of payment, and all other terms and details of the offer.

(b) For a period of thirty (30) days after it receives the Sale Notice (the "Refusal Period"), SBBC shall have a right to make and have accepted an alternative offer (the "Alternative Offer") with a purchase price which is eighteen percent (18%) less (the "Reduction") than stated in the Offer. The Reduction shall apply to each of the financial terms of the Offer, including, but not limited to, the amount of any escrow deposit, any cash payment, and any promissory note, so that each payment under the Alternative Offer shall be eighteen percent (18%) less than each such payment stated in the Offer. With respect to all other material terms of the Offer, the Alternative Offer shall match such terms.

(c) In the event SBBC fails to exercise its right to make an Alternative Offer within the Refusal Period, Lee and/or Stockholder may sell or transfer the Station to the Offeror if (i) such sale is on the terms and conditions set forth in the Sale Notice, and such sale occurs no later than thirty (30) days after the date upon which all required government approvals to the sale of the Station to Offeror, including FCC consents, have been granted and have become final, or (ii) twelve (12) months after the date of the Sale Notice, whichever date is earlier. "Final" means no longer subject to judicial or administrative review, reconsideration or rehearing.

On July 16, 1999, WCVA, Inc., (WCVA)[2] submitted to Schuehrer and DLC a letter expressing the intent to acquire WTRX. The ensuing due diligence review uncovered the existence of the RFR. Thereafter, WCVA allowed its letter of intent to purchase WTRX to expire. On August 7, 1999, WCVA obtained an option to purchase the RFR from SBBC. On September 14, 1999, Schuehrer notified SBBC that DLC was canceling the TBA and had received an offer from Rainbow Radio (Rainbow) to purchase "the Station." Defendants' "Notice per 'Right of First Refusal'" provided that Rainbow's offer was for "all of the licenses, authorization and other assets used or useful [sic] in the operations of the radio station WTRX." It is undisputed that SBBC and plaintiff were also advised of a separate offer from New Tower, Inc. (New Tower) to purchase the land, building and towers used by WTRX.

On September 29, 1999, SBBC advised Schuehrer and DLC that the September 14 notice did not comply with the requirements of the RFR because it did not "provide the required Sale Notice with respect to the proposed sale of the Station's transmitter site, towers and buildings pursuant to a Purchase and Sale Agreement ('PSA') between you and [New Tower]." SBBC also asserted that "cross-contingencies" in the Rainbow and New Tower deals, including lease and closing provisions, made it "impossible to ascertain what the proposed transaction between DLC, [Schuehrer], Rainbow and New Tower actually will entail." In response, defendants claimed the notice of sale was proper under the RFR and real property individually owned by Schuehrer and merely leased by DLC was not subject to the RFR.

On October 12, 1999, WCVA assigned the RFR to plaintiff. The next day, plaintiff submitted an offer to purchase the assets mentioned in the Rainbow and New Tower deals at an 18% discount. Alternatively, plaintiff offered to exercise the RFR in connection with the assets of the Rainbow deal and to submit to arbitration or litigation the issue whether the real property described in the New Tower deal was subject to the RFR. After expiration of thirty days from defendants' notice of sale, plaintiff filed the present action for specific performance. Plaintiff sought to require defendants to accept its October 13, 1999 offer.

Defendants filed a motion for summary disposition, arguing that the plain language of the RFR does not apply to the sale of property individually owned by Schuehrer. Plaintiff's motion for summary disposition argued that defendants are obligated under the RFR to accept plaintiff's offer. Plaintiff claimed Schuehrer signed the RFR in his individual capacity and, therefore, assets owned by Schuehrer that are used or useable by WTRX are subject to the RFR. The trial court concluded that the RFR does not cover real property individually owned by Schuehrer, and issued an order denying plaintiff's motion for summary disposition and granting summary disposition for defendants. Plaintiff's subsequent motion for reconsideration was denied.

II. Analysis

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[2] Plaintiff operates WDEO AM 990, which is an affiliate of WCVA.

Plaintiff argues that the trial court erred in granting summary disposition for defendants because there are questions of fact regarding whether Schuehrer's individually owned assets are subject to the terms of the RFR. We agree.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Moreover, the interpretation of contractual language is a question of law that is reviewed de novo on appeal. *Bandit Industries, Inc v Hobbs International Inc*, 463 Mich 504; 511; 620 NW2d 531 (2001). In reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

"The primary goal in interpreting contracts is to determine and enforce the parties' intent." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Id*. The language of the contract is to be given its ordinary, plain meaning and technical, constrained constructions should be avoided. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991). The construction of the terms of a contract is generally a question of law for the court; however, where a contract's meaning is ambiguous, the question of interpretation should be submitted to the factfinder. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996); *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997) A contract is ambiguous when its words can reasonably be understood in different ways. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; __ NW2d __ (2001); *D'Avanzo, supra*. The fact that a contract is inartfully worded or clumsily arranged does not render it ambiguous if it fairly admits of one interpretation. *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

In the present case, it is undisputed that Schuehrer owns the land and building where WTRX is located in his individual capacity. Plaintiff contends that Schuehrer signed the RFR individually and that Schuehrer's personal assets that are "used or usable" by the station are therefore subject to the terms of the RFR. Defendants concede that Schuehrer signed the RFR individually, but maintain that he did so only to insure that any transfer of his DLC stock would conform to the terms of the RFR.

Reading the RFR as a whole, we cannot conclude as a matter of law that Schuehrer was a party to the RFR only with respect to his transfer of DLC stock. The RFR does not expressly state that Schuehrer was made a party to the agreement only with respect to his transfer of stock. While the opening paragraph of the RFR refers to Schuehrer as "Stockholder," it merely indicates that Schuehrer is to be identified as "Stockholder" throughout the RFR. Schuehrer signed the RFR without any designation that he was signing only in his capacity as stockholder. Significantly, the definition of "bona fide offer" within the RFR is sufficiently broad to include assets that may be individually owned by Schuehrer. The RFR broadly defines "bona fide offer," in part, as an offer containing an "agreement to purchase Lee's stock or any of the assets of the

Station, including, but not limited to, the Station License and *any assets used or useable in the operation of the Station."* (Emphasis added.) The term "Station" is not defined in the RFR.[3] While the definition of "bona fide offer" does not expressly mention Schuehrer's individually owned assets other than his stock,[4] it does not expressly exclude such assets. The phrase "any assets used or useable in the operation of the Station" is sufficiently broad to include assets individually owned by Schuehrer that are used or useable in the operation of WTRX.[5]

Under these circumstances, we conclude that the RFR is ambiguous in regard to whether Schuehrer's individually owned assets that were used or useable in the operation of the station are subject to the terms of the RFR. Schuehrer's obligation under the RFR can reasonably be understood in different ways. *Universal Underwriters, supra*; *D'Avanzo, supra*. Consequently, there are questions of fact in regard to whether Schuehrer's individually owned assets are subject to the RFR and defendants were not entitled to judgment as a matter of law on plaintiff's action for specific performance. *Port Huron Education Ass'n, supra*; *D'Avanzo, supra*. We reverse the trial court's order granting summary disposition for defendants and remand for further proceedings. Given our conclusion, we need not address plaintiff's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Brian K. Zahra

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[3] The recitals indicate that radio station WTRX (AM) is to be identified as the "Station" throughout the RFR. However, the term is not specifically defined.

[4] We conclude that the term "Lee's stock" used in the "bona fide offer" clause of the RFR refers to Schuehrer's individual stock, notwithstanding the fact that the RFR defines the term "Lee" to be DLC. "Lee's stock" must refer to the DLC stock owned by Schuehrer given that the corporation (DLC) does not own stock and Schuehrer is DLC's sole stockholder.

[5] Defendants narrowly interpret the RFR as only including Schuehrer's asset of stock; however, the RFR fairly admits of a more broad interpretation. Thus, while defendants ask this Court to infer that Schuehrer's individually owned assets are not subject to the RFR, such an inference is unreasonable under a plain reading of the entire RFR. Defendants' interpretation is one plausible interpretation of the terms; however, interpreting the RFR to include Schuehrer's individually owned assets is equally plausible. *Universal Underwriters, supra*; *Michigan Twp, supra*.