STATE OF MICHIGAN

COURT OF APPEALS

OXFORD INVESTMENT GROUP, INC., SELWYN ISAKOW, TRUSTEE, HILSEL INVESTMENT COMPANY, L.P., and REX E. SCHLAYBAUGH, JR.,	UNPUBLISHED July 17, 2012
Plaintiffs-Appellees,	
v	No. 304209 Oakland Circuit Court LC No. 2009-105076-CK
FOURSLIDES, INC., ARETE, INC., a/k/a ARETE, L.L.C., GEORGE S. HOFMEISTER, RPM-TEC, L.L.C., JJ SEVILLE, L.L.C., d/b/a SEVILLE BRONZE, PALM PLASTICS HOLDINGS, L.L.C., ARETE BENT TUBE, L.L.C., ARETE PRIME PRODUCTS, INC., EAST JORDAN TOOL & DIE, INC., EATON TOOL & DIE COMPANY, BAKER METAL PRODUCTS CORPORATION, a/k/a BAKER MICHIGAN PRODUCTS CORPORATION, and TRIEM MOTORS, L.L.C.,	
Defendants,	
and	
AHD INTERNATIONAL, L.L.C., JSM CLEVELAND, INC., and REVSTONE INDUSTRIES, L.L.C.,	
Defendants-Appellants.	

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendants, AHD International, L.L.C. (AHD), JSM Cleveland, Inc., and Revstone Industries, LLC, ("defendants") appeal as of right from a consent judgment[1] entered in favor of plaintiffs, the Oxford Investment Group, Inc. (Oxford), Selwyn Isakow, Trustee, (the Isakow Trust), Hilsel Investment Company, L.P. (Hilsel), and Rex E. Schlaybaugh, Jr., in this breach of contract action. We affirm.

On appeal, defendants argue that the trial court erred in granting plaintiffs' motion for summary disposition against them with respect to liability because the contracts at issue are ambiguous and there is a question of fact regarding whether the term "Arete Companies" includes them. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Cedroni Assoc v Tomblinson, Harburn Assoc*, 290 Mich App 577, 584; 802 NW2d 682 (2010). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Id*. When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmovant. *Id*. A motion for summary disposition should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when "reasonable minds could differ . . . after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Issues of contract interpretation are questions of law that this Court reviews de novo. *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011).

FACTS

The contracts at issue in this case were executed in February of 2009 when the owners of Fourslides, Inc. (Fourslides), the Isakow Trust and Schlaybaugh sold it to Arete, Inc. (Arete). These contractual documents consist of:

> (1) Stock Redemption and Issuance Agreement (Redemption Agreement)
>
> (2) Amendment to Promissory Note [Hilsel], Amendment to Promissory Note [Schlaybaugh], and Amendment to Promissory Note [Isakow Trust] (the Note Amendments)
>
> (3) Agreement, dated February 20, 2009, signed by Hofmeister (Hofmeister Agreement)

[1] The consent judgment specifically preserved defendants' rights to appeal the trial court's decision with respect to their liability.

We refer to the Redemption Agreement, Note Amendments, and Hofmeister Agreement collectively in this opinion as "the transaction documents."

The Redemption Agreement was executed by Arete, Fourslides, Oxford, the Isakow Trust, and Schlaybaugh. Under the agreement, Fourslides is required to make monthly payments to Oxford. If Fourslides is unable to make payment, then "the Arete Companies," jointly and severally, are liable for the payments due or arising after October 1, 2009. The Arete Companies are defined as Arete and "any direct or indirect subsidiary or affiliate" of Arete. Hofmeister, the chairman of Arete, signed the agreement on behalf of Arete and the Arete Companies.

The Note Amendments amended promissory notes held by Hilsel, Schlaybaugh, and the Isakow Trust. Like the Redemption Agreement, the Note Amendments require Fourslides to make monthly payments. If Fourslides is unable to make payment, then the Arete Companies, jointly and severally, are liable for the payments due or arising after October 1, 2009. The Note Amendments' definition of Arete Companies is identical to the Redemption Agreement's definition: Arete and "any direct or indirect subsidiary or affiliate" of Arete. Again, Hofmeister signed the agreements on behalf of Arete and the Arete Companies.

The Hofmeister Agreement was executed by Oxford, the Isakow Trust, Schlaybaugh, and Hofmeister. This agreement makes Hofmeister personally liable for payments owed by Fourslides under the transaction documents that were due or arose between February 20, 2009, and October 1, 2009, that Fourslides is unable to pay. The parties to the Hofmeister Agreement also agreed that they would not "directly or indirectly disclose to any other person, firm, corporation, or bank" the existence of the Hofmeister Agreement without express written authorization from each other.

In addition, Hofmeister's three children each have a trust (the Hofmeister Trusts). The Hofmeister Trusts control four holding companies: Arete, AHD, Revstone Industries, L.L.C., and RPM-TEC, L.L.C. Each of these holding companies in turn owns several other companies, many of which were parties to this suit (although not parties to this appeal). With respect to AHD, each of the three trusts owns 17 percent and two other individuals each own 24½ percent. Both of these individuals and Hofmeister are directors of AHD; Hofmeister is the chairman.

ANALYSIS

A contract should be read as a whole and applied according to its plain language. See *White v Taylor Distributing Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010). If a contract's language is unambiguous, then the parol evidence rule precludes the use of extrinsic evidence to determine the contract's meaning. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). When a contract's language is ambiguous, however, parol evidence can be used to discern the parties' actual intent. *Id.*

Extrinsic evidence can also be used to show that a latent ambiguity exists, even if the language of the contract itself is unambiguous. *Shay*, 487 Mich at 667. A latent ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Id.* at 668. To determine if a latent ambiguity exists, a court must consider the extrinsic evidence and decide if "that evidence

supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation." *Id*. Once a latent ambiguity is determined to exist, extrinsic evidence can be used to discern the parties' intended meaning. See *id*.

Defendants argue that because they were not specifically named in the transaction documents, the documents are ambiguous. This argument lacks merit. While extrinsic evidence is required to determine defendants' relationships to Arete, it does not necessarily follow that the language of the contract is ambiguous. In fact, the transaction documents clearly define Arete Companies to mean Arete and "any direct or indirect subsidiary or affiliate" of Arete. An affiliate is "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." Black's Law Dictionary (9th ed). A subsidiary corporation is "[a] corporation in which a parent corporation has a controlling share." Black's Law Dictionary (9th ed). Based on the plain language of the transaction documents, the Arete Companies are:

(1) Arete;

(2) all entities controlled by Arete (subsidiaries);

(3) the entity that has a controlling share of Arete, if such an entity exists (the parent company or corporation); and

(4) all entities that are also controlled by Arete's parent company or corporation (sibling companies or corporations).

Determining the identities of Arete's subsidiary, parent, and sibling companies or corporations does not require interpretation of the transaction documents. The trial court did not have to assess credibility or make factual determinations to determine the identities of Arete's subsidiary, parent, and sibling companies or corporations. An entity is a subsidiary, parent, or sibling of Arete, or it is not. In this case, AHD is an affiliate of Arete because it is a sibling company of Arete; both are controlled by the Hofmeister Trusts.[2] The same holds true for Revstone Industries, LLC. JSM Cleveland, Inc. was owned by and thus a subsidiary of Arete. While the existence of defendants was determined from extrinsic evidence, i.e., from Hofmeister's testimony, they could also have been discerned from a number of other sources, such as the financial or shareholder records of the companies. The fact that a company was referred to in a general sense (affiliate or subsidiary) rather than named specifically does not necessarily equate with an ambiguity.

Second, defendants argue that plaintiffs' interpretation of the term Arete Companies makes it synonymous with "the Hofmeister Companies," which creates an ambiguity because contracts should be interpreted to avoid surplusage. This argument also lacks merit. The Note Amendments define "Hofmeister Companies," as the Arete Companies and "any other company

[2] The Hofmeister Trusts own 51 percent of AHD and 100 percent of Arete.

controlled direct or indirectly" by Hofmeister. The Arete Companies are Arete and "any direct or indirect subsidiary or affiliate" of Arete. Arete is owned by the Hofmeister Trusts, *not* Hofmeister himself. Under the plain language of the transaction documents, the Arete Companies thus are Arete, Arete's subsidiaries, and all other companies owned by the Hofmeister Trusts. On the other hand, the Hofmeister Companies are all of the Arete Companies, *plus* any additional companies controlled, directly or indirectly, by Hofmeister individually.

Finally, defendants argue that there was a latent ambiguity in the transaction documents regarding the meaning of affiliate. Defendants' argument relies primarily on February 16, 2009, email correspondence between plaintiffs' and Hofmeister's attorneys. The email from Hofmeister's attorney to plaintiffs' attorney states, in part:

> Due to various security agreements with lenders for various entities "controlled" by George [Hofmeister][.]
>
> Those entities are forbidden from Guaranteeing [sic] any debt.
>
> We would immediately be in default with our lenders.
>
> However, the Arete entities (5 or 6 fairly profitable companies) are not restricted in this way. I believe that the best way to handle this is to change the definition of "Hofmeister Companies" to the following:
>
> > (A) The Shareholder, (B) any subsidiary or affiliate of Shareholder (the "Arete Companies")
>
> This will not limit the ability of other entities from contributing to the payments but it will not be a loan covenant violation with their secured lenders.

While defendants contend that the above language reveals a latent ambiguity in the transaction documents with respect to the meaning of Arete Companies and affiliate, we are not persuaded of the same. Defendants submitted this evidence to the trial court for its consideration and we, like the trial court, do find it overwhelmingly persuasive. The email from Hofmeister's attorney to plaintiffs' attorney could demonstrate that Fourslides, Hofmeister, and Arete intended for the transaction documents to implicate the five or six "fairly profitable companies" that Hofmeister's attorney refers to as "the Arete entities." However, the email could also demonstrate that Hofmeister's attorney was using the parenthetical reference to simply indicate that the Arete companies included 5 or 6 that were fairly profitable. Either way, the intent or understanding of one party to an agreement is in no way dispositive. See, *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 246; 760 NW2d 828 (2008)("a contract requires mutual assent or a meeting of the minds on all the essential terms"). Because the extrinsic evidence does not reveal a latent ambiguity in the transaction documents, summary disposition was appropriate.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen Fort Hood