STATE OF MICHIGAN

COURT OF APPEALS

WEST TOWN LINE ASSOCIATES, LLC, and CAPITOL PARK ASSOCIATES, LLC, Plaintiffs-Appellants,	UNPUBLISHED March 9, 2010
v	No. 288384 Oakland Circuit Court
MACK & MELDRUM ASSOCIATES, LLC, Defendant-Appellee.	LC No. 2008-091245-CK

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(8). Because the agreements at issue are ambiguous and because plaintiffs set forth a claim upon which relief could be granted, we reverse.

Defendant is a member both plaintiffs' LLC's, West Town Line Associates ("WTA") and Capitol Park Associates ("CPA"). Each plaintiff has the same members: defendant Richard Lewiston, and Richards-Pitt LLC. As part of its membership with each plaintiff (the operating agreements/contracts are identical), defendant agreed to contribute funds to plaintiffs on a pro rata basis when necessary for plaintiffs to conduct their business and affairs. Between June 2006 and April 2008, Lewiston allegedly loaned plaintiffs over $2 million, interest-free, to prevent them from defaulting on their bank loans. In April 2008, Lewiston issued a "capital call" to the members requesting that they contribute additional funds to, in part, pay back the loans he had made to the companies. Being a member, Lewiston's share was converted to his capital account. Richards-Pitt contributed his share, but defendant did not. According to plaintiffs, defendant's inaction amounts to a breach of the parties' contracts.

In lieu of answering plaintiffs' complaint, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(5) (lacking legal capacity to sue) and (8) (failure to state a claim). The trial court denied defendant's motion based upon MCR 2.116(C)(5), but found that summary disposition was, in fact, proper pursuant to MCR 2.116(C)(8). This appeal followed.

We review de novo the grant or denial of a motion for summary disposition. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). A motion under subrule

(C)(8) is properly granted if no factual development could justify recovery under the plaintiff's claim. *Id.*

Here, while defendant requested summary disposition based upon MCR 2.116(C)(8), in rendering its decision, the trial court reviewed the parties' contracts and necessarily determined whether plaintiffs' actions were violative of the contract terms. Thus, we also review the trial court's order of summary disposition under MCR 2.116(C)(10).

A motion filed under subrule (C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The motion is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The interpretation of a contract is a question of law that, like a motion for summary disposition, is subject to de novo review. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). This Court reads the agreement as a whole and attempts to apply the plain language of the contract itself to enforce the parties' intent. *Id.* "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." *Phillips v Homer*, 480 Mich 19, 24; 745 NW2d 754 (2008). If, however, the contractual language is ambiguous, it presents a question of fact to be decided by a jury. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW2d 217 (2007). A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), or "when [a provision] is *equally* susceptible to more than a single meaning," *City of Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

At issue here is the meaning of section 4.2 of the parties' operating agreements. While plaintiffs initially couch the issue as whether the operating agreement unambiguously permits capital calls, defendant never argued, and the trial court never ruled, that capital calls were or were not allowed. Instead, the trial court appears to have ruled that the capital call at issue was impermissible under the specific facts before it because the capital call was to be used for a purpose not allowable under another provision in the operating agreements.

In order to form the LLC plaintiffs, defendant and the other members were required to contribute a certain amount of initial capital. Section 4.2 provides for further funding as follows:

> All further funds required by the Company for the conduct of its business and affairs shall be from time to time, either contributed pro rata by the Members to the Company, or secured for the Company by the Members (it being understood that (a) all such funds may be borrowed for, and in the name of, the Company, under the direction of the Members, from banks, and/or others, at usual and customary interest rates, and such borrowed funds shall be deemed direct obligations of the Company, and shall not be deemed to be capital contributed by the Members, and (b) if a guaranty is required in connection with any such

> borrowing by the Company, such guaranty shall be given and furnished by the Members in proportion to their respective interests). The Managing Member shall give each Member at least fifteen (15) days' prior written notice of the need for such further and additional funding.

The above provision clearly provides for two mechanisms through which the company can obtain funds: either contributions by the members (a request for which is termed a "capital call") or borrowing funds. One of the members, Lewiston, claims to have made loans totaling over $2 million to plaintiffs. Because section 4.2 provides that funds may be borrowed in the name of the company "from banks and/or others" if these loans were, in fact, made by Lewiston (he attached a capital call letter to his complaint detailing the loans he made), he could be construed as an "other" from whom plaintiffs borrowed funds.

Moreover, the operating agreements provide that the managing member (defined in the agreements at 1.7 as "Neil Spizizen, or Kevin Spizizen, or Lewiston, or Balberman, or Murray C. Pitt") has the authority:

> To borrow money on either a secured or unsecured basis and on either a recourse or non-recourse basis for use in the business of the Company (it being understood that such financing may be obtained from independent parties, from persons directly or indirectly related to the Company, and/or from any of the Members). . .

Lewiston, as managing member, could thus borrow money for use in the business of the company from any of the members, presumably including him, as there is no exclusion. The operating agreements do not differentiate between lenders, and there is no assertion that the alleged loans made by Lewiston were pro rata contributions by him as a member.

We then again look to section 4.2 for an indication as to how the loans are to be treated. This section provides that "such borrowed funds shall be deemed direct obligations of the Company, and shall not be deemed to be capital contributed by the Members." Borrowed funds then, clearly would be the responsibility of plaintiffs, and borrowed funds are not to be considered a capital contribution (i.e. the person securing the funds cannot claim the loan as his or her capital contribution). The trial court's decision was apparently based upon a finding that plaintiffs were attempting to shift the responsibility of their debt repayment to defendant, and the members were using the capital call as a vehicle through which to repay the loans. If the call were honored, the end result would obviously be that the members would ultimately repay the loans through their capital contributions. The question is, though, whether the capital call was an impermissible way to get around the provision that borrowed funds are the "direct obligation of the company." To answer this question, we cannot look at this phrase in isolation.

The agreements clearly contemplate that further funds may be required, and if funds are required for the companies to conduct their business and affairs, there are only two specified ways in which the funds can be obtained- loans and capital contributions by the members. The request for funds from the members (including defendant) was permitted under the operating agreements and, it could be argued, that use of the word "shall" requires contributions by the members when the plaintiffs require funds to conduct its business and affairs. The key question, then, is whether the repayment of a loan is construed as "business and affairs."

Importantly, the provision allowing for capital contributions is not limited to a specific purpose. Instead, plaintiffs "for the conduct of its business and affairs" can use capital contributions. This is broad language and it is undefined in the agreements. Accordingly, we may look to dictionary definitions to determine the ordinary meaning of words. "Conduct" means "to direct the course of; manage or control" (American Heritage Dictionary, 4th ed.). "Business" is defined in Black's law Dictionary (7th ed.) as "A commercial enterprise carried on and for profit," and in the American Heritage Dictionary as "commercial, industrial, or professional dealings" or "an affair or matter." "Affair" is defined as "transactions and other matters of professional or public business" (American Heritage Dictionary, 4th ed.).

To the extent that repayment of a loan could be considered conducting "business and affairs", the provision allowing for capital calls to be used to obtain funds to conduct business and affairs would be inconsistent with the provision providing that borrowed funds are the direct obligation of the companies. Because capital contributions can be used to conduct business and affairs, and the repayment of company debts can also be construed as conducting "business and affairs", an end result could be that the capital contributions collected from members would be used to repay company debts, thereby indirectly shifting the burden of debt repayment to the members. The provisions are thus ambiguous. As a result, a question of fact to be decided by a jury exists (*Laurel Woods Apartments*, 274 Mich App at 638) and summary disposition pursuant to MCR 2.116(C)(10) is inappropriate. Further, plaintiffs having claimed that because the agreements indicate that necessary funds "shall" be contributed by the members on a pro rata basis and defendant, being a member, did not contribute his share, stated a claim upon which relief could be granted. Summary disposition pursuant to MCR 2.116(C)(8) was thus also inappropriate.

Defendant also argues that, based upon the Limited Liability Company Act, dismissal would also have been appropriate pursuant to MCR 2.116(C)(5). This claim was addressed and rejected by the trial court and defendant did not file a cross-appeal on the decision. However, the general rule is that a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court or tribunal. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

Defendant directs us to two provisions in the Michigan Limited Liability Company Act (MCL 450.4101 *et seq*.) that deny plaintiffs the legal capacity/standing/authority to sue. The first provision, MCL 450.4405 states:

> (1) Except as otherwise provided in the articles of organization or an operating agreement, voting by managers shall be as provided in this section.
> (2) If management of a limited liability company is delegated to managers under section 402 [MCL 450.4402] and the limited liability company has more than 1 manager, each manager has 1 vote and the vote of a majority of all managers is required to decide or resolve any difference on any matter connected with carrying on the business of the limited liability company that is within the scope of the managers' authority.
> (3) If management of a limited liability company remains in the members, section 502 [MCL 450.4502] applies to voting by the members.

Defendant specifically states that subsection (2), above is applicable.

Section 5.1(m) of the operating agreements provide that the managing member shall have the power and authority to "do any and all acts, conduct all proceedings, and execute, acknowledge, deliver, and perform all contracts, rights and privileges. . .that the Managing Member may deem necessary or appropriate to conduct the business of the Company, or to carry out the purposes of the Company." The agreements define the managing member as "Neil Spizizen, or Kevin Spizizen, or Lewiston, or Balberman, or Murray C. Pitt. . .either of whom, acting alone, is the Managing member in the Company. . ." Thus, any member acting alone, may be the managing member, and the managing member may essentially do anything he may deem appropriate to conduct the business of the companies. It could be argued that initiating a lawsuit to have a member perform his contractual obligations to plaintiffs is appropriate to conduct the business of the companies. Lewiston, as the managing member could thus initiate the lawsuit without a vote under the express operating agreement language.

Additionally, use of the word "the" rather than "a" before managing member in the operating agreements and reference to managing "member" rather than "members" suggests that while any one member, acting alone can be managing member, only one can be acting as managing member at a time. Because the management of the limited liability companies is delegated to only one manager at a time, MCL 450.4405(2) is arguably inapplicable and thus provides no basis for summary disposition pursuant to MCR 2.116(C)(5).

Defendant next directs us to MCL 450.4502(5) and (8) as a basis for its assertion that plaintiffs lack the capacity to sue.

MCL 450.4502 provides, in relevant part, as follows:

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> (5) Unless authorized in advance by an operating agreement, a transaction with the limited liability company or a transaction connected with the conduct or winding up of the limited liability company in which a manager of the limited liability company has a direct or indirect interest or a manager's personal use of property of the limited liability company may be authorized or ratified only by a vote of the disinterested members entitled to vote. The manager shall disclose all material facts regarding the transaction and the manager's interest in the transaction or all material facts about the manager's personal use of the limited liability company's property before the members vote on that transaction or use.

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> (8) Unless the vote of a greater percentage of the voting interest of members is required by this act, the articles of organization, or an operating agreement, a vote of a majority in interest of the members entitled to vote is required to approve any matter submitted for a vote by the members.

First, MCL 450.4502(8) does not provide for *when* or under what circumstances a vote must take place. It simply states the requirement for approval *if* a matter is submitted for a vote

by the members. The matter of the lawsuit was not submitted for a vote by the members. Thus, MCL 450.4502(8) has no bearing on the issue before us.

Second, plaintiffs argued, and the trial court found, that the lawsuit is not a "transaction" as referenced in MCL 450.4502(5). We agree.

"Transaction" is not defined in the Michigan Limited Liability Company Act. Where a statutory term is undefined, the term is given meaning as understood in common language, taking into consideration the text and subject matter relative to which it is employed. *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 367; 579 NW2d 374 (1998). When determining the ordinary meaning of an undefined word or phrase, consulting a dictionary is also appropriate. *Stanton v City of Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002).

"Transaction" is defined in Black's law Dictionary (7th ed.) as "the act or instance of conducting business or other dealings," "something performed or carried out; a business agreement or exchange." A lawsuit is not a business agreement, nor is it an act of conducting business. Further, it is customary to refer to transactions as leading to or being the underlying basis of a lawsuit. For example, "[T]he consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." *People v Garcia*, 448 Mich 442, 487; 531 NW2d 683 (1995); "This is a broad rule of required joinder and it is predicated on the theory of requiring the parties to settle all matters arising out of the transaction or occurrence in one lawsuit." *Hughes v Medical Ancillary Services, Inc*, 88 Mich App 395, 399; 277 NW2d 335 (1979); "After being inspected in the several lawsuits which grew out of this transaction. . ." *Woodhull v Whittle*, 63 Mich 575, 579; 30 NW 368 (1886).

Here, the lawsuit is the result of an initial transaction between Lewiston and the plaintiffs wherein he allegedly loaned them money, and his subsequent issuance of a capital call to fund the companies so that the loans could be repaid. Because the lawsuit is not a "transaction" with plaintiffs in which Lewiston has a direct or indirect interest, MCL 450.4502 provides no basis to conclude that plaintiffs have no standing or legal capacity to initiate the lawsuit, and summary disposition under MCR 2.116(C)(5) is unwarranted. Again, the operating agreements specifically provide Lewiston, or whoever is acting as the managing member, with the authority to do anything he feels is necessary for the companies.

Finally, defendant contends that even if the claims are deemed derivative in nature, summary disposition pursuant to MCR 2.116(C)(5) would nevertheless be appropriate. However, plaintiffs never claimed that the action was derivative in nature and, in fact, have consistently asserted that the action was direct. The trial court also did not address this issue. Thus, defendant's argument is irrelevant and need not be addressed. Because summary disposition was inappropriate, we also need not consider plaintiffs' remaining argument that they should have been allowed to amend their complaint after entry of the summary disposition order.

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

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto