STATE OF MICHIGAN

COURT OF APPEALS

JAY S. TURNER, Plaintiff-Appellant,	UNPUBLISHED April 15, 2014
v	No. 313936 Oakland Circuit Court
J & J SLAVIK, INC., Defendant-Appellee.	LC No. 2007-082782-CZ

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order entering a judgment of no cause in this shareholder-rights action. We reverse.

Plaintiff argues that the trial court erred when it held that he was not entitled to a declaratory judgment stating that he is a shareholder of defendant. Specifically, plaintiff contends that, because his shares in defendant were not redeemed pursuant to the procedures in the parties' stock restriction and redemption agreement when his employment with defendant terminated in January 1992, he holds the same ownership interest today. We agree.

"This Court reviews de novo a trial court's ruling in a declaratory judgment action." *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010). Factual findings are reviewed under the "clearly erroneous" standard, which is met "when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011).

"In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1); *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). "Redemption arises out of a contract between the corporation and its shareholders, whereby the corporation agrees to repurchase the shares under terms agreed upon by the parties and set forth in the articles [of incorporation]." *Miller v Magline, Inc*, 105 Mich App 413, 417; 306 NW2d 533 (1981). In securities law, "redemption" means "the act or an instance of reclaiming or regaining possession by paying a specific price, including the reacquisition of a security by the issuer." *Coates v Bastian Brothers, Inc*, 276 Mich App 498, 505; 741 NW2d 539 (2007), quoting Black's Law Dictionary (8th ed) (quotation marks and punctuation omitted).

According to this understanding of "redemption," defendant did not redeem plaintiff's shares. The stock restriction and redemption agreement provided, in part, that "[i]n the event the employment . . . of [plaintiff] . . . terminates, . . . [defendant] shall purchase, and [plaintiff] . . . shall sell, all of the shares of common stock in [defendant] then owned by such terminated employee." The purchase price for such shares was to be "the fair market value thereof as of . . . the last day of the month immediately preceding the termination of employment of [plaintiff] . . . as such value is determined and adjusted under the provisions . . . below." "Fair market value" meant "the amount of [defendant's] assets less the amount of its liabilities (book value) on the [v]aluation [d]ate divided by the number of shares outstanding . . . ." The parties agree, however, that no valuation occurred. Similarly, the same agreement established a process and deadline for the closing of the redemption of plaintiff's stock, and it is undisputed that no such closing took place.

Defendant takes the same position it took in its May 21, 1992, letter to plaintiff, which is that plaintiff was owed no cash payment in exchange for his shares because defendant was statutorily prohibited from redeeming plaintiff's shares, and "[t]he law does not require the doing of a useless act."[1] Because the Michigan Business Corporation Act, MCL 450.1101 *et seq.*, does not define "redemption," whether defendant redeemed plaintiff's shares is a question of whether the process for redemption agreed upon by the parties was followed, and there is no dispute that it was not. Indeed, defendant unambiguously declined, in the May 21, 1992, letter, to redeem plaintiff's shares because, "by necessary implication, the [stock restriction and redemption agreement] indicates that *there be no redemption* of stock having a negative value under the valuation provisions of the [a]greement." (Emphasis added.)

But the agreement contained no exemption from the valuation and closing processes for shares having negative or no value. The lack of transparency resulting from defendant's failure to follow these processes meant that the only information available to plaintiff concerning defendant's financial position was its vague and self-serving May 21, 1992, letter declaring that defendant was "in a substantial deficit position even after taking into account the mark-up to fair market value." If defendant is correct that plaintiff's shares had no value when his employment was terminated, defendant was still bound by the stock restriction and redemption agreement to establish that it was insolvent as of December 31, 1991, which it made no attempt to do.

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[1] MCL 450.1345(3) provides:

> A distribution shall not be made if, after giving it effect, the corporation would not be able to pay its debts as the debts become due in the usual course of business, or the corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

Since no redemption occurred, there remains the question of what became of plaintiff's shares. The trial court, in its opinion and order, held that "the January 1992 termination of [p]laintiff's employment with [d]efendant instantly terminated [p]laintiff's status as a shareholder," creating an "unconditional obligation for [p]laintiff to transfer his shares to [d]efendant." Because plaintiff's stock "had a negative value as of December 31, 1991," according to the trial court, "there was no need for [d]efendant to write [p]laintiff a check for 'zero' to 'redeem' the stock when [p]laintiff's employment ended." The flaw with this conclusion is that it relies on the trial testimony of Michael Lewiston, defendant's former attorney, to value plaintiff's shares in defendant, when the parties specifically established a valuation procedure that was not used. Only after that procedure was followed would it then have been between plaintiff and defendant to decide whether any payment was warranted. The bargained-for valuation procedure was substantially more transparent—providing, if necessary, for three real-estate appraisers—than the unsupported claims plaintiff received from defendant, and plaintiff had a right to be secure in the knowledge that his shares had no objective value.

Defendant argues that "the beneficial rights of ownership in specific property pass from buyer to seller when an unconditional contract for sale exists." Neither of the two Michigan cases it cites in support of that position, however, apply to the facts of this case. *Beardslee v Grindley*, 236 Mich 453, 456-457; 210 NW 486 (1926), involved an option for the purchase of real estate and held that the plaintiff was not required to tender payment concurrently with his acceptance of the option in order to create a binding contract. Mere acceptance was sufficient, and only a "contractual relation," not a property right, was created as a result of the acceptance. *Id.* at 458. *Catsman v Eister*, 8 Mich App 563; 155 NW2d 203 (1967), also concerned an option for the purchase of land. It is one thing to say that a binding contract is created out of the exercise of an option; it is another to say that shares of stock were automatically and immediately transferred, by operation of law, when plaintiff's employment terminated, when there is no evidence that the parties agreed to such a transaction. There is no doubt that plaintiff was required to sell his shares to defendant when his employment ended, but there is also no doubt that such sale did not take place because defendant refused to initiate one, as its letter illustrated and as Ronald Slavik, a 40-percent shareholder of defendant, admitted. Because a valuation that conformed to the terms of the redemption agreement was not performed, there was no evidence, that the parties agreed in advance to recognize, that plaintiff's shares were, in fact, worthless.

Nor is defendant's argument, adopted by the trial court, that plaintiff transformed from a shareholder to a nonshareholder when his employment terminated, supported by the evidence. The stock restriction and redemption agreement does not provide for this arrangement, and the federal district court opinion defendant and the trial court relied on does not assist defendant on this issue. In *Jenkins v Haworth, Inc*, 572 F Supp 591 (WD Mich, 1983), the plaintiff former shareholder sued the defendant company, among other claims, for breach of fiduciary duty in voting to terminate his employment and repurchase his shares. The court found that "since [the plaintiff] agreed to the mandatory repurchase provision," he "lost his right to shareholder status when he was terminated from full-time employment." *Id.* at 601. Although decisions of a federal district court interpreting Michigan law are not binding, we may find their reasoning persuasive. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 16; 697 NW2d 913 (2005). However, in this instance we are not persuaded. First, in *Jenkins*'s multi-state scenario, it is not evident that this portion of the opinion addressing the plaintiff's claim of breach of fiduciary duty was based on Michigan law. See *Jenkins*, 572 F Supp at 601-602. Second, the federal court

opinion offered this pronouncement without citing to any authority. See *id.* at 601. Third, this portion of the opinion arguably is obiter dicta since it was not necessary to the resolution of the claim. *Dessart v Burak*, 252 Mich App 490, 496 n 5; 652 NW2d 669 (2002). In addition to dismissing the plaintiff's claim of breach of fiduciary duty on the basis that the plaintiff lacked standing (from not being a shareholder), the court also found that plaintiff's underlying claim was without merit since he had agreed to the buy/sell agreement, which allowed the defendant to terminate the plaintiff's employment with or without cause and repurchase his stock. See *Jenkins*, 572 F Supp at 595, 598, 601-602. Fourth, the facts underlying *Jenkins* are factually distinguishable. Primarily, the defendant corporation in *Jenkins* never treated the plaintiff as a shareholder after the plaintiff's employment was terminated. In fact, the board of directors even resolved to repurchase the plaintiff's shares of stock. *Id.* at 597. As discussed herein, defendant refused to repurchase plaintiff's stock, and defendant's agents continued to treat plaintiff as a shareholder after his employment ended.

Plaintiff received notices of shareholder meetings and was identified as both a shareholder and a director in the minutes of at least one such meeting. On a December 14, 1994, consent resolution of the shareholders and directors, plaintiff's signature appeared twice, once in his capacity as a shareholder, and once as a director. Patrick O'Keefe, a shareholder and defendant's former chief financial officer, considered plaintiff to be a shareholder after the latter's employment ended. The shareholders' voting agreement provided, in part, that the board of directors, would consist "solely" of shareholders, and plaintiff was a director at least until his January 1, 1995, resignation. Even the last sentence of defendant's May 21, 1992, letter refusing to redeem plaintiff's stock can be read to have contemplated a future redemption: "Therefore, the only basis upon which we would be able to consider redeeming your stock would be in a manner [in] which the net assets of [defendant] would not be depleted as a direct result of the redemption." At the very least, this language does not suggest the automatic transfer of worthless shares.

The provision in the stock restriction and redemption agreement calling for a closing within 30 days of "the determination of the purchase price of redeemable shares" and requiring that defendant and the outgoing shareholder "execute and deliver all such instruments" would be meaningless if plaintiff's status as a shareholder was immediately revoked upon termination of his employment. These provisions demonstrate the parties' intent that plaintiff's shares would not pass unless and until defendant paid fair-market value for them.[2] "Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 111; 812 NW2d 799 (2011), remanded on other grounds 493 Mich 859 (2012) (quotation marks and punctuation omitted).

[2] This does not mean that if the stock had no value that defendant would be forced to write a check for zero dollars. In that case, plaintiff would have to transfer the stock back to the company without getting anything in return. But what is important in this case is that the agreed-upon evaluation method for determining the value of the stock never occurred, and defendant expressly refused to proceed with the stock redemption.

We further note that the stock certificate introduced into evidence stamped "canceled" is not dispositive on the question of whether plaintiff continues to be a shareholder in defendant, not only because of its dubious authenticity—a concern the trial court shared—but also because the stamp, by itself, has no independent legal effect. Because the redemption procedure bargained for by the parties was not followed, plaintiff's stock was not canceled, and plaintiff did not lose his status as a shareholder. Therefore, he was entitled to a declaratory judgment to that effect.

We reverse the trial court's November 30, 2012, opinion and order, and remand with instructions to enter a judgment declaring that plaintiff is a shareholder of defendant. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen