

STATE OF MICHIGAN
COURT OF APPEALS

LINDE, LLC,

Plaintiff-Appellant,

v

OWENS-BROCKWAY GLASS CONTAINER,
INC.,

Defendant-Appellee.

UNPUBLISHED
November 27, 2012

No. 307299
Eaton Circuit Court
LC No. 10-001344-CK

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendant pursuant to MCR 2.116(C)(8) (failure to state a valid claim). For the reasons set forth in this opinion, we affirm.

I. FACTS

Plaintiff is a Delaware LLC and supplier of industrial gasses. Defendant is a Delaware corporation and industrial glass manufacturer operating several plants across the country. On October 15, 1999, plaintiff and defendant entered into an “On-Site Product Supply Agreement” (hereinafter “the Agreement”), wherein plaintiff agreed to construct, at its own expense, an oxygen supply facility located at defendant’s glass manufacturing plant in Charlotte, MI. Plaintiff’s total expenditures in building, and later upgrading, the oxygen supply facility exceeded \$5 million. In turn, defendant agreed to exclusively purchase oxygen for the Charlotte plant from plaintiff for 15 years—referred to as the “Supply Period”—from February 2000 to February 2015. Pursuant to the Agreement, defendant also agreed to pay a minimum product charge every month, regardless of defendant’s actual oxygen requirements.¹

Plaintiff began supplying oxygen to defendant’s Charlotte plant in February 2000, and service continued until defendant notified plaintiff on February 11, 2010 of its intent to terminate

¹ Although the initial rate was \$85,000 per month, the current minimum product charge is \$93,262.

the Agreement in order to permanently shut down all operations at the Charlotte plant. Plaintiff refused to accept defendant's termination, arguing that defendant could not invoke the termination provision cited by defendant, ¶ 14.1 of the Agreement, because that provision did not apply if defendant decided to permanently shut down its operations at the Charlotte plant. Plaintiff reasoned that defendant could only invoke ¶ 14.1 if it found an alternative method of glass manufacturing that rendered the use of oxygen product obsolete. As defendant continued to dismantle the Charlotte plant, plaintiff filed the instant complaint, asking the court to find that defendant unlawfully terminated the Agreement.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that the plain language of the termination provision in the Agreement, ¶ 14.1, permitted defendant to lawfully terminate the contract in the event of a permanent shutdown at the Charlotte plant. Plaintiff countered by asking for summary disposition pursuant to MCR 2.116(I)(2). The lower court agreed with defendant and granted its motion while denying plaintiff's. Specifically, the court made the following conclusions: (1) under Ohio law,² plaintiff's interpretation of ¶ 14.1 was unreasonable because the plain language of the provision did not require a technological change for defendant to invoke the provision; (2) plaintiff's interpretation of ¶ 14.1 contradicted its assertion that defendant could invoke this provision if it reverted back to traditional air furnaces; (3) plaintiff's concerns over defendant's ability to terminate the Agreement in the event of a temporary shutdown is precluded by the language "then and continuing future operations" in ¶ 14.1; (4) ¶¶ 13.3 and 13.6 do not support plaintiff's construction of ¶ 14.1, because those provisions only apply to temporary shutdowns; and (5) ¶ 14.2, the other termination provision, is an alternative provision that neither modifies nor restricts defendant's rights under ¶ 14.1.

II. ANALYSIS

At issue in this case is whether defendant's permanent shutdown of the Charlotte plant was within the scope of ¶ 14.1. If so, then defendant did not breach the Agreement, was not obligated to continue paying the minimum product charges, and the trial court properly granted summary disposition to defendant. If not, then defendant breached the Agreement by terminating it before the full 15-year term of the contract had expired, and the court erred in granting summary disposition to defendant.

The court's grant of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). Although a dispositive motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint and allows consideration of only the pleadings," any action predicated on an attached, written contract "becomes part of the pleadings themselves." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); see MCR 2.113(F). The court must also "accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party," and the motion should only be granted when "no factual development

² The Agreement contained a choice of law provision, which neither party challenged, specifying that Ohio law governed its construction and application.

could possibly justify recovery.” *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 591; 773 NW2d 271 (2009).

Under Ohio law, the Court’s role is to give full effect to the intent of the parties, presuming that the language in the written instrument, considered as a whole, fully expresses the parties’ intent. *Sunoco, Inc v Toledo Edison Co*, 129 Ohio St 3d 397, 404; 953 NE2d 285 (2011). The construction of a clear and unambiguous contract only presents questions of law, not fact. *Inland Refuse Transfer Co v Browning-Ferris Industries of Ohio, Inc*, 15 Ohio St 3d 321, 322; 474 NE2d 271 (1984). Extrinsic evidence cannot be considered by the court to interpret the plain language in a contract provision when the contract is unambiguous, *Sunoco, Inc*, 129 Ohio St 3d at 406, 411, or to demonstrate an ambiguity not present on the face of the written instrument, unless the “circumstances surrounding the agreement invest the language of the contract with a special meaning., *id.* at 409, citing *Shifrin v Forest City Enterprises, Inc*, 64 Ohio St3d 635, 638; 597 NE2d 499 (1992). “[A] contract is unambiguous if it can be given a definite legal meaning.” *Westfield Ins Co v Galatis*, 100 Ohio St 3d 216, 219; 797 NE2d 1256 (2003). On the other hand, “if a term cannot be determined from the four corners of a contract, factual determination of intent or reasonableness may be necessary to supply the missing term,” which presents a question for the jury. *Inland Refuse Transfer Co*, 15 Ohio St 3d at 322. The court cannot “create ambiguity in a contract where there is none,” *Lager v Miller-Gonzalez*, 120 Ohio St 3d 47, 49; 896 NE2d 666 (2008), and is “prohibited from rewriting the contract” by imputing ambiguity in order to achieve a perceived equitable result, *Sunoco, Inc*, 129 Ohio St 3d at 410. “It is only when a provision . . . is susceptible of more than one reasonable interpretation that an ambiguity exists” *Hacker v Dickman*, 75 Ohio St 3d 118, 119-120; 661 NE2d 1005 (1996).

The words in an instrument “are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument.” *Alexander v Buckeye Pipe Line Co*, 53 Ohio St 2d 241, 245-246; 374 NE2d 146 (1978), superseded by statute on other grounds. If possible, the court must “give effect to every provision of the contract,” and a construction that gives meaning and purpose to the language must prevail over a construction that renders that same language meaningless. *Sunoco, Inc*, 129 Ohio St 3d at 408.

The relevant provisions of the Agreement cited by the parties are ¶¶ 13.3, 13.6, 14.1, and 14.2. Paragraph 14.1 provides as follows:

14. TERMINATION

14.1 If [defendant] establishes that it no longer requires Oxygen Product in connection with the then and continuing future operations of [defendant’s] plant, [defendant] shall have the right to terminate this Agreement, in its entirety, as of the last day of any calendar month during the Supply Period, by giving [plaintiff] not less than twelve (12) months’ prior written notice of such termination and paying BOC the total sum hereinafter set forth. On the effective date of termination, which shall be specified in [defendant’s] notice of termination, [defendant] shall pay to [plaintiff] the following termination fee:

(i) The Minimum Product Charge applicable to the month during which such termination becomes effective together with all other charges related to Product previously delivered to [defendant] and any such charges applicable to any prior month as well as any other sums due [plaintiff] under this Agreement, which are then unpaid;

PLUS

(ii) The sum stated in the following table that is applicable to the date on which such termination becomes effective

The “sum” stated in ¶ 14.1(ii) varies based on the remaining number of years in the contract, from \$1,890,000 if more than 14 years remain to \$220,000 if less than one year remains.³

Paragraph 14.2, states as follows:

14.2 In lieu of termination in the manner specified in 14.1, if at any time [defendant] no longer has any requirement for oxygen, [defendant] has the option to request [plaintiff] to relocate, at [defendant’s] cost and expense, the [oxygen supply facility] to another location operated by [defendant]. Upon making such request, [defendant] shall provide to [plaintiff] such assurance as [plaintiff] may reasonably request demonstrating that [defendant] is contractually free to purchase oxygen from [plaintiff] at such other location. If [defendant] provides such assurance to [plaintiff], [plaintiff] and [defendant] shall execute an amendment to this Agreement making it applicable to such other location, and such amendment shall also extend the term of this Agreement for a period of two (2) days for each day that the [oxygen supply facility] is out of service due to [defendant’s] cessation of oxygen requirements at [defendant’s] plant and any required [sic] to dismantle the [oxygen supply facility] and install it at such other location. [Plaintiff] shall notify [defendant] in writing of the total period of extension of the Agreement applicable to supply at such new location. [Defendant] shall reimburse [plaintiff] within thirty (30) days of presentation of an invoice detailing the costs and expenses associated with dismantling, removing, transporting, storing, refurbishing, and installing the [oxygen supply facility] at such other location. Any additional local expenses incurred by [plaintiff] at the new location shall be negotiated in good faith by the parties prior to the actual relocation. In addition, the price of Liquid Oxygen for the new location will be negotiated, in good faith, to take into account [plaintiff’s] regional supply situation at such new location. [Boldface in original.]

³ Plaintiff does not dispute that the relevant termination fee under ¶ 14.1(ii) is \$590,000.

The other two provisions in the Agreement cited by the parties, ¶¶ 13.3 and 13.6, are under the title “EXCUSED NONPERFORMANCE.” These provisions temporarily abate the accrual of the minimum product charge during certain temporary shutdowns, such as any force majeure (superior or irresistible force) or maintenance periods. However, the Supply Period is extended during these shutdowns.

The contract is clear and unambiguous, and defendant was permitted to invoke ¶ 14.1 when it effected a permanent shutdown of the Charlotte plant. There is no ambiguity on the face of the Agreement, and the words are clear and are not subject to more than one reasonable interpretation. Defendant’s interpretation of ¶ 14.1 is reasonable, gives full effect to all the operative language, and is consistent with both ¶ 14.1 and the Agreement as a whole.

When viewed in context, the language “then and continuing future operations” plainly refers to the types of defendant’s operations that are subject to the termination provision. The language prevents defendant from being able to terminate the Agreement in its entirety for a temporary shutdown. Hence, the “then and continuing future operations” language effectively excludes defendant’s ability to invoke ¶ 14.1 in the event it no longer requires oxygen product in connection with past or solely present operations, such as a temporary shutdown. However, in the event of a permanent shutdown, defendant would no longer require oxygen product for its “then and continuing future operations,” as all operations would have expired. With no such requirements for oxygen product, defendant was clearly permitted to invoke ¶ 14.1 to terminate the Agreement “in its entirety.” This interpretation is also consistent with ¶ 14.1’s sliding scale fee to be paid in the event defendant invoked the termination provision. This fee was based entirely on the remaining duration on the life of the Agreement.

Plaintiff’s reading injects an implied condition precedent into the provision, effectively requiring that defendant could “only” invoke the termination provision if it had ongoing operations at the facility but no longer required the oxygen product for those operations. However, the intent to impose this implied restriction is not apparent anywhere on the face of the Agreement. Additionally, plaintiff’s interpretation is only feasible if one ignores the context of the words “then and continuing future operations,” which were clearly preceded by the words “no longer requires Oxygen Product in connection with the.” In context, it is clear that “then and continuing future operations” was designed to describe the type of defendant’s operations to which defendant could terminate the Agreement in the event it “no longer requires Oxygen Product.” Contrary to plaintiff’s assertions, this language did not create an implied condition precedent requiring that defendant maintain operations in order to invoke ¶ 14.1.

Further, plaintiff’s argument that defendant’s construction of ¶ 14.1 renders nugatory the word “continuing” is meritless, as the inclusion of this word prevents defendant from being able to terminate the Agreement by switching its manufacturing operations to a new product line that does not require oxygen product. Accordingly, plaintiff’s construction of this provision is unreasonable and insufficient to defeat defendant’s motion for summary disposition.

Plaintiff also argues that ¶ 14.2, the alternative termination provision, supported its interpretation of ¶ 14.1, because ¶ 14.2 provided broad termination rights to defendant. Admittedly, ¶ 14.2 is broader than ¶ 14.1 in its application, as it applies whenever defendant “no longer requires oxygen,” while ¶ 14.1 only applies when defendant “no longer requires Oxygen

Product.” Further, ¶ 14.2 does not contain the language limiting the activities subject to the provision. However, ¶ 14.2 states that this provision is “in lieu of” ¶ 14.1, which gives no indication that ¶ 14.2 was intended to be an either/or proposition or limit defendant’s rights under ¶ 14.1. Further, ¶ 14.2 is not a “true” termination provision; it permits defendant to relocate the oxygen supply facility to a new location, but does not allow defendant to terminate the Agreement. It further requires defendant to extend the supply period of the contract and does not extinguish defendant’s responsibility to pay the minimum product charge. As ¶ 14.2 does not actually terminate the parties’ Agreement, it does not follow that this provision actually limits defendant’s right to invoke ¶ 14.1, which is an actual termination provision. Accordingly, ¶ 14.2 has no bearing on interpreting the language in ¶ 14.1.

Plaintiff also asserts that ¶¶ 13.3 and 13.6 bolster its interpretation of the Agreement, purportedly because these provisions similarly do not suspend defendant’s obligation to pay the minimum product charge during temporary shutdowns. Plaintiff reasons that, because the Agreement did not intend to permit defendant to avoid paying the minimum product charges during a temporary shutdown, it also did not permit defendant to avoid these payments during a permanent shutdown. Accordingly, plaintiff contends the parties never intended to allow defendant to terminate the Agreement in the event of a permanent shutdown.

This argument is flawed for two reasons. First, ¶ 14.1 specifically states that defendant may terminate the Agreement “in its entirety,” which necessarily includes its responsibility to pay the minimum product charges. Thus, plaintiff’s interpretation clearly conflicts with the universal language in ¶ 14.1. Second, ¶¶ 13.3 and 13.6 cannot be used to interpret ¶ 14.1 because those provisions are dealing with entirely different circumstances than ¶ 14.1. As ¶ 13 deals with excused nonperformance for temporary shutdowns, they have no relevance in determining the scope of a provision purporting to permanently terminate the Agreement. Although the parties agreed that defendant would still have to pay the minimum product charge in the event of a temporary shutdown, it does not follow that the parties also agreed that defendant would have to continue making those payments after full termination of the Agreement.

We reject plaintiff’s assertion that the trial court should not have considered defendant’s motion because it was untimely, as discovery was already underway. A motion under MCR 2.116(C)(8) may be raised at any time, and defendant filed the motion before the deadline stated in the court’s scheduling order. MCR 2.116(D)(4). Plaintiff has failed to persuade this Court that any further discovery will lead to any additional evidence that would have any bearing on this Court’s decision. We also reject the argument that the trial court erred by granting defendant’s motion after plaintiff uncovered extrinsic evidence supporting its interpretation of the Agreement. Because the Agreement is unambiguous, “no factual development could possibly justify recovery.” *Begin*, 284 Mich App at 591. Further, as a motion pursuant to MCR 2.116(C)(8) is decided on the pleadings alone, any newly discovered evidence outside the pleadings is irrelevant to interpreting the Agreement. Although plaintiff had the right to amend its pleading, it made no request to do so. MCR 2.116(I)(5).

Plaintiff also argues that the trial court erred by failing to consider extrinsic evidence to define the meaning of “minimum product charge” within the industrial gas industry, because Ohio law permits consideration of extrinsic evidence to explain the meaning of specific terms

commonly used in a trade or industry. First, the lower court had no opportunity to address this question because it was not raised. Second, as noted above, ¶ 14.1 of the Agreement permits termination of the Agreement “in its entirety.” This necessarily includes defendant’s obligations to pay the minimum product charge, regardless of how these words are interpreted. Further, plaintiff’s complaint already explains that a “minimum product charge” is commonly used in the industrial gas industry to mean a minimum monthly payment that is always paid throughout the entire duration of the contract.

Plaintiff asserts that it did not assume the risk that defendant would permanently shut down the Charlotte plant. However, it provides no legal support for the notion that this “evidence” of its subjective intent should have been considered by the trial court. Plaintiff also correctly notes that the trial court misconstrued its position that defendant could only invoke ¶ 14.1 in the event of a technology change. However, plaintiff fails to demonstrate how this error was dispositive of the court’s ultimate interpretation of the contract. It does not follow that the trial court erroneously interpreted ¶ 14.1 merely because the court misconstrued plaintiff’s argument. As plaintiff offers no legal support for these arguments, they are abandoned on appeal. *PIC Maintenance, Inc v Dep’t of Treasury*, 293 Mich App 403, 414; 809 NW2d 669 (2011).

In sum, ¶ 14.1 clearly and unambiguously permitted defendant to terminate the Agreement, in its entirety, in the event of a permanent shutdown of all operations. The trial court correctly granted defendant’s motion for summary disposition.

Affirmed. Defendant, having prevailed, may tax costs. MCR7.219(A).

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens