STATE OF MICHIGAN

COURT OF APPEALS

FENTON FAMILY PARZ LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v

EDGAR M. FENTON and EDGAR M. FENTON COMPANY,

Defendants-Appellants.

UNPUBLISHED
November 16, 2006

No. 270425
Oakland Circuit Court
LC No. 2005-067555-CK

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendants appeal as of right, challenging the trial court's orders granting plaintiff's motion for summary disposition and denying defendants' cross-motion. The trial court determined that defendant Edgar M. Fenton Company (EMFCO) forfeited its 50-percent interest in plaintiff, a Michigan partnership, to another partner, Ronald Parz, and that defendants were no longer affiliated in any manner with plaintiff. We reverse and remand for further proceedings.

Plaintiff commenced this action, alleging that EMFCO forfeited its entire interest in plaintiff by failing to timely make a required $400,000 capital call payment to Saddle Creek Associates (SCA), a partnership in which plaintiff held a 25-percent interest. Relying on a prior Release and Settlement Agreement (RSA) that governed the parties' obligations in the event SCA made a capital call demand on plaintiff, the trial court agreed and granted plaintiff's motion for summary disposition.

As this Court explained in *O'Donnell v Garasic*, 259 Mich App 569, 572-573; 676 NW2d 213 (2003):

> A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed 'in the light most favorable to the party opposing the motion. Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact,

> and the moving party is entitled to judgment as a matter of law. [Internal quotations and citations omitted.]

Resolution of this case depends on the interpretation of paragraph 10 of the RSA. In resolving this question, this Court begins by considering the basic rules regarding contract interpretation. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994).

> "We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." [*Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947), quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941).]

As the Court stated in *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996):

> The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. [Citations omitted.]

A contract is ambiguous if "its words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982).

In this case, the trial court determined that, under paragraph 10 of the RSA, EMFCO forfeited its interest in plaintiff because it did not timely make a required $400,000 capital call payment to SCA. We agree that this case is governed by paragraph 10, but disagree with the trial court's conclusion that this paragraph is clear and unambiguous.

Paragraph 10 of the RSA states that EMFCO was required to provide the full amount of the required funds to SCA "at least five business days prior to the date pursuant to Section 2.4(b) of the July 14, 1997 Saddle Creek Associates Restated Partnership Agreement, as it may be amended from time to time." Because the RSA refers to § 2.4(b) of the SCA partnership agreement, it is necessary to consider that section in the interpretation of paragraph 10 of the RSA. Where one writing references another instrument for additional contract terms, the two writings should be read together. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998).

Section 2.4(b) of the SCA partnership agreement governs an SCA partner's additional funding obligations, and provides in pertinent part:

> If a Partner or a Partner's Principal fails to perform its or his Funding Obligations and if such failure continues for a period of ten (10) days after written notice from the other Partner, then such Partner shall be in default. In such event the provisions of Section 10 shall become applicable.

We agree with the trial court that paragraph 10 can reasonably be understood as referring to the date the capital call payment was due. But because the phrase "the date" is immediately followed by the phrase "pursuant to Section 2.4(b)" of the SCA partnership agreement, without any intervening punctuation, we believe that paragraph 10 can also reasonably be understood as referring to a date prescribed in § 2.4(b) of the SCA partnership agreement. Under this latter interpretation, if plaintiff failed to make the capital call payment when due, then upon written notice from another partner, EMFCO would have been obligated to make the payment within five business days before the expiration of the ten-day period after the written notice. If EMFCO failed to make payment within those five days, it would be in breach of paragraph 10 of the RSA, and plaintiff's other partners could make the payment to SCA in the remaining five-day period to avoid being in default under the SCA partnership agreement. It is undisputed, however, that plaintiff made the capital call payment on the due date, and therefore did not fail to perform its funding obligation.

Because we conclude that paragraph 10 can reasonably be understood in different ways, its interpretation is a question of fact and summary disposition was inappropriate.

Furthermore, we believe that the trial court should consider on remand whether the clean hands doctrine precludes the equitable relief plaintiff seeks. A party seeking the aid of equity must come in with clean hands. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 462-463; 646 NW2d 455 (2002). The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. *Id.*; *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975). In determining whether a plaintiff comes before the court with clean hands, a primary factor to consider is whether the plaintiff sought to mislead or deceive the other party. *Isbell v Brighton Area Schools*, 199 Mich App 188, 190; 500 NW2d 748 (1993). If there are any indications of overreaching or unfairness on the plaintiff's part, equitable relief will not be granted. *Id.*

In this case, Ronald Parz and EMFCO, as partners, were in a fiduciary relationship. *Penner v DeNike*, 288 Mich 488, 490; 285 NW 33 (1939). As the Court explained in *Penner*,

> [a] partnership is presumed to be based upon mutual trust and confidence and the utmost good faith is requisite in the relations between the partners. This is the rule in this country. Copartners are accountable between themselves as fiduciaries, and under all circumstances, it is the duty of each of the copartners to render true and full information to the other. [*Id*. (citations omitted).]

Parz had a duty to disclose all known information that was significant and material to partnership affairs. *Band v Livonia Assoc*, 176 Mich App 95, 112-113; 439 NW2d 285 (1989).

Here, the evidence could permit a conclusion that Parz acted in bad faith in paying the capital call. Paragraph 10 of the RSA authorized Parz to pay his proportionate share of the capital call, but he paid the full amount. Moreover, paragraph 10 provides that if a contribution is made, Parz was required to notify EMFCO. However, it is undisputed that Parz never informed defendant Fenton of his intention to pay on the capital call, and instead informed Fenton that he would *not* make the full payment. There was also conflicting evidence concerning whether Parz ever informed defendant Fenton of the May 31, 2005, meeting, or

whether he may have misrepresented the purpose of the meeting. Finally, it is undisputed that Parz failed to inform defendant Fenton that SCA had set a May 31, 2005, 2:00 p.m., deadline for payment. Because there remained a genuine question whether Parz breached his fiduciary duties to EMFCO and attempted to unfairly deprive EMFCO of its interest in plaintiff, we direct the trial court to determine whether the equitable component of plaintiff's claim is barred by the clean hands doctrine.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen