STATE OF MICHIGAN

COURT OF APPEALS

VAN TOL, MAGENNIS & LANG, Inc, Plaintiff-Appellant, v JOHN L. WOODWARD, Defendant-Appellee.	UNPUBLISHED October 4, 2012 No. 305313 Kent Circuit Court LC No. 10-008479-CK

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this dispute over a covenant not to compete, plaintiff Van Tol, Magennis & Lang, Inc. (Van Tol), appeals by right the trial court's opinion and order granting summary disposition in defendant John L. Woodward's favor. On appeal, the sole issue is whether the trial court properly determined that Van Tol and Woodward unambiguously agreed to void Woodward's earlier covenant not to compete. Because there is an ambiguity as to the scope of their agreement to nullify earlier agreements, including the covenant not to compete, we conclude that the trial court erred when it dismissed Van Tol's suit. Accordingly, we reverse and remand for further proceedings.

I. BASIC FACTS

Woodward began working for Van Tol as an insurance agent in 1996. In September 2004, Woodward signed a new employment agreement with Van Tol. In the 2004 employment agreement, Woodward agreed that he would not compete with Van Tol for a period of three years after leaving Van Tol's employ. On the same day, Woodward signed an agreement with Van Tol and other persons owning shares in Van Tol, which restricted the shareholders' ability to transfer their shares.

In January 2009, Woodward entered into a "Stock Redemption Agreement" with Van Tol in which Van Tol agreed to purchase Woodward's 1,000 shares of stock for more than $60,000. The agreement contained the following paragraph:

> 10. **Merger.** It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract which alone fully and completely expresses their agreement. This Agreement may not be changed or terminated orally.

After a medical leave of absence that was several months, Woodward resigned from Van Tol in August 2010. That same month, Van Tol sued Woodward to enforce the covenants in Woodward's 2004 employment agreement and for tortious interference with its business relationships. Van Tol alleged, in part, that Woodward used his medical leave to establish a competing insurance agency and that he had used proprietary information to solicit business from Van Tol's customers in violation of his agreement not to compete.

In May 2011, Woodward moved for summary disposition. He argued that his agreement to not compete for a period of three years after leaving Van Tol's employ was no longer valid as a matter of law. Specifically, he argued that the merger clause found in the parties' 2009 stock agreement effectively nullified every antecedent agreement that he had made with Van Tol, including his 2004 employment agreement. The trial court agreed and, in July 2011, entered an opinion and order dismissing Van Tol's claims.

This appeal followed.

II. THE MERGER CLAUSE

A. STANDARD OF REVIEW

On appeal, Van Tol argues that the merger clause in the 2009 stock agreement was ambiguous because it is not clear whether the parties intended it to nullify every antecedent agreement between the parties, without regard to the agreement's subject matter, or only intended to nullify all prior agreements regarding Woodward's stock. In contrast, Woodward argues that the merger clause—by its plain and unambiguous terms—nullified every antecedent agreement between the parties without regard to the subject. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of a contract. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

B. ANALYSIS

In consideration for employment as an insurance agent, Woodward agreed in his 2004 employment agreement that he would not compete with Van Tol for three years after he left Van Tol's employ. If reasonable, such covenants are valid and enforceable. See *Brillhart v Danneffel*, 36 Mich App 359, 363-364; 194 NW2d 63 (1971). Nevertheless, the parties to an agreement are not forever locked into the terms of that agreement; they may subsequently agree to discharge or modify the prior agreement. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 412-413; 646 NW2d 170 (2002).

Despite the fact that he continued to work for Van Tol for more than a year after he entered into the 2009 stock agreement, Woodward argued that he and Van Tol explicitly agreed to discharge Woodward's 2004 employment agreement with the merger clause found in the 2009 stock agreement. The trial court agreed that the merger clause nullified Woodward's 2004 employment agreement. Thus, we must determine whether Woodward and Van Tol unambiguously agreed to nullify Woodward's 2004 employment agreement in the merger clause found under paragraph 10 of the 2009 stock agreement.

In paragraph 10 of their 2009 stock agreement, Woodward and Van Tol stated that "[i]t is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract . . . ." Although obscured by circumlocutions and legalese,[1] one possible interpretation of this clause is that Woodward and Van Tol agreed that the 2009 stock agreement superseded all their prior understandings and agreements. See *Flajole v Gallaher*, 354 Mich 606, 609; 93 NW2d 249 (1958) (stating that the mere possibility of semantic ambiguity does not render a clause ambiguous because "the unhappy fact is that the possibility of such ambiguity lurks in almost every written instrument devised by man;" rather, the issue is "whether any ambiguity which arguably may exist is, on its face, so palpable and so grave that recourse must be had to explanation lying without the instrument."). Moreover, the adjective "all" can mean "any whatever", see *Random House Webster's College Dictionary* (1996), and when given this meaning, could be understood to mean every understanding or agreement that the parties had made, rather than some subset of understandings or agreements. Nevertheless, when paragraph 10 is read together and in the context of the agreement as a whole, see *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000), the phrase "all understandings and agreements" could plausibly mean that the 2009 stock agreement superseded only those agreements and understandings that dealt with the same subject.

In construing this clause, we find it noteworthy that the parties did not explicitly state that the 2009 stock agreement "superseded" all their prior agreements without regard to the subject of the prior agreement; rather, they agreed that "all understandings and agreements" were "merged" and did so in a clause labeled "merger." When referring to the law of contracts, merger refers to the common law doctrine where courts presume that a prior contract between the same parties and on the same subject will be extinguished in whole or in part by absorption into the new contract. See 17A CJS, Contracts, § 574, p 467;[2] see also 17A Am Jur 2d, Contracts, § 527,

[1] The phrase "[i]t is understood and agreed", is a passive construct that is typically used when the actor is unknown or generalized (as when referring to what people generally do or know). Read in isolation, one might be tempted to conclude that this clause merely describes what some unknown person or persons understand and agree. But this Court does not read contractual provisions in isolation. *Perry v Sied*, 461 Mich 680, 689; 611 NW2d 516 (2000). And, given that the agreement is between Woodward and Van Tol and that they stated that they "agree" to the numbered paragraphs following the introduction, the most logical interpretation is that Van Tol and Woodward are the ones who understand and agree. As for the term "heretofore", it is a quaint bit of legalese that means "prior" or "previous." Similarly, the term "hereto" refers to the parties who signed the agreement, presumably as opposed to some unnamed third-parties.

[2] "With respect to the law of contracts, merger refers to the extinguishment of one contract by its absorption into another contract. The general rule is that when parties enter into a second contract dealing with the same subject matter as their first contract without stating whether the second contract operates to discharge or substitute for the first contract, the two contracts must be interpreted together and the latter contract prevails to the extent they are inconsistent. A second contract dealing with different subject matter than a prior contract does not replace the prior contract. Subsequent agreements may, however, cover additional matters and still replace

p 498. Under the merger doctrine, courts often construed the contracts together and determined that the subsequent contract controlled only to the extent that the contracts conflicted—that is, the prior contract might survive to the extent that the terms of that contract are not inconsistent with the terms of the subsequent contract. *Id.* To prevent such an occurrence, the parties might include an explicit statement that the new agreement constitutes the final expression of the parties' negotiations and that the new agreement supersedes all prior understandings or agreements. See, e.g., *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504-507; 579 NW2d 411 (1998). By labeling paragraph 10 with the common law term "merger", Woodward and Van Tol might have intended to limit paragraph 10's effect to that consistent with the common law term; that is, they might have intended that the phrase "all understandings and agreements" be limited to understandings and agreements on the same subject. This understanding is further bolstered by the parties' inclusion of a subordinate clause limiting the scope of the term "contract."

Van Tol and Woodward agreed that their prior understandings and agreements merged into "this contract", but they also limited the term "contract" by stating that it fully and completely expressed their "agreement." The term agreement must refer to the specific *terms* expressed within the agreement. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (noting that courts must generally give effect to every word in a contract and avoid an interpretation that would render any part surplusage or nugatory). Under the introductory clause, the parties stated that the agreement was "*an understanding* with respect to the sale by [Woodward] and the redemption by [Van Tol] of one thousand . . . shares" of stock in Van Tol (emphasis added). Hence, the parties might have intended this subordinate clause to limit the scope of the merger to those "understandings and agreements" that conflict with the otherwise "fully and completely expresse[d]" terms in the 2009 stock agreement. Because paragraph 10 is equally susceptible to either construction, it is patently ambiguous. *Shay v Aldrich*, 487 Mich 648, 678; 790 NW2d 629 (2010) (stating that a contract is patently ambiguous only if the court concludes that a term is equally susceptible to more than a single meaning). And the ambiguity must be resolved by the finder of fact. *Klapp*, 468 Mich at 469.

Even if this clause were not patently ambiguous, we would nevertheless conclude that it contained a latent ambiguity. A latent ambiguity exists where the meaning of the language used in the agreement appears clear on the surface, but where some extrinsic fact creates the possibility of more than one meaning. See *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 648 (2010) ("A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the necessity for interpretation or a choice among two or more possible meanings.") (quotation marks omitted). As already noted, the phrase "all understandings and agreements" might refer to all understandings and agreements of any kind, but it could also mean all understandings and agreements on the same subject. Even assuming that the former construction would normally constitute the "plain" construction, there is evidence that Woodward was working for Van Tol under the 2004 employment agreement when he entered into the 2009 stock agreement and continued to work for Van Tol for more than a year afterward under the same terms. Given this evidence, the term

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the former agreements so long as the basic subject matter is the same." 17A CJS, Contracts, § 574, p 467.

"all" must be understood to contain a latent ambiguity; that is, a jury must determine whether the parties understood the term "all" in its most expansive sense or in the more limited sense. See *id.* at 670-676 (stating that the circumstances surrounding the parties' execution of the release created a latent ambiguity as to whether the parties intended the phrase "all other persons" to include any and all other persons, or intended it to include all persons within a particular subset of persons).

C. CONCLUSION

The trial court erred when it determined that paragraph 10 was unambiguous. With paragraph 10, the parties might have intended to nullify all their prior agreements, including Woodward's 2004 employment agreement. But it is equally plausible that the parties intended paragraph 10 to only apply to their prior agreements concerning the sale and redemption of Van Tol's stock. Because this ambiguity must be resolved by the finder of fact, the trial court erred when it dismissed Van Tol's claims.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Van Tol may tax its costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens