

STATE OF MICHIGAN
COURT OF APPEALS

POWER PLAY INTERNATIONAL, INC., and
GORDON HOWE,

UNPUBLISHED
September 22, 2011

Plaintiffs-Appellees,

v

DEL REDDY, AARON HOWARD, MICHAEL
REDDY, and IMMORTAL INVESTMENTS,
LLC.,

No. 298774
Oakland Circuit Court
LC No. 2007-087623-CK

Defendants-Appellants.

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendants appeal by leave granted an order of the circuit court granting in part and denying in part plaintiffs' motion for entry of consent judgment. We reverse and remand.

The underlying lawsuit was initiated in 2007 and was settled the following year. Pursuant to the terms of the parties' settlement agreement, an injunction was issued permanently enjoining defendants from "possessing, using, selling, storing, or in any way profiting from" a comprehensive list of items associated with Detroit Red Wing hockey legend Gordie Howe. Also, as set forth in the agreement, the court dismissed all remaining claims with prejudice. The settlement agreement further required defendants to return numerous items related to Howe, his family, and plaintiff Power Play International, Inc. Using a 16-foot moving truck and two passenger vans, defendants indeed delivered hockey merchandise and memorabilia to plaintiffs as mandated by the settlement agreement. However, defendants also gave plaintiffs two invoices from a company named "Shred-It" that reflected the destruction of papers, tapes, CDs, and DVDs at the request of defendants. An affidavit from an operations manager employed by Shred-It confirmed the destruction of the items. There is no dispute that the items were associated with Gordie Howe, nor is there a dispute that the items were destroyed; rather, defendants contend that the destruction was consistent with the settlement agreement, whereas plaintiffs maintained that the destruction constituted a violation of the settlement agreement.

Thereafter, plaintiffs, claiming a violation of the settlement agreement, filed a motion for entry of consent judgment seeking the stipulated/liquidated damages set forth in ¶ 4 of the settlement agreement, which was in the amount of \$60,000, plus costs, attorney fees, and any

sums improperly received by defendants. There is no dispute that ¶ 4 permits the entry of a consent judgment upon a violation of the permanent injunction, and a consent judgment and the permanent injunction were incorporated into the settlement agreement by way of reference and attachments as exhibits to the agreement. The controversy is whether the consent judgment can be entered for violation of the settlement agreement as opposed to a violation of the permanent injunction. The trial court, finding that a violation of the permanent injunction was necessary for plaintiffs to collect the stipulated damage award found in the consent judgment, denied plaintiffs' motion with respect to entry of the consent judgment and an award of \$60,000. The trial court also found, however, that defendants had breached the terms of the settlement agreement, and it ordered a hearing to establish the amount of damages to be awarded. Prior to the hearing, defendants filed an application for leave to appeal, which this Court granted. *Power Play Int'l, Inc v Reddy*, unpublished order of the Court of Appeals, entered July 30, 2010 (Docket No. 298774).

“An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts.” *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006), quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). “In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument.” *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). “If the language of [a] contract is unambiguous, we construe and enforce the contract as written.” *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

Paragraph 4 of the settlement agreement provides in relevant part as follows:

4. **Permanent Injunction and Consent Judgment.** The parties will immediately execute and enter with the Court a Permanent Injunction in the form attached as Exhibit A to this Agreement, . . . and *upon violation of the Permanent Injunction*: (i) for any violation occurring within 15 years of the date of this Agreement, or within 5 years after expiration of the 15 year period if discovered by Plaintiffs and shown to have existed during the 15 year period, *Plaintiffs may file a motion for entry of a Consent Judgment* against any violating Defendant(s) in the form attached as Exhibit B to this Agreement [Emphasis added.]

The provided for consent judgment itself reads in relevant part as follows:

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs, Power Play International, Inc. and Gordon Howe, are awarded the sum of SIXTY THOUSAND (\$60,000) DOLLARS and NO/100S together with all sums received by Defendant(s)_____ *as a result of his/their violation of the Permanent Injunction* entered by this Court [Emphasis added.]

Paragraph 4 and the adopted consent judgment language clearly indicate that only upon a violation of the permanent injunction by defendants are plaintiffs entitled to the entry of consent judgment in the form set forth.

Paragraph 5 of the settlement agreement provides that upon any alleged breach of the settlement agreement, either party is entitled to “pursue any and all remedies at law or equity, including those in paragraph 4,” i.e., entry of a consent judgment for \$60,000. This provision can be read as indicating that a consent judgment for \$60,000 can be sought where a breach of the settlement agreement other than a violation of the permanent injunction is alleged. However, this interpretation conflicts with the unambiguous linking of the issuance of the agreed upon consent judgment to a violation of the permanent injunction.

In order to harmonize the two paragraphs, *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982), and effectuate the bargained for agreement, we construe the reference in ¶ 5 to the remedies of ¶ 4 as indicating that where the alleged breach of the settlement agreement is a breach of the permanent injunction, the aggrieved party may pursue entry of a consent judgment in accord with the agreed upon language, or may pursue “any and all remedies” available at law. However, where the alleged breach does not involve the permanent injunction, then the aggrieved party may pursue “any and all remedies” available at law, except for entry of the agreed upon consent judgment, which by its very terms is limited to violations of the permanent injunction.

Plaintiffs are free to pursue a claim for breach of the settlement agreement, but to do so they must file a separate breach of contract action, not a motion for entry of consent judgment.

Reversed and remanded for further action consistent with this opinion. We do not retain jurisdiction. Defendants, having fully prevailed on appeal, are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot