Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-16-00532-CV

FRANKLIN ADVISERS, INC., on behalf of certain investment funds managed by it; Oz Management LP, on behalf of certain investment funds managed by it; Oz Management II LP, on behalf of certain investment funds managed by it; and Benefit Street Partners, LLC,
Appellants

v.

iHEART COMMUNICATIONS INC., f/k/a Clear Channel Communications, Inc.,
Appellee

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2016-CI-04006
Honorable Cathleen M. Stryker, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: October 11, 2017

AFFIRMED

Franklin Advisers Inc., Oz Management LP, Oz Management II LP, and Benefit Street Partners LLC, (collectively, "Franklin and Oz"), appeal from a final judgment granting declaratory and injunctive relief against them. On appeal, Franklin and Oz argue the judgment should be reversed because the trial court erred in construing the contracts at issue in this case. We conclude the trial court did not err, and therefore, affirm its judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying dispute is between Franklin and Oz and iHeart Communications, Inc. iHeart is a media company based in San Antonio, Texas. Franklin and Oz manage investment funds, including funds that own a portion of iHeart's publicly traded debt.

Between 2011 and 2015, iHeart borrowed approximately $6 billion and issued five series of priority guarantee notes. iHeart's obligations to the priority guarantee noteholders were governed by five special contracts, known in the business financing industry as indentures. The indentures, which are identical in all material respects, provide that they must be construed in accordance with New York law.

The indentures contain restrictive covenants that limit what iHeart and some of its subsidiaries can do with their assets. Section 4.10 of the indentures restricts certain asset sales and section 4.11 restricts certain transactions with affiliates. Nevertheless, the indentures contain numerous exceptions to these restrictions. Some of these exceptions, called "baskets," allow iHeart to undertake certain transactions up to a particular dollar amount regardless of the restrictive covenants. In addition to the baskets, the indentures allow iHeart to create unrestricted subsidiaries that are not subject to the indentures' restrictive covenants.

On December 3, 2015, iHeart directed one of its restricted subsidiaries, CC Holdings, to transfer $516 million worth of shares of Clear Channel Outdoor Holdings stock to one of iHeart's unrestricted subsidiaries, Broader Media. Some of the priority guarantee noteholders believed that the stock transfer violated sections 4.10 and 4.11 of the indentures. On January 5, 2016, counsel for these noteholders wrote a letter to iHeart's counsel, asserting that the stock transfer violated sections 4.10 and 4.11 of the indentures and none of the exceptions to such a transaction applied. Counsel asserted the stock transfer was not permissible under the indentures because the word "investment," as defined by common English usage and New York law, was an expenditure

intended to produce a profit. In response, iHeart's counsel wrote a letter to the noteholders' counsel, claiming that the stock transfer was permissible under the indentures because the stock transfer was a capital contribution and the indentures broadly defined the term "Investment" to include capital contributions. Attempts to resolve the dispute failed.

On March 7, 2016, some of the noteholders issued formal notices of default. On the same day, iHeart filed the underlying suit in which it sought declarations that it had not violated the indentures and was not in default on the notes. iHeart also sought injunctive relief.

After a bench trial, the trial court rendered judgment in favor of iHeart. Specifically, the trial court declared that (1) the stock transfer did not violate the indentures; (2) the stock transfer was an investment and a permitted investment under the indentures; (3) the stock transfer was not a basis for accelerating the notes; and (4) iHeart was not in default under the indentures. Additionally, the trial court granted a permanent injunction rescinding the notices of default and prohibiting Franklin and Oz from issuing or threatening to issue notices of default arising out of the stock transfer. The trial court made findings of fact and conclusions of law in support of its judgment. In its conclusions of law, the trial court concluded that a profit motive was not required for a capital contribution to constitute an "Investment" under the indentures. Franklin and Oz appealed.

DISCUSSION

On appeal, Franklin and Oz argue that the trial court erred when it concluded that the stock transfer from CC Holdings to Broader Media was permissible under the indentures. Franklin and Oz assert that the plain language of the indentures required the stock transfer at issue in this case to have a "profit motive" and that iHeart failed to prove the required profit motive at trial.

Under New York law, when a written agreement is complete, clear, and unambiguous on its face, it must be enforced according to the plain meaning of its terms. *Samuel v. Druckman &*

Sinel, LLP, 879 N.Y.S.2d 10, 13 (2009); *Reiss v. Fin. Performance Corp.*, 738 N.Y.S.2d 658, 661 (2001). Courts may not, by construction, add or excise terms, nor distort the meaning of the terms used and thereby make a new contract for the parties under the guise of interpreting the writing. *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 892 N.Y.S.2d 303, 307 (2009); *Reiss*, 738 N.Y.S.2d at 661.

In construing a contract, the threshold issue is ambiguity. Whether a contract is ambiguous is a question of law. *Riverside*, 892 N.Y.S.2d at 307. An ambiguity exists when the terms of a contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. *Louisiana Generating, L.L.C. v. Illinois Union Ins. Co.*, 831 F.3d 618, 622-23 (5th Cir. 2016) (citing *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London, England*, 136 F.3d 82, 86 (2nd Cir. 1998) (citations omitted)). A court determines ambiguity by looking within the four corners of the document, not to outside sources. *Riverside*, 892 N.Y.S.2d at 307. Extrinsic evidence is not admissible to create an ambiguity in a contract that is complete, clear and unambiguous on its face. *Fluor Corp. v. Citadel Equity Fund Ltd.*, 760 F.Supp.2d 685, 690 (N.D. Tex. 2010) (citing *W.W.W. Associates, Inc. v. Giancontieri*, 565 N.Y.S.2d 440, 443 (1990)). Additionally, words and phrases must be given their plain meaning. *Id*. at 689. In considering whether a contract is ambiguous, courts review the entire contract. *Louisiana Generating*, 831 F.3d at 622-23. Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole, and the intention of the parties as manifested thereby. *Riverside*, 892 N.Y.S.2d at 307. When the language chosen by the parties has a definite and precise meaning, there is no ambiguity. *Id*.

Under New York law, a court may not declare a contract ambiguous simply because the parties have differing interpretations of its plain language. *Fluor Corp.*, 760 F.Supp.2d at 690 (citing *RM Realty Holdings Corp v. Moore*, 884 N.Y.S.2d 344, 346 (N.Y. App. Div. 2009); *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2nd Cir. 1990); *Breed v. Ins. Co. of N. Am.*, 413 N.Y.S.2d 352, 355 (1978)). A written agreement is ambiguous only if it is reasonably susceptible to more than one interpretation. *Id*. (citing *Moore*, 884 N.Y.S.2d at 346).

Here, the parties argue that the pertinent language in the indentures is not ambiguous. Franklin and Oz contend the pertinent language in the indentures required the stock transfer to have a profit motive. By contrast, iHeart argues the pertinent language in the indentures did not require the stock transfer to have a profit motive. After reviewing the four corners of the indentures, we conclude that the pertinent language in the indentures is not ambiguous. Additionally, as will be discussed below, we conclude that only iHeart's interpretation of the pertinent language is reasonable.

Because the indentures in this case are not ambiguous, we must enforce them according to their plain meaning without the use of extrinsic evidence. *See Samuel*, 879 N.Y.S.2d at 13. Furthermore, we may not, by construction, add or excise terms, nor distort the meaning of the terms used and thereby make a new contract for the parties. *See Riverside*, 892 N.Y.S.2d at 307.

The parties expressly defined the word "Investments" in the indentures. The indentures provide:

> "Investments" means, with respect to any Person, all investments by such Person in other Persons (including Affiliates) in the form of loans (including guarantees), advances or capital contributions (excluding accounts receivable, trade credit, advances to customers and commission, travel and similar advances to directors, officers, employees and consultants, in each case made in the ordinary course of business), purchases or other acquisitions for consideration of Indebtedness, Equity Interests or other securities issued by any other Person, and investments that are required by GAAP to be classified on the balance sheet (excluding the footnotes) of such Person in the same manner as the other investments included in this definition to the extent such transactions

> involve the transfer of cash or other property. For purposes of the definition of "Unrestricted Subsidiary" and Section 4.07 hereof:
>
> (1) "Investments" shall include the portion (proportionate to the Issuer's direct or indirect equity interest in such Subsidiary) of the fair market value of the net assets of the Subsidiary of the Issuer at the time that such Subsidiary is designated an Unrestricted Subsidiary . . . and
>
> (2) any property transferred to or from an Unrestricted Subsidiary that shall be valued at its fair market value at the time of such transfer, in each case as determined in good faith by the Issuer.

To support their argument that the indentures required the stock transfer to have a profit motive, Franklin and Oz focus on the first sentence of the above-quoted definition. This text provides that: "Investments means, with respect to any Person, all *investments* by such Person in other Persons (including Affiliates) in the form of loans (including guarantees), advances or capital contributions…." (emphasis added). Franklin and Oz do not dispute that the stock transfer at issue in this case was a "capital contribution." However, Franklin and Oz argue that to qualify as an "Investment," a transaction must be an "investment," which they claim means an expenditure intended to produce a profit.

Under New York law, courts may refer to the dictionary to determine the plain and ordinary meaning of undefined words in a contract, even when not ambiguous. *See Ragins v. Hosp. Ins. Co., Inc.*, 981 N.Y.S.2d 640, 641 (2013); *Mazzola v. Cty. of Suffolk*, 533 N.Y.S.2d 297, 297-98 (2d Dept. 1988). To determine the plain and ordinary meaning of the term "investment" in the indentures, we have consulted several dictionaries. According to one dictionary, "investment" means "[t]he investing of money (now also time and effort); an instance of this" and "[a]n amount of money invested. Also, anything in which money etc. is or may be invested." *Shorter Oxford English Dictionary* 1426 (Sixth Ed. 2007). Another dictionary provides that "investment" means "[a]n expenditure to acquire property or assets to produce revenue; a capital outlay;" and "[t]he asset acquired or the sum invested." *Black's Law Dictionary* 844-45 (Eighth Ed. 2004). Yet

another dictionary provides that "investment" means "the outlay of money usu[ally] for income or profit; capital outlay; also the sum invested or the property purchased." *Webster's Ninth New Collegiate Dictionary* 637 (1991). iHeart argues that because the word "investment" does not always and only mean an expenditure with a profit motive, that term cannot bear the weight Franklin and Oz assign to it. We agree. After considering multiple dictionary definitions, we cannot say that use of the word "investment" necessarily contemplates an expenditure intended to produce a profit.

The indentures expressly define the term "Investment." The indentures provide that "'Investments means'" "all investments . . . in the form of loans (including guarantees)," "advances or capital contributions," "purchases or other acquisitions," and "investments that are required by GAAP to be classified on the balance sheet . . . in the same manner as the other investments included in this definition to the extent such transactions involve the transfer of cash or other property." Therefore, the definition of "Investments" includes other types of transactions that do not ordinarily require a profit motive, namely "guarantees" and "advances." In fact, we could not adopt Franklin and Oz's argument that the term "Investments" requires the existence of a profit motive because to do so would violate a cardinal rule of contract construction by excising the words "guarantees" and "advances" from the contract. *See Riverside*, 892 N.Y.S.2d at 307. Therefore, after considering the word "investments" in context in the indentures, we conclude that it does not require the existence of a "profit motive."

Other language in the indentures reinforces the conclusion that the parties did not intend for the term "Investments" to require the existence of a "profit motive." The indentures define the term "Permitted Investments" to mean, among other things, "(2) any Investment in cash and Cash Equivalents . . .;" "(11) any Investment consisting of a purchase or other acquisition of inventory, supplies, material or equipment…;" and "(14) advances to, or guarantees of Indebtedness of

employees, directors, officers and consultants not in excess of $20,000,000 outstanding at any one time, in the aggregate . . . .” Again, like the definition of “Investments,” the definition of “Permitted Investments” includes types of transactions that do not ordinarily require a profit motive, such as cash and cash equivalents; the purchase or acquisition of inventory, supplies, material or equipment; and advances and guarantees.

Finally, we note that the term “profit motive” never appears in the definition of “Investments” in the indentures. If the parties had intended to require a capital contribution like the one in this case to have a profit motive, they could have used the term “profit motive” in the definition of “Investments.” The parties did not do so.

We are obligated to construe the indentures in a manner that ensures that the parties are bound by the agreements as written. After construing the definition of “Investments” in conjunction with the other relevant language in the indentures, we reject Franklin and Oz’s argument that the indentures required the capital contribution in this case to have a profit motive.

iHeart argues the indentures permitted capital contributions to affiliates without regard to profit motive based on the plain language of the definition of “Investments” as “all investments in the form of” “capital contributions.” We conclude this is the only reasonable interpretation of the language in question. We hold that the trial court properly concluded that the indentures did not require the capital contribution at issue in this case to have a profit motive and that the capital contribution did not violate the indentures.

CONCLUSION

The judgment of the trial court is affirmed.

Karen Angelini, Justice