S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

D.A.N. JOINT VENTURE III, L.P., assignee of FIFTH THIRD BANK,	UNPUBLISHED November 22, 2011
Plaintiff-Appellant,	
v	No. 300777 Berrien Circuit Court
GEORGE HOFMEISTER,	LC No. 2004-003492-CZ
Defendant-Appellee,	
and	
AMERICAN COMMERCIAL HOLDINGS, INC.,	
Defendant.	

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting in part defendant's[1] motion for satisfaction of judgment. We reverse and remand.

I. BASIC FACTS

The underlying facts in this case are primarily undisputed. Defendant owned ACH, which in turn, owned the three companies at the center of this case: American Commercial Assembly, Inc. ("ACA"), Clark Metal Products Company, and Trans-Industries of Indiana, Inc. (collectively, the "borrower companies"). These borrower companies were suppliers to the trucking industry. In 1999, the borrower companies received over $10 million in loans from Old Kent Bank, which was later acquired by Fifth Third Bank. Both defendant and ACH, the parent holding company of the borrower companies, executed limited guaranties of the indebtedness.

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[1] "Defendant" will refer to the appellee, George Hofmeister. American Commercial Holdings, Inc., the other defendant in this case, will be referred to as "ACH."

In 2001, the loans were in default, and defendant increased his personal guaranty to an unlimited and unconditional amount. During this time, all of the parties entered into a series of forbearance agreements, culminating with an eighth amended version in April 2002. At that time, the amount due on the loans totaled $5,091,405.90. This latest forbearance agreement also directed the sale and liquidation of the borrower companies.

On May 6, 2002, ACA entered into an Asset Purchase Agreement ("APA") with Salem Preferred Partners, LLC ("Salem"). The APA included an "earn-out" provision, where Salem would return 50 percent of aggregate cash flow after taxes each year, up to a total of $1,400,000.[2] Through the terms of the APA, the $1,400,000 cap for the earn-out payment was lowered to $1,200,000.

After the selling and liquidating of the borrower companies' assets, the indebtedness was reduced to $2,209,505.24 as of April 26, 2004. On December 28, 2004, Fifth Third Bank filed a complaint against the guarantors (defendant and ACH). That same day, defendant consented to a judgment against him in an amount of $2,209,505.24. This "Agreed Judgment" also provided that plaintiff waived any interest that accrued from April 26, 2004 through December 28, 2004, and that the "claims asserted against [ACH] shall remain active and pending subject to further orders" of the court. However, ACH was eventually dismissed for lack of service.

Sometime before December 22, 2004, defendant was awarded a $28,000,000 judgment against the Cincinnati Insurance Company, following a jury verdict in a civil action in the Scott Circuit Court in Kentucky. On December 22, 2004, six days before Fifth Third Bank filed its complaint in Michigan, defendant and Fifth Third Bank entered into an agreement titled Assignment of Litigation Proceeds ("AOLP"). The AOLP provided the following, in pertinent part:

> WHEREAS, [defendant] is indebted to Bank in the amount of $2,209,505.24, plus interest, fees and costs, under the terms of a series of Notes dated June 3, 1999 and a personal Guaranty dated March 30, 2001, as well as under the terms of a confessed Judgment which has or will be entered in the State of Michigan, Berrien County Trial Court in proceedings designated as *Fifth Third Bank v George Hofmeister, et al,*;
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> WHEREAS, [defendant] has informed the Bank that he is currently unable to pay the indebtedness referenced above in full, and has further indicated that he and his Spouse have been awarded a $28,000,000.00 Judgment against Cincinnati Insurance Co., . . . which is currently on appeal before the Kentucky Court of Appeals . . . ; and

[2] This earn-out payment was not to trigger until Salem received $1,600,000 in cash flow after taxes. Thus, the actual 50 percent of aggregate cash flow is from cash flow earned above and beyond the initial $1,600,000 earned.

> WHEREAS, Bank is willing to discount and partially compromise the indebtedness referenced above in the event [defendant] can provide reasonable assurance that a compromised payment will and can be made to satisfy the discounted debt;
>
> NOW, THEREFORE, for and in consideration of the promises and of the mutual covenants set forth in this Assignment, the parties agree as follows:
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> 1. [Defendant] hereby assigns to the Bank his portion of any and all monetary judgments, awards, recovery, garnishments, executions, rights and claims [defendant] has now or may acquire later against Cincinnati Insurance Co. . . .
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> * * *
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> 4. Nothing in this agreement precludes [defendant] from settling his claims against Cincinnati Insurance Co., however, this assignment shall attach to and include the right to collect the proceeds from any such settlement.
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> 5. In consideration of the [defendant's] undertaking as set forth above, the Bank shall, and does hereby agree to partially compromise, discount and reduce the full amount of indebtedness owed to the Bank by [defendant], to the full sum of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS AND NO CENTS ($750,000.00).
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> 6. Upon the Bank's receipt of the full sum of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS AND NO CENTS ($750,000.00), any remaining or residual monetary judgment, award, recovery, garnishment, execution, right or claim assigned to the Bank herein shall immediately revert back to the possession and property of [defendant] without the necessity of executing any further documentation to effectuate said reversion.
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> 7. In the event the Kentucky Court of Appeals, Kentucky Supreme Court or the Scott Circuit Court reduce the amount of the judgment in *George Hofmeister and Kay Hofmeister, his wife V. Eugene Clark*, Scott Circuit Court, Civil Action No. 00-C1-00030 below the amount of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS AND NO CENTS ($750,000.00), or in the event the Bank does not otherwise receive said payment for any reason, this assignment as well as the consent Judgment entered in the State of Michigan, Berrien County Trial Court in proceedings designated as *Fifth Third Bank v George Hofmeister, et al*, shall become null and void, and the Bank may proceed to collect the full amount of the indebtedness owed.

In December 2006, plaintiff acquired Fifth Third Bank's interest in the debt which ACH and defendant guaranteed. In October 2008, the Kentucky Court of Appeals overturned the jury

award.[3] The parties to the APA (Salem and ACA) disagreed on the amount the "earn-out" should be, so the matter went to arbitration. Arbitration awarded $736,442, which plaintiff received on November 28, 2008.

On January 21, 2010, defendant filed a motion for satisfaction of judgment. Defendant argued that the earn-out payment of $736,442 from Salem to plaintiff on behalf of ACA coupled with defendant's tender of $13,558 satisfied his $750,000 obligation under the AOLP. The trial court granted the motion, in part. The order allowed for the earn-out proceeds to apply towards the payment of the judgment. The court came to this conclusion because it determined that, while the contingency clause in ¶ 7 of the AOLP used the word "or," the parties meant to use the word "and." As a result, the contingency was not satisfied, and the assignment and the reduction of defendant's obligation to $750,000 were still valid. The trial court concluded,

> As of today, the amount due under the judgment, after deduction [of] the $736,442.00 Plaintiff has already received from the Earn Out and including interest at the legal rate [pursuant to MCL 600.6013(8)] on the unpaid balance since December 28, 2004, is $145,770. [Footnote omitted.]

II. ANALYSIS

Plaintiff argues that the trial court erred when it applied the earn-out proceeds towards defendant's $750,000 indebtedness. We agree because the AOLP, which reduced defendant's indebtedness to $750,000, was void. The proper interpretation of a contract, including a trial court's determination of whether contract language is ambiguous, is a question of law that we review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

"The primary goal in interpreting contracts is to determine and enforce the parties' intent. To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (citations omitted). "If the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

We hold that the AOLP is void because the contingency necessary for it becoming void was met. The AOLP was a conditional agreement, where the contingency was located in ¶ 7:

> 7. In the event the Kentucky Court of Appeals, Kentucky Supreme Court or the Scott Circuit Court reduce the amount of the judgment in *George*

[3] This decision ultimately went to the United States Supreme Court, who denied certiorari in *Hofmeister v Cincinnati Ins Co*, ___ US ___; 130 S Ct 401; 175 L Ed 2d 270 (2009).

> *Hofmeister and Kay Hofmeister, his wife V. Eugene Clark*, Scott Circuit Court, Civil Action No. 00-C1-00030 below the amount of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS AND NO CENTS ($750,000.00), **or** in the event the Bank does not otherwise receive said payment for any reason, this assignment as well as the consent Judgment entered in the State of Michigan, Berrien County Trial Court in proceedings designated as *Fifth Third Bank v George Hofmeister, et al*, shall become null and void, and the Bank may proceed to collect the full amount of the indebtedness owed. [Emphasis added.]

The trial court determined that the use of the word "or" was ambiguous, which produced a "dubious" result. As a result, it reformed the contract, changing the word "or" to be "and" instead. This interpretation and subsequent reformation is contrary to the rules of contract construction. In doing so, the trial court relied on *Nolan v Mich Dept of Licensing & Regulation*, 151 Mich App 641, 649; 391 NW2d 424 (1986), where this Court noted that the use of the terms "or" and "and" is "so loose and frequently inaccurate," which means that their literal meaning only "should be followed when their accurate reading does not render the sense dubious." *Id.* However, just because a contract may be inartfully worded or clumsily arranged, if it fairly admits of but one interpretation, it is not ambiguous. *Meagher*, 222 Mich App at 721-722. Moreover, a court may not rewrite clear and unambiguous language under the guise of interpretation. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007).

First, the term "or" is not ambiguous. The disjunctive term "or" indicates a choice between two alternatives. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). From the plain language of the contract, the agreement would be void if either (a) the amount of the jury award of reduced by the Kentucky judiciary, or (b) plaintiff did not "otherwise receive said payment." There is nothing to suggest that the word "or" has multiple meanings. Moreover, its use does not create a sentence with provisions that cannot be reconciled. The trial court thought that use of "or" was dubious because

> the Plaintiff could receive from another source all the money it expected to receive under the AOLP, and more, but would still be able to pursue the Defendant for further collection of the full amount of the debt. If that is what the parties meant, the "or" was not a necessary component of their agreement.

It is not for the courts to second-guess the wisdom of certain contracts provisions. See *Terrien v Zwit*, 467 Mich 56, 69-70; 648 NW2d 602 (2002). As long as the unambiguous, plain meaning can be constructed, that is the meaning that must govern. Here, the trial court missed the plain meaning and purpose of the phrase: the portion after the "or" is meant to protect plaintiff in the event that, for whatever reason, plaintiff never received any of the $28,000,000 judgment, even if the judgment was still valid.

The trial court erred when it determined that the $750,000 could be paid from any source. Contrary to the trial court's conclusion, the term "said payment" does unequivocally refer to payment from the Kentucky judgment.

First, the entire focus of the AOLP is on this judgment and getting payment from it. The entire recitals and first eight paragraphs all refer to the Kentucky judgment. Second, when viewing paragraphs 6 and 7 together, it is clear that "said payment" can only refer to a payment resulting from the judgment.

> 6. Upon the Bank's receipt of the full sum of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS AND NO CENTS ($750,000), any remaining or residual monetary judgment, award, recovery, garnishment, execution, right or claim assigned to the Bank herein shall immediately revert back to the possession and property of [defendant] without the necessity of executing any further documentation to effectuate said revision.
>
> 7. In the event the Kentucky Court of Appeals, Kentucky Supreme Court or the Scott Circuit Court reduce the amount of the judgment in *George Hofmeister and Kay Hofmeister, his wife V. Eugene Clark*, Scott Circuit Court, Civil Action No. 00-C1-00030 below the amount of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS AND NO CENTS ($750,000.00), or in the event the Bank does not otherwise receive said payment for any reason, this assignment as well as the consent Judgment entered in the State of Michigan, Berrien County Trial Court in proceedings designated as *Fifth Third Bank v George Hofmeister, et al*, shall become null and void, and the Bank may proceed to collect the full amount of the indebtedness owed.

Thus, when determining what "said payment" is referencing, it does not matter if one looks to earlier in ¶ 7 or back to ¶ 6, where the only other mention of any payment is located. Both incidents clearly refer to payment via the Kentucky judgment. Paragraph 7's reference is explicit, while ¶ 6's reference is implicit. Paragraph 6 stating that "any remaining or residual monetary judgment, award, recovery" indicates that the payment contemplated is from the Kentucky judgment, otherwise that phrase would be meaningless.

We also note that the trial court's invoking of the last antecedent rule is inapposite since the last antecedent rule deals with modifying or restricting clauses. See *Duffy v Mich Dept of Natural Resources*, ___ Mich ___; ___ NW2d ___ (Docket No. 140937, decided July 30, 2011), slip op, p 10. Here, the clause after the "or" merely *references* "said payment," which is not the same as *modifying or restricting* any prior language. Furthermore, the last antecedent rule is used when there are a series of items, which are then followed by a single modifying clause. The rule helps determine whether that trailing modifying clause modifies all of the preceding items or only the last one. See, e.g., *Stanton v City of Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002) (holding that last antecedent rule provided that the phrase "as defined in the Michigan Vehicle Code" only applied to the last term, "owner" and not earlier term of "motor vehicle," where entire phrase was "a motor vehicle of which the governmental agency is owner, as defined in [the Michigan Vehicle Code]"); LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 The Journal of the Legal Writing Institute 81, 82 (1996) (stating that last antecedent rule is an attempt to resolve the ambiguity stemming from a modifier that has the potential of modifying *more than one* antecedent). Since there was only a single phrase preceding the "or" phrase, the last antecedent rule is not applicable.

Moreover, assuming arguendo that the AOLP was valid, the earn-out proceeds would not apply to defendant's indebtedness. Defendant's liability under the AOLP was limited to $750,000. No where does the AOLP reduce this liability amount further on the event that the *borrower* made a payment on the total $2,209,505.24 debt. Thus, as an example, if a borrower made a payment of $1,000,000, the overall indebtedness would be reduced to approximately $1,200,000, but defendant's personal liability would remain unchanged at $750,000. Here, that is precisely what happened. Salem, on behalf of borrower ACA, made an earn-out payment of $736,442, which would reduce the total debt to $1,473,063.24, but leaving defendant's liability at $750,000. The only way for defendant's *personal* liability to be reduced would be for him to *personally* make a payment or for a borrower to have made payments in excess of $1,459,505.24, which would have brought the total indebtedness to less than $750,000. Since neither of these instances occurred, defendant would still be liable for $750,000.

In sum, the plain language of the AOLP established that it was voided upon one of two incidents occurring. One of those incidents was the Kentucky courts reducing the $28,000,000 jury award. Because the Kentucky courts did reduce the jury award, the condition was satisfied, and the AOLP and the Agreed Judgment were voided. As a result, defendant's indebtedness was not reduced to $750,000, and the trial court erred when it determined otherwise.

Because we find that the AOLP and Agreed Judgment were void, plaintiff's motion for satisfaction of judgment should have been denied in full. Additionally, because the Agreed Judgment is void, there is no basis for any interest calculations, and plaintiff's arguments regarding said interest calculations are moot. As a result, we need not address them.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello