STATE OF MICHIGAN

COURT OF APPEALS

4G INNOVATION, L.L.C., Plaintiff-Appellant,	UNPUBLISHED October 18, 2011
v	No. 296786 Washtenaw Circuit Court
ETAS, INC., Defendant/Third-Party Plaintiff-Appellee/Cross-Appellant,	LC No. 08-001162-CK
WILLIAM L. MILLER, Third-Party Defendant-Cross-Appellee.	

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff, 4G Innovation, LLC ("4G Innovation"), brought an action, alleging breach of contract against defendant, ETAS, Inc. ("ETAS"). ETAS, as a third-party plaintiff, in turn, filed suit against third-party defendant, William L. Miller, alleging breach of contract on a subsequent contract. The jury determined that neither contract was breached. Both 4G Innovation and ETAS appeal as of right. We affirm.

I. BASIC FACTS

Miller was the president and sole employee of the limited liability company, 4G Innovation. Miller was also an adjunct professor at the University of Michigan's Ross School of Business. While teaching at the university, he met Jason Forcier, who was a senior executive at ETAS. After Miller and Forcier discussed how Miller could aid ETAS grow as a company, ETAS and 4G Innovation entered into a contract for consulting services. One of the terms of the contract was for ETAS to pay "a 2% fee . . . based on the final price of any acquisitions *introduced* by [4G Innovation] and completed by ETAS." (Emphasis added.) With Miller's help from 4G Innovation, ETAS acquired another company, Vetronix.

After the consulting term ended between 4G Innovation and ETAS, ETAS hired Miller as an employee of ETAS. Several months later, Miller and ETAS terminated the employment relationship and entered into a separation agreement. The separation agreement provided, in

part, that "[Miller] will not encourage any other person to file or prosecute any claim, charge, complaint, or action of any sort whatsoever against [ETAS] before any local, state, or federal court or any administrative agency or other forum."

Thereafter, 4G Innovation filed a breach of contract suit against ETAS, alleging that ETAS failed to pay it the "acquisition fee" owed under the consulting contract in conjunction with the Vetronix acquisition. ETAS, in turn, filed suit against Miller, claiming that he breached the separation agreement by participating in and encouraging the lawsuit filed by 4G Innovation. After denying competing motions for summary disposition, a jury trial was held. At the close proofs, the parties moved for directed verdicts, which the trial court again denied. After deliberating, the jury found that neither contract provision was breached.

II. JURY INSTRUCTION

4G Innovation argues that the trial court erred when it denied its request for a particular jury instruction. We disagree. Properly preserved claims of instructional error are reviewed de novo. *Cox v Bd of Hosp Managers for City of Flint*, 467 Mich 1, 8; 651 NW2d 356 (2002). "Instructional error warrants reversal if the error resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Id.* at 9 (internal quotations omitted).

At trial, 4G Innovation requested the following instruction regarding the term, "introduced":

> Where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to consider extrinsic evidence to explain or illustrate the meaning of that word or phrase. A word or phrase may be given meaning by its context or setting.

The trial court denied the request.

The language of the requested instruction was taken directly from *Moraine Products, Inc v Parke, Davis & Co*, 43 Mich App 210, 213; 203 NW2d 917 (1972), where this Court stated,

> Parol evidence is always receivable to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings – the one common and universal and the other technical. Similarly, where a new and unusual word or phrase is used in a written instrument, or where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally. Under this rule, parol evidence is admissible to show that apparently ambiguous statements of description and price have a recognized meaning in the trade or business to which the contract relates.

In the instant case, there was no evidence that the terms "introduced" or "acquisitions introduced by" had peculiar meanings as used in the trade or business of acquiring companies. Miller, as president of 4G Innovation, was the person who authored that part of the contract, and he testified on direct examination as follows:

> *Q.* And the contract uses the word introduce an acquisition. Tell the jury at the moment when you signed the contract what *you meant* by introduce an acquisition.
>
> *A.* Well, again, introduce an acquisition is not, you know, hello, how are you, I'm done. It's a long process that takes about a year to complete and it involves, you know, understanding the problem, the solution, the strategy, how to implement the strategy successfully, and protect yourself through things like patents. And then what are the candidates if an acquisition makes sense, what business are they in, what business are you in, how do you fit these two entities together, and so forth, right.
>
> So there's a – there's a whole bunch of things that had to be done to introduce and acquisition. [Emphasis added.]

Aside from the mischaracterization of the actual term of the contract,[1] Miller never testified that this language is commonly used and understood in the industry. In fact, he was only asked what *he* meant when *he* drafted the term. Additionally, no other witnesses testified that the term in question had a peculiar meaning that is commonly used in the business. Instead, other witnesses similarly explained what they thought the term meant to *them*. Thus, without any evidence to support the proposed jury instruction, the trial court did not err in denying the request.

Moreover, even if the phrase did have a special meaning within the trade or industry, the instruction would still have been improper. "[E]ven where such usage or custom is well established, it is not controlling if only one party meant the usage or custom to be operative and the other party had no reason to know of this interpretation." *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 183; 565 NW2d 887 (1997). There are two reasons why the other party, ETAS, had no reason to know of Miller's interpretation. First, it was established that ETAS had no experience with acquisitions before the acquisition in question. Second, Forcier, who negotiated and signed the contract on behalf of ETAS, testified that he simply understood "introduce" to be consistent with its commonly understood meaning – in other words, 4G Innovation would be entitled to a "finder's fee" if it brought a company to ETAS's attention that it later acquired. Thus, there was absolutely no reason for Forcier or ETAS to know of the interpretation suggested by Miller's testimony. Accordingly, the trial court did not err by refusing to give the jury instruction regarding how the term is used within the business or industry.

[1] The question and answer were regarding the phrase "introduce an acquisition," while the contract used the phrase "acquisition introduced by."

III. SUMMARY DISPOSITION/DIRECTED VERDICT

ETAS argues in its cross-appeal that the trial court erred when it did not find, as a matter of law, that Miller breached the separation agreement. We disagree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Likewise, a trial court's decision on a motion for a directed verdict is reviewed de novo. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). We view the evidence in a light most favorable to the nonmoving party. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008). "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts*, 280 Mich App at 401.

ETAS, in its motion for summary disposition and its motion for directed verdict, argued that it was entitled to judgment as a matter of law because the term "person" in the separation agreement not only included human beings, but also business entities, such as 4G Innovation. The contract provision, in full, states that "[Miller] will not encourage any other person to file or prosecute any claim, charge, complaint, or action of any sort whatsoever against [ETAS] before any local, state, or federal court or any administrative agency or other forum." However, in our view, whether the term "person" includes business entities is not dispositive. Rather, the key is not the object of the sentence, "person," but instead the subject, Miller, and verb, "encourage."

Any terms not defined in a contract, such as the word "encourage" in this case, should be given their plain and ordinary meaning, which may be determined by consulting dictionaries. *McGrath v Allstate Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 289210, issued November 2, 2010), slip op, p 3. The word "encourage" is defined in *Random House Webster's College Dictionary* (2d ed), as "1. to inspire with courage, spirit, or confidence. 2. to stimulate by guidance, approval, etc. 3. to promote; foster." Thus, in the context of the contract provision, Miller was prohibited from promoting, stimulating, or inspiring someone else to file suit against ETAS.

ETAS argues that, as a matter of law, Miller impermissibly "encouraged" the lawsuit filed on behalf of 4G Innovation. We disagree. Michigan recognizes the general principle that separate entities will be respected. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). Reinforcing this concept is Michigan's Limited Liability Company Act, MCL 450.4101 et seq., which provides that "a person that is a member or manager, or both, of a limited liability company is not liable for the acts, debts, or obligations of the limited liability company." MCL 450.4501(4). In this regard, we note that the separation agreement was

between ETAS and Miller – it did not prohibit, let alone address, 4G Innovation, a non-party to the contract, from invoking any rights it possessed. As we previously indicated, Miller was the sole employee and president of 4G Innovation. Miller testified at his deposition and at trial that he participated in the development of the complaint that 4G Innovation filed, but that he did so as the company's president and not as an individual. Thus, because 4G Innovation had a right to pursue any of the rights it had under its consulting agreement with ETAS, up to and including the filing of a lawsuit, its president, Miller, could appropriately act on its behalf, regardless of his separation agreement with ETAS. Whether Miller, as an individual, "encouraged" 4G Innovation to file the lawsuit against ETAS was a proper question for the jury to consider. Accordingly, the trial court properly denied ETAS's motions for summary disposition and directed verdict.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray