STATE OF MICHIGAN

COURT OF APPEALS

WOLVERINE PIPE LINE COMPANY, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 25, 2008
v	No. 277462 Washtenaw Circuit Court
MARATHON ASHLAND PETROLEUM, L.L.C., Defendant-Appellee/Cross-Appellant.	LC No. 05-000906-CZ

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right from the trial court's order granting in part defendant's motion for summary disposition. We affirm. Defendant cross appeals the same order, which granted in part plaintiff's cross-motion for summary disposition. We reverse. The matter is remanded for entry of an order granting defendant's motion for summary disposition.

I. Background

In 1999, defendant and Ultramar Diamond Shamrock Corporation entered into a contract under which defendant acquired certain pipeline assets. Because defendant was not interested in owning the pipeline assets, it assigned the assets to plaintiff. Concomitantly, plaintiff and defendant entered into a 20-year Throughput and Deficiency Agreement (T&D Agreement) under which defendant agreed to ship certain amounts of product through the pipelines to ensure a minimum annual revenue for plaintiff. The contract was to begin on the Definitive Start-Up Date. A Definitive Start-Up Date of January 1, 2003, was agreed to after the contract was executed.

Under the contract, defendant guaranteed plaintiff a minimum annual revenue of $14 million during the first four contract years and $12 million thereafter, referred to as the Incremental Revenue Obligation (IRO). The IRO was to partially offset the financial risks incurred by plaintiff. Defendant also agreed to an annual inflation adjustment of the IRO. Section 3.03 of the T&D Agreement provided:

> The Incremental Revenue Obligation shall be adjusted as of September 1 of each Year, beginning with the second Year, based on the change in the

> Escalator, the components of which are as published in the immediately preceding June of that calendar year. For purposes of this Section 3.03, the components of the base Escalator shall be as published in June, 1999. An example of the application of the Escalator is shown on Exhibit D.

The term "Year" was defined in the contract as "a period commencing on the Definitive Start-Up Date and any subsequent anniversary thereof and running for 365 days thereafter (except when there is a February 29 in any period, in which even such Year shall have 366 days)."

The T&D Agreement also provided that, in addition to the IRO, defendant would pay a Base Revenue Obligation (BRO) of $3.2 million. The BRO represented the revenues historically enjoyed by plaintiff as a result of the product volume defendant shipped through its pipelines. The BRO was also subject to an annual adjustment. Section 5.01 of the T&D Agreement provided, in part:

> The Base Revenue Obligation shall be adjusted effective as of September 1 of each Year based on a factor equal to the percentage change in the simple average of the full non-incentive Tariff Rates to the Obligation Destinations between July 31 of that Year and July 31 of the last most recent Year.

In August 2005, plaintiff filed the instant complaint for declaratory relief and breach of contract. Plaintiff alleged that defendant failed to pay it certain amounts due under the T&D Agreement because of a dispute regarding when the adjustments to the IRO and BRO were to occur. The dispute regarding the IRO adjustment concerned whether the effective date of the adjustment was January 1 or September 1. The parties agreed that 2004 was the first year the adjustment was effective. The dispute regarding the BRO adjustment concerned the first year it was to be effective, either 2003 or 2004. The parties filed cross-motions for summary disposition. Plaintiff argued that the annual effective date of the adjustment to the IRO was January 1, while defendant argued that it was September 1. Plaintiff also argued that the first adjustment to the BRO was to have been made on September 1, 2003, while defendant argued that it was to have been made on September 1, 2004.

The trial court found that § 3.03 was unambiguous. It stated that there was no language in the provision to support plaintiff's interpretation that the effective date of the IRO adjustment was January 1. Rather, the provision clearly stated that the IRO was to be adjusted "as of September 1 of each Year," "Year" being a defined term. The trial court stated that the phrase "as of" served to denote the date the adjustment was to be made. Therefore, it held that the IRO adjustment was effective each September 1, beginning in 2004.

The trial court found that some ambiguity existed in § 5.01. It stated that the contract definition of "Year" did not create any confusion if it was only applied to the beginning of the sentence. However, "Year" was also used at the end of the sentence. If the contract definition was applied there as well, 2002 could not be a "Year" because the contract did not begin until 2003. Thus, the first two years that could be averaged to calculate the escalator were 2003 and 2004. Because of the ambiguity, the trial court looked to the intent of the parties by comparing §§ 3.03 and 5.01. It found that the absence of the phrase "beginning in the second Year" in § 5.01, which was present in § 3.03, was purposeful. It also found significant that the word "each" immediately preceded the word "Year" in the phrase "effective as of September 1 of each

Year" in § 5.01, which clearly suggested an intent to adjust the BRO each year. Therefore, the trial court held that the first BRO adjustment was effective September 1, 2003. Accordingly, the trial court denied in part and granted in part both parties' summary disposition motions.

In a final order, the trial court awarded plaintiff damages on its breach of contract claim regarding the BRO adjustment. Both parties appeal.

II. Standards of Review

We review de novo a trial court's decision on a motion for summary disposition. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

We also review de novo issues of contract interpretation, including whether a contract is ambiguous. *Klapp*, *supra*.

> In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties. [*In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (footnotes and citations omitted).]

III. The IRO Adjustment

The trial court held that the IRO adjustment provision, § 3.03, was unambiguous and clearly stated that the adjustment was to be effective on September 1. Plaintiff argues that, if the parties had intended for an adjustment to be effective on September 1, that is what they would have stated—just as they did in Section 5.01. Thus, plaintiff claims, the IRO adjustment is to be made on September 1, but it is effective on January 1. Accordingly, the first IRO adjustment should have been calculated on September 1, 2004, but then made retroactive to January 1, 2004. Defendant argues that, if the parties had intended for an adjustment to be effective on January 1 of the same year it was made—and thus be retroactive—that is what they would have stated. Instead, the contract clearly provides that the annual adjustment occurs on September 1. The trial court agreed with defendant, as do we.

Again, Section 3.03 of the T&D Agreement provided:

> The Incremental Revenue Obligation shall be adjusted as of September 1 of each Year, beginning with the second Year, based on the change in the Escalator, the components of which are as published in the immediately preceding

> June of that calendar year. For purposes of this Section 3.03, the components of the base Escalator shall be as published in June, 1999. An example of the application of the Escalator is shown on Exhibit D.

Contrary to plaintiff's argument, the provision does not provide that the adjustment is to be effective on January 1 and, thus, retroactive—those terms are not even in the provision. To render plaintiff's interpretation we would have to interject and read words into the provision that were not agreed to by the parties. This we will not do. We will not rewrite an unambiguous provision under the guise of interpretation. *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). A contract provision is ambiguous only if its terms are susceptible to more than one meaning, or when two provisions irreconcilably conflict. *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Here, by the plain language of the provision, the IRO adjustment occurs on September 1. There are no terms in the provision providing that the adjustment is retroactive to January 1. And it has not been argued that an irreconcilable conflict exists between this provision and any other in the contract. Therefore, § 3.03 is not ambiguous and the trial court properly granted defendant's motion for summary disposition on this issue.

IV. The BRO Adjustment

Defendant argues that the trial court erred in finding that the first BRO adjustment was effective as of September 1, 2003. We agree and conclude that the first BRO adjustment was to be effective as of September 1, 2004. Based on the provision's plain language, the first year the adjustment was to be made depended on the first "last most recent Year" based on the method prescribed for calculating the escalator. According to the contract's own definition of "Year," 2004 was the first year that the BRO was to be adjusted. We do not place the same significance on the word "each" in the phrase "effective as of September 1 of each Year" as the trial court did. Because the phrase "last most recent Year" indicates which contract year the BRO adjustment is first effective, the word "each" at the beginning of the sentence simply indicates that the BRO adjustment is to be made annually thereafter. The trial court's interpretation necessarily means that it found that the capitalization of "Year" in the phrase "last most recent Year" was a typographical error. Such disregard for the contract's express language is unnecessary.

And we disagree that the extrinsic evidence cited by plaintiff creates a latent ambiguity. While the BRO represents an existing revenue stream for plaintiff and, absent the contract, it would have been entitled to the adjustment in 2003, there are a myriad of reasons plaintiff could have been willing to forego a year's adjustment. Simply because plaintiff would have been entitled to the adjustment in 2003 had it not entered into the contract with defendant does not mean that it did not intend to forego it under the executed contract.

Plaintiff also cites a PowerPoint presentation slide regarding the BRO adjustment but the slide is shorthand. There is no testimony from its creator explaining its meaning. Additionally, we find no merit to plaintiff's contention that use of a non-capitalized "year" in referring to the "last most recent Year" indicates that the word was not intended to be capitalized in the contract. If there was to be such parity, the slide would have simply stated that the adjustment was each "Year," instead of "YEAR."

Accordingly, the trial court erred in granting summary disposition in favor of plaintiff on this issue and awarding plaintiff damages on its breach of contract claim regarding the BRO adjustment.

Affirmed in part, and reversed in part. The matter is remanded for entry of an order granting defendant summary disposition. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra