STATE OF MINNESOTA
IN COURT OF APPEALS
A10-911

Renaissance Dairy, LLP,
Appellant,

vs.

Ronald J. Tobkin, et al.,
Respondents.

Filed February 1, 2011
Affirmed
Peterson, Judge

Otter Tail County District Court
File No. 56-CV-08-2992

Robert G. Manly, Vogel Law Firm, Moorhead, Minnesota (for appellant)

Chad R. Felstul, Pemberton, Sorlie, Ruter & Kershner, P.L.L.P., Fergus Falls, Minnesota (for respondents)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

On appeal in this real-estate-conveyance dispute, appellant (the holder of an option) argues that (1) the district court erred in ruling that the parties' option agreement is ambiguous; and (2) if the option agreement is ambiguous, reasonable notice to

appellant of respondent-sellers' intent to sell the property at issue to a third party was required. We affirm.

FACTS

Respondent Ronald Tobkin, an owner of Little Pine Dairy, and David Van Heel, an owner of appellant Renaissance Dairy, LLP, entered into a contract for the sale of Little Pine Dairy to appellant. The sale agreement included an option for appellant to buy additional property from respondents Ronald and Sally Tobkin (respondent-sellers):

> Seller grants to the Buyer the right of first option, for a period of five (5) years from and after October 15, 2004, to purchase up to 320 acres of the Seller's irrigated land for the price of $1,700.00 an acre, it being understood by the Buyer that the Seller retains the option to sell said 320 acres at any time during said five year period. The exact terms of the Option . . . shall be set out in a separate agreement . . . .
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> Furthermore, the Seller grants to the Buyer the option to purchase an additional 680 acres of land, said acreage to be selected by the Seller, on or before the five year anniversary of this agreement for the price of $1,700.00 an acre, it being understood by both parties that said 680 acres may not be sold during said five year period except upon the exercise of the Buyer's option or upon the death of Ronald J. Tobkin. In the event of the death of Ronald J. Tobkin, his heirs shall have the right to sell said 680 acres of land at anytime after his death and prior to the five year anniversary of this agreement, but in that event, the Buyer shall have the right of first refusal to purchase all or any part of said 680 acres . . . .

The option agreement states:

> [Seller] hereby gives to [buyer] the first option, for a period of five (5) years from and after October 15, 2004, to purchase up to 320 acres of [seller's] irrigated land for the price of $1,700.00 an acre, it being understood by [buyer] that [seller] retains the option to sell said 320 acres at any time during said five year period.

> Furthermore, [seller] grants to [buyer] the first option to purchase an additional 680 acres of land, said acreage to be selected by [seller], on or before the five year anniversary of this agreement for the price of $1,700.00 an acre, it being understood by both parties that said 680 acres may not be sold during said five year period except upon the exercise of [buyer's] option or upon the death of Ronald C. Tobkin.[1] In the event of the death of Ronald C. Tobkin, his heirs shall have the right to sell said 680 acres of land at anytime after his death and prior to the five year anniversary of this agreement, but in that event, [buyer] shall have the right of first refusal to purchase all or any part of said 680 acres . . . .
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> . . . .
>
> [Buyer] shall exercise this option by giving [seller] ten (10) days written notice by certified mail of its intent to do so.

In March 2008, Ronald Tobkin met with Van Heel and Jay Stene, appellant's manager, about a possible sale of the 320 acres. Van Heel indicated that appellant was interested in executing the option and stated that 30 days was a reasonable amount of time in which to execute it. Ronald Tobkin met with Van Heel again on May 15, 2008, about whether appellant intended to exercise its option to buy the 320 acres, and Van Heel stated that he would discuss execution of the option with appellant's other owners at a meeting on May 22, 2008.

On May 23, 2008, Ronald Tobkin contacted Van Heel and stated that he intended to sell the 320 acres. Van Heel claims that he stated that appellant would buy the property and that appellant could obtain financing for the purchase in 30 days. According to Ronald Tobkin, he attempted to learn whether appellant intended to buy the

[1] We note that the sale agreement refers to Ronald J. Tobkin and the option agreement refers to Ronald C. Tobkin, but both agreements were signed by Ronald J. Tobkin.

property but he "couldn't get that out of them, what their intentions were . . . if they wanted to buy them or not."

On May 26, 2008, respondent-sellers and their son, respondent Patrick Tobkin, executed a purchase agreement for the sale of the 320 acres to Patrick Tobkin. On June 5, 2008, respondent-sellers executed a contract for deed to sell the 320 acres to Patrick Tobkin for $2,250 per acre. Appellant did not record its option until after Patrick Tobkin bought the property.[2]

On May 29, 2008, appellant mailed a certified letter to respondent-sellers stating appellant's intent to exercise its "right of first refusal to purchase the 320 acres." The letter was delivered to respondent-sellers on June 12, 2008. The return receipt for the letter included a copy of the envelope that showed the following writing next to the address: "5-30, 6-4 and 6-14 return."

Appellant brought this declaratory judgment action against respondents seeking a judgment declaring the contract for deed null and void and directing that the property be conveyed to appellant. The district court determined that the memorandum of agreement and option agreement were ambiguous as to notice. The district court interpreted the agreements as granting appellant the right to purchase the 320 acres after being notified of respondent-seller's intent to sell, but granted judgment for respondents based on the finding that respondents gave appellant sufficient time to exercise its option. This appeal followed.

[2] Although nine tax statements are attached to the memorandum of agreement and only two of them are for the property transferred to Patrick Tobkin, the district court found, and the parties apparently agree, that the option applies to that property.

D E C I S I O N

"In a declaratory judgment action tried without a jury, the court as the trier of facts must be sustained in its findings unless they are palpably and manifestly contrary to the evidence." *Samuelson v. Farm Bureau Mut. Ins. Co.*, 446 N.W.2d 428, 430 (Minn. App. 1989), *review denied* (Minn. Nov. 22, 1989). But the district court's determination of questions of law is subject to de novo review. *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Ins.*, 549 N.W.2d 96, 98-99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996).

"The interpretation of a contract is a question of law if no ambiguity exists, but if ambiguous, it is a question of fact and extrinsic evidence may be considered." *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). The determination whether a contract is ambiguous is a question of law. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). "A contract is ambiguous if it is reasonably susceptible to more than one construction." *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. App. 1985), *review denied* (Minn. June 24, 1985).

Citing *King v. Dalton Motors, Inc.*, 260 Minn. 124, 109 N.W.2d 51 (1961), appellant argues that the parties' agreement gave appellant an absolute and exclusive option to buy the 320 acres within the five-year period. In *King*, the supreme court explained that, although a first-option term generally grants the option holder a preferential right to purchase on the same terms as contained in a bona fide offer from a third party that is acceptable to the seller, "the phrase 'first option to buy' may give rise

to an absolute option if other language in the agreement so indicates." 260 Minn. at 127 & n.9, 109 N.W.2d at 53 & n.9 (citing *Steen v. Rustad*, 313 P.2d 1014 (Mont. 1957); *Roth v. Snider*, 171 P.2d 819 (Wash. 1946)). The parties' intent "must be gathered from the instrument as a whole and cannot rest solely upon isolated clauses." *Id.*

Here, the option to buy the 320 acres was not conditioned on the terms of an offer from a third party or on respondent-seller's willingness to sell. Rather, the sale agreement and the option agreement set forth a definite sale price, $1,700 per acre, and the option agreement states the method for exercising the option, "by giving [respondent-sellers] ten (10) days written notice by certified mail of [buyer's] intent to do so." Reading the two agreements in their entirety, we conclude that appellant had an absolute option to buy the 320 acres. *See King*, 260 Minn. at 127-28, 109 N.W.2d at 53-54 (noting that first-option clause was not used in ordinary sense of granting preferential right when agreement provided for price to be negotiated at time of sale); *Steen*, 313 P.2d at 1018 (rejecting argument that option was conditioned on seller's willingness to sell and construing option as absolute when agreement stated sale price and method of executing option).

Although we agree that appellant had an absolute option to buy the 320 acres, we disagree that it was an exclusive option that prohibited the sale of the property to a third party during the time the option was in effect. "A contract must be interpreted in a way that gives all of its provisions meaning." *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995); *see also Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 266 Minn. 426, 436, 123 N.W.2d 793, 799-800 (1963) (noting

"cardinal rule of [contract] construction that any interpretation which would render a provision meaningless should be avoided on the assumption that the parties intended the language used by them to have some effect"). The only reasonable interpretation of the clause "it being understood by [buyer] that [seller] retains the option to sell said 320 acres at any time during said five year period" is that the seller retained the right to sell the 320 acres to a third party. If the parties intended to prohibit the sale of the 320 acres to a third party, there would have been no reason for respondent-sellers to retain the right to sell. We, therefore, construe the sale and option agreements as permitting the sale of the 320 acres to a third party during the period the option was in effect. Our construction is also supported by the option to buy 680 acres, which, in contrast, prohibited the acreage from being sold during the option period "except upon the exercise of [buyer's] option or upon the death of Ronald C. Tobkin." *See Despatch Oven Co. v. Rauenhorst*, 229 Minn. 436, 446, 40 N.W.2d 73, 80 (1949) (noting construction rule that difference in language indicates difference in meaning).

The district court concluded that the option to buy the 320 acres

> is ambiguous because it is not clear what amount of time the [respondent-sellers] must give [appellant] to purchase the property, before selling the 320 acres. Similarly, the meaning of 'ten (10) days' written notice' is vague in that it does not identify the event that ten days' notice must precede.

The district court's conclusion that the option to buy the 320 acres is ambiguous was based on its determination that "[t]here must be a time limit on [appellant's] exercising the option after receiving notice of the [respondent-sellers'] intention to sell. Otherwise, [appellant] would have the ability to delay the [respondent-sellers'] sale." But because

neither the sale nor the option agreement contains a requirement that the seller provide to appellant any notice of intention to sell, the agreements unambiguously did not require respondent-sellers to give notice to appellant before selling the 320 acres. A court cannot add terms to a "contract by interpretation when the terms set out by the parties are unambiguous." *Burke v. Fine*, 608 N.W.2d 909, 913 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. June 13, 2000).

To exercise the option to buy the 320 acres, appellant was required to provide "written notice by certified mail of its intent to do so." "[A]n acceptance under an option contract is not operative until received by the offeror." *Salminen v. Frankson*, 309 Minn. 438, 440, 245 N.W.2d 839, 840 (1976) (alteration in original) (quotation omitted). Respondent-sellers did not receive written notice of appellant's intent to exercise the option until June 12, 2008, after the 320 acres had been sold to Patrick Tobkin.

Appellant argues that the district court's finding that appellant failed to prove that respondent-sellers avoided delivery of the certified letter is clearly erroneous. Factual findings are clearly erroneous when they are manifestly against "the weight of the evidence or not reasonably supported by the evidence as a whole." *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985). Appellate courts give great deference to the fact-finder's determinations of the weight and credibility of witnesses. *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn. 1996).

The district court found:

> The return receipt from the United States Postal Service included a photocopy of the front of the envelope addressed to the [respondent-sellers]. The following writing appears

> next to the address: "5-30, 6-4 and 6-14 return." Van Heel claims that, based on discussions with [Stene], there were attempts to deliver the letter "many times" before June 12, but "it was not accepted." However, Van Heel did not explain the basis of this conclusion, information from [Stene] is hearsay, and there is no reason to believe that [Stene] would have special knowledge of the workings of the post office. According to Ronald Tobkin, he was out of town on a week-to-ten-day fishing trip beginning June 5, during which time [Sally Tobkin] was also out of town, and he had no notification of the letter until [Sally Tobkin] picked it up on June 12. Even if the Court accepts [appellant's] assertion that the post office attempted delivery on May 30 and June 4, there is no evidence that [respondent-sellers] were aware of any attempted delivery.

We defer to the district court's determination of the weight and credibility of Van Heel's testimony regarding the discussions with Stene. Based on that determination and on appellant's failure to substantiate its claim that respondent-sellers avoided delivery, the district court did not clearly err in finding that appellant failed to prove "the meaning of the writing on the envelope or that [respondent-sellers] avoided delivery of the certified letter."

The district court properly granted judgment for respondents based on appellant's failure to provide notice of its intent to exercise its option until after the 320 acres had already been sold.

Because respondent-sellers retained the right to sell the 320 acres and there was no requirement that respondent-sellers provide appellant notice before selling the property, we need not address the issue of whether Patrick Tobkin was a bona fide purchaser.

Affirmed.