STATE OF MICHIGAN

COURT OF APPEALS

OFFICE OF FINANCIAL & INSURANCE REGULATION,

Petitioner-Appellee,

v

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent,

and

MICHAEL E. TOBIN, ELLEN M. DOWNEY, FRANCIS P. DEMPSEY, MICHAEL A. MCCOLLUM, BETH L. MCCROHAN, and LESLIE J. GOLA,

Appellants,

and

TRAPEZA CDO IX LTD, TRAPEZA CDO X LTD, and HOLDCO ADVISORS LP,

Appellees.

UNPUBLISHED
September 9, 2014

No. 312470
Ingham Circuit Court
LC No. 10-000397-CR

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

This case arises from the 2010 collapse of Respondent American Community Mutual Insurance Company (ACMI). On April 8, 2010, the circuit court entered a Rehabilitation Order, naming petitioner-appellee, Office of Financial and Insurance Regulation (OFIR), as Rehabilitator of ACMI (Rehabilitator). On various dates between April 16, 2010 through December 2011, appellants, former officers and directors of ACMI, were either terminated by the Rehabilitator or voluntarily resigned their positions. Thereafter, appellants submitted claims to the Rehabilitator seeking severance pay benefits under their former executive employment

agreements with ACMI. The Rehabilitator denied the claims, finding that they were barred by MCL 500.8137(4), which limits payouts to former officers to "payments for services rendered" prior to entry of the rehabilitation order. The circuit court affirmed the Rehabilitator's denial of the claims. Appellants appeal the circuit court's order as of right. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Following significant financial losses in 2008 and 2009, in April 2010, the Rehabilitator filed a stipulated petition and proposed rehabilitation order in the circuit court to place ACMI into rehabilitation. Prior to entry of the petition, ACMI, through its board of directors, approved a resolution authorizing ACMI to "consent to any relief sought by [the Rehabilitator] or ordered by a court of competent jurisdiction. . . ." The circuit court entered the stipulated order on April 8, 2010. The order provided, in part, that the Rehabilitator would not be responsible for paying severance pay to the company's officers under the officers' employment contracts with ACMI. The order further provided that, "[s]ubject to any contractual rights and applicable law, upon entry of this Order all employment contracts of [ACMI's] officers . . . and employees are terminated."

Following entry of the rehabilitation order, on April 16, 2010, the Rehabilitator discharged former CEO, appellant Michael Tobin. The remaining five officers signed retention bonus plans, but eventually, between August 2010 and December 2011, four of the officers resigned and the other officer was permanently laid off.

In January and April 2012, four appellants[1] submitted claims to the Rehabilitator for payment of severance benefits under their executive employment agreements with ACMI. The Rehabilitator denied the claims, stating that they were barred by MCL 500.8137(4), which provides in pertinent part as follows:

> Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers *are limited to payment for services rendered prior to the issuance of an order of rehabilitation* . . . [MCL 500.8137(4) (emphasis added).]

The Rehabilitator determined that appellants' claims were barred under the statute because it determined that the severance pay was not "payment for services rendered prior to the issuance of [the rehabilitation order]."

On April 11, 2012, the circuit court allowed appellants to litigate their claims and allowed surplus note holders of ACMI to participate and oppose the claims. Ultimately, on August 24, 2012, the trial court affirmed the Rehabilitator, reasoning as follows:

[1] The other two appellants later joined in the circuit court litigation asserting the same claims.

> The language of MCL 500.8137(4) permits a "limited" avenue for payment to directors, principal officers, or persons performing similar functions under employment contracts. This limited avenue requires two elements to be met in order to be eligible: 1) that the payment is for "services rendered," and 2) that the services rendered were "prior to the issuance of an order of rehabilitation." The legislature clearly required payment to directors, principal officers . . . to be limited in scope. The legislature effectuated this limitation by requiring that a plaintiff have "rendered" or completed the service that he or she is seeking compensation for prior to the issuance of the order of rehabilitation.
>
> Here, even assuming that Plaintiffs were rendering services as required by MCL 500.8137(4), Plaintiffs had not yet rendered the service required to entitle them to compensation pursuant to their pre-rehabilitation contract severance benefits as a change of control had yet to occur "prior to the issuance of an order of rehabilitation." Even if the order of rehabilitation placing the Rehabilitator in charge of American is deemed a change in control as Plaintiffs argue, Plaintiffs did not completely render the service required to receive their pre-rehabilitation contract benefits prior to the rehabilitation order. . . .
>
> Plaintiffs' had yet to perform service sufficient to vest their rights to the pre-rehabilitation contract severance benefits, thereby barring payment of the severance benefits under MCL 500.8137(4).

The circuit court entered a final written order on September 10, 2012, and appellants appeal that order as of right.

II. ANALYSIS

The resolution of this issue turns on the interpretation of a statute, which involves a question of law that we review de novo. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). A statute must be read as a whole and "[t]he words of a statute provide the most reliable evidence of its intent." *Id*. (quotation marks and citations omitted).

Appellants' claims concern severance benefits set forth in ACMI's executive employment agreements. The agreements contain the same triggering mechanisms for the benefits, but the value of the benefits varies depending on the officer's title with the company. The agreements contain the following essential terms:

> 5. Termination. [] The following events shall have the following respective effects on the obligations of the Company and Employee pursuant hereto:
>
> * * *

(c) Termination by the Company Other than for Cause. In the event that this Agreement is terminated for any reason by the Company (except for a termination for "Cause" . . .

(i) Employee shall be entitled to receive an amount equal to a minimum of 26 weeks' pay plus [1 or 2] weeks' pay for each year of fully completed service . . . not to exceed 52 weeks' pay . . .

(ii) The Company shall pay Employee's COBRA premiums . . .

(iii) The Company shall provide a basic outplacement package . . .

(iv) [] [T]he Company shall provide [certain incentive compensation plan] . . .

* * *

(e) Change in Control. If (1) a Change in Control occurs . . . and (2) either Employee [voluntarily resigns] . . . or the Company or its successor terminates Employee's employment without Cause, both within two years after the Change in Control, Employee will receive [the following] benefits . . .

* * *

[ii] (a) [T]he Employee's full [unpaid] base salary . . . plus an amount equal to [an amount derived from a formula] . . . and

(b) The Company will pay to the Employee . . . a severance payment in an amount equal to [either 200 or 300 percent of the employee's "annual compensation"] . . . and

(c) [certain enumerated insurance benefits]

(d) [certain retirement benefits.]

In their brief on appeal, appellants attempt to distinguish what they term "change of control benefits" from "severance pay." However, for purposes of this case, that distinction is irrelevant. Under the above-referenced provisions, appellants were entitled to benefits under one of two conditions: (1) the officer was terminated by ACMI for any reason other than for cause, or (2) either the officer voluntarily quit or the officer was terminated following a "change in control." Thus, irrespective of how the officers became entitled to benefits—i.e. even assuming that the rehabilitation order amounted to a "change in control"—the central issue remains whether the resulting benefits constitute "payment for services rendered prior to the issuance of [the] order of rehabilitation," under MCL 500.8137(4). Thus, we proceed by resolving that issue.

MCL 500.8137 is part of Chapter 81 of the Insurance Code, which governs supervision, rehabilitation, or liquidation of a failed insurance company. See MCL 500.8101. MCL

500.8137 governs claims against the insurer involving third-parties, contingent claims, and "claims under employment contracts." As noted above, it provides in relevant part as follows:

> (4) Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers *are limited to payment for services rendered prior to the issuance of an order of rehabilitation* or liquidation . . . . [MCL 500.8137(4) (emphasis added).]

The critical language in the statute limits appellants' claims to "*payment for services rendered prior to* the issuance of an order of [rehabilitation]." Thus, appellants prevail on their claims only if the severance benefits are: (1) payment for services rendered, and (2) the services were rendered *prior to* issuance of the rehabilitation order. Here, even if we were to assume that (A) the agreements remained in full effect after entry of the rehabilitation order and (B) the severance benefits constitute "payment for services rendered," the services were not rendered *prior to* issuance of the rehabilitation order. Under the contracts, appellants were entitled to severance benefits and the benefits vested only upon the date that their employment ended. All of the officers' employment ended sometime after the court entered the rehabilitation order. Therefore, at best, the severance benefits amounted to payment for services that the officers' provided *both before and after* the rehabilitation order entered. Contrary to appellants' arguments, nothing in the employment contracts indicates that appellants were entitled to payment of the severance benefits at some point other than at the time employment terminated. Therefore, appellants cannot show that the severance benefits amounted to payment for services that were rendered *prior* to entry of the rehabilitation order and their claims were barred by MCL 500.8137(4).

Appellants argue that the severance benefits vested six months prior to entry of the rehabilitation order. In support of this argument, appellants cite the following contractual language:

> (5)(e)(i)(c) "Change in Control Date" means the date during the term of this Agreement on which a Change in Control occurs. Anything in this Agreement to the contrary notwithstanding, if the Employee's employment or status as an elected officer with the Company *is terminated within six months prior to the date on which a Change in Control occurs*, then . . . for all purposes of this Agreement the "change in Control Date" means the date immediately prior to the date of such termination. [Emphasis added.]

Appellants contend that the rehabilitation order amounted to a "change in control" and, therefore, pursuant to paragraph 5(e)(i)(c), the severance benefits vested six months prior to entry of the rehabilitation order. This argument is devoid of all merit. The contractual language cited above applies in situations where an officer was terminated six months prior to the date on which a change in control occurs. Here, even assuming that the rehabilitation order amounted to a change in control, none of the officers were terminated six months prior to entry of the order. Therefore, this contractual provision is wholly inapplicable and appellants' arguments to the contrary are baseless.

In sum, the circuit court did not err in holding that the former officers' claims were barred by MCL 500.8137(4).[2]

Affirmed. No costs awarded. MCR 7.219(A). Jurisdiction is not retained.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[2] Given our resolution of this issue, we need not address appellants' arguments that the rehabilitation order constitutes a "change in control," that appellants' claims are superior to those of the surplus note holders and that the rehabilitation order is not personally binding on appellants.