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NO. 4-14-0681

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September 4, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DONNA BURTLE, MARYBETH DILLMAN, and ADAM BURTLE, Plaintiffs-Appellees, v. DOUBLE S/S FARMS, INC., WILLIAM SHAW, ALEX SHAW, and RYAN SHAW, Defendants-Appellants.	)	Appeal from Circuit Court of Sangamon County No. 12MR1002 Honorable John P. Schmidt, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of plaintiffs where the contract language unambiguously provides that a minority shareholder's interest shall not be discounted during the valuation process.

¶ 2 Plaintiffs, Donna Burtle, and her children, Marybeth Dillman and Adam Burtle, are minority shareholders in Double S/S Farms, Inc., a closely held corporation. Defendants are Double S/S Farms, William H. Shaw, and his children, Alex Shaw and Ryan Shaw. William H., Alex, and Ryan are also minority shareholders in Double S/S Farms. In July 2008, plaintiffs notified defendants of their intent to sell their shares in Double S/S Farms, and a dispute arose concerning whether, according to the governing "Buy/Sell Agreement," plaintiffs' shares should be discounted in determining their fair market value. When the arbitration process failed, plaintiffs filed an action for declaratory judgment, and defendants counterclaimed, asking the court to determine the meaning of the phrase, "[m]inority interests shall not be discounted in

determining fair market values" contained in the agreement. The parties then filed cross motions for summary judgment, with plaintiffs asserting the plain language of the provision at issue prohibited any discounting of their minority shares, and defendants contending the plain language precluded only a "minority-interest discount" from being applied. Following a May 28, 2013, hearing, the trial court granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment. Defendants filed a timely motion to reconsider which the court denied.

¶ 3 Defendants appeal, asserting the trial court erred in (1) granting plaintiffs' motion for summary judgment and (2) denying defendants' motion to reconsider. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On January 3, 1984, William R. Shaw, his wife, Elizabeth Shaw, and their two children, Donna and William H., entered into a "Buy/Sell Agreement" (the agreement) related to their closely held corporation, Double S/S Farms. On that date, they were the sole shareholders of Double S/S Farms' stock. Specifically, of the total 2,150 shares of stock, William R. owned 703 shares, Elizabeth owned 703 shares, Donna owned 297 shares and William H. owned 447 shares. Article one of the agreement sets forth certain stock transfer restrictions designed to maintain family ownership of shares in Double S/S Farms. Article four of the agreement allows for the gifting of shares to descendents, but any new shareholders must abide by the stock-transfer restrictions in the agreement. William R. and Elizabeth subsequently transferred by way of gift all of their shares to their children and grandchildren. Donna and William H. both received 449 additional shares, bringing Donna's total number of shares to 746 and William H.'s to 869. Marybeth, Adam, Alex, and Ryan each received 127 shares.

¶ 6 In July 2008, plaintiffs notified defendants of their intent to sell their shares in Double S/S Farms. Pursuant to article three of the agreement, "DOUBLE S/S FARMS, INC. and its remaining shareholders are obligated, jointly and severally, to purchase the shares of any shareholder who elects to sell in whole or in part his or her shares. The sales price shall be the amount determined pursuant to the provisions of Article Five." Article five provides as follows:

> "Fair market value may be determined by mutual agreement made between the parties to sale or, lacking same, by competent, independent appraisers, one to be selected by the prospective seller, one to be selected by the prospective purchaser and a third to be selected by the two appraisers so selected. *Minority interests shall not be discounted in determining fair market values*." (Emphasis added.)

In addition, article six of the agreement provides, in relevant part, as follows:

> "Should a genuine dispute develop regarding interpretation of or compliance with the provisions hereof and, in particular, regarding determination of fair market value of the stock of DOUBLE S/S FARMS, INC.[,] and if the parties in interest cannot resolve their difference by mutual agreement, then the matters in issue shall be submitted to binding arbitration."

Article six further provides that each party to the dispute should promptly select an arbitrator, and within 15 days thereafter, the two arbitrators selected by the parties should select one additional arbitrator who together will resolve the dispute.

¶ 7 In December 2012, plaintiffs filed a two-count complaint for declaratory relief in the Sangamon County circuit court. Count I alleged that the parties had, in previous litigation (Sangamon County case No. 2011-MR-361), stipulated that the meaning of the phrase, "[m]inority interests shall not be discounted," contained in article five of the agreement was a question of interpretation to be resolved by the arbitrators under article six of the agreement (the arbitration provision). The complaint further alleged that the arbitration provision did not include a method for selecting a third arbitrator when the two arbitrators selected by the parties were unable to agree on the selection of a third arbitrator. Plaintiffs asserted the parties were unable to select a third arbitrator and therefore requested that the trial court find the arbitration process had failed. Count II requested that the court specifically determine the meaning of the phrase in the agreement, "[m]inority interests shall not be discounted in determining fair market values." According to plaintiffs, as minority shareholders, the phrase at issue prohibited any discounting of their shares during the valuation process.

¶ 8 In January 2013, defendants filed a counterclaim. Defendants agreed with plaintiffs' assertion in Count I that the arbitration process had failed. As did plaintiffs, defendants requested that the trial court interpret the meaning of the phrase, "[m]inority interests shall not be discounted in determining fair market values." In contrast, however, defendants argued that the agreement precluded only the application of a "minority[-]interest discount" when determining the fair market value of plaintiffs' shares. According to defendants, other discounts, including a lack-of-marketability discount and a discount for built-in-gains taxes could be considered under the terms of the agreement.

¶ 9 In April 2013, plaintiffs filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)). Plaintiffs asserted

that, pursuant to the plain language of the agreement, their minority interests could not be discounted in determining the fair market value of their Double S/S Farms shares.

¶ 10 In May 2013, defendants filed a motion for summary judgment contending that the plain language of the agreement precluded only a minority-interest discount from consideration, and that other discounts, including lack-of-marketability and built-in-gains discounts, could be considered during the valuation process.

¶ 11 Following a May 2013 hearing on the parties' cross-motions for summary judgment, the trial court, in a docket entry, granted plaintiffs' motion and denied defendants' motion. No transcript of the hearing is contained in the record.

¶ 12 In June 2013, defendants filed a motion to reconsider asking the trial court to enter judgment in their favor which the court denied.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendants assert that the trial court erred in granting plaintiffs' motion for summary judgment and in denying their motion to reconsider.

¶ 16 "Summary judgment is appropriate when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino and Terpinas*, 2015 IL 117096, ¶ 14, __ N.E. 3d __ (quoting 735 ILCS 5/2-1005(c) (West 2010)). We review a trial court's entry of summary judgment *de novo*. *Id*. We also review *de novo* a trial court's interpretation of a contract. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II*, 403 Ill. App. 3d 234, 245, 931 N.E.2d 780, 790 (2010).

¶ 17 At the outset, we note that defendants' contention on appeal is not that genuine issues of material fact exist such that summary judgment should not have been granted, but rather, that a proper interpretation of the language at issue should have resulted in the entry of summary judgment in their favor.

¶ 18 The primary objective when construing the language of a contract is to give effect to the intent of the parties, which is to be discerned from the language of the contract. *Zabaneh Franchises, LLC v. Walker*, 2012 IL App (4th) 110215, ¶ 17, 972 N.E.2d 344. "Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43, 58 (2007). "If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning." *Thomspson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 47 (2011). The language of a contract is ambiguous when it is susceptible to more than one reasonable interpretation. *Id*. However, "[a] contract is not rendered ambiguous merely because the parties disagree on its meaning." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153, 821 N.E.2d 206, 214 (2004).

¶ 19 The agreement at issue here provides that when a Double S/S Farms' shareholder elects to sell his or her shares in whole or in part, Double S/S Farms and its remaining shareholders are obligated, jointly and severally, to purchase the shares for their "fair market value," which is to be determined by mutual agreement of the parties, or lacking such, by competent, independent appraisers. In either case, the agreement directs that "[m]inority interests shall not be discounted in determining fair market values." According to plaintiffs, "[t]he plain language of the agreement prohibits *any* discounting relative to [their minority] interests in the valuation process." (Emphasis added). Defendants disagree, asserting the above

provision means only that a "minority[-]interest discount" shall not be applied to plaintiffs' shares during the valuation process, but that other discounts which are regularly used to determine the fair market value of shares may be applied.

¶ 20 Defendants argue that a strict interpretation of the language at issue, meaning no discounting whatsoever of minority shares, would lead to an absurd result by placing a greater value on the interests of minority shareholders to the financial detriment of majority shareholders. As such, they ask this court to interpret the provision at issue to mean, "[m]inority[-]interest discounts shall not be applied in determining fair market values," or, alternatively, "[m]inority interests shall not be discounted, based upon their status as minority interests, in determining fair market values."

¶ 21 In support of their contention, defendants first assert that according to *Independence Tube Corp. v. Levine*, 179 Ill. App. 3d 911, 535 N.E.2d 927 (1988), shares of closely held corporations are subject to discounting during the valuation process based upon their minority-interest position and lack of marketability. Defendants next advance a hypothetical scenario to demonstrate the unreasonableness of plaintiffs' suggested interpretation. They suggest that if William H. were to purchase his children's shares, he would own 53.5% of Double S/S Farms's stock, making him a majority shareholder. In this scenario, defendants theorize William H.'s majority interest could be subject to a 20% lack-of-marketability discount to reflect the lack of marketability in a closely held corporation (this appears to be the same percentage discount approved in *Independence Tube Corp.*). According to defendants, William H.'s majority interest of 53.5%, following a 20% lack-of-marketability discount, would be worth less than the remaining 46.5% minority interest owned by plaintiffs, which would not be subject to *any* discount according to plaintiffs. Defendants argue this would constitute an absurd result,

and therefore, even if the language of the agreement is deemed plain and unambiguous, the parties must have meant something different than what was said. See *e.g., In re Marriage of Olsen*, 124 Ill. 2d 19, 26, 528 N.E.2d 684, 687 (1988) (noting "a court may properly disregard even unambiguous language when it is clear that the parties means something different from what was said"); *Reserve Insurance Co. v. General Insurance Co.*, 77 Ill. App. 3d 272, 280, 395 N.E.2d 933, 938 (1979) ("When two constructions of an agreement are arguable and one would lead to an absurd result, the other construction is preferred.").

¶ 22 First, we note that we are not faced with the hypothetical situation defendants posit. Whether such a situation ever arises and, if it does, whether a court would apply a lack-of-marketability discount in whatever amount, if any, is purely speculative.

¶ 23 More important, plaintiffs' suggested interpretation of the agreement—that there be no discounting of minority shares—is a recognized principle in the valuation of majority ownership shares in closely held corporations, as more fully discussed below, and thus is not unreasonable or irrational on its face. Defendants argue a court must consider discounts such as a minority-interest discount or a lack-of-marketability interest discount in order to arrive at the fair market value of the minority shares. In their brief, they argue "a valuation process which excludes discounts normally applied to determine fair market value cannot then still result in fair market value." Initially, we note that even if we were to adopt defendants' interpretation and only preclude consideration of a minority-interest discount, this would still run afoul of defendants' assertion that the fair market valuation process requires consideration of *all* "discounts normally applied." In other words, defendants' proposed interpretation of the disputed language would still result in what they consider to be a flawed fair market value determination as it would not allow for consideration of *all* discounts.

¶ 24 Further, defendants' view that minority shares in a closely held corporation should be subject to a minority-interest discount and lack-of-marketability discount in the valuation process is in fact a minority view. It is true that in at least two cases, Illinois courts have approved of such discounting of minority-share value. See *Independence Tube Corp*., 179 Ill. App. 3d at 918, 535 N.E.2d at 931; *Stanton v. Republic Bank of South Chicago*, 144 Ill. 2d 472, 480, 581 Ill. 2d 678, 682 (1991). However, a majority of states have concluded that a minority-interest discount or lack-of-marketability discount should not be considered in determining fair value when a minority shareholder is selling to a majority shareholder or the corporation. See *Brown v. Arp & Hammond Hardware Co.*, 141 P.3d 673, 683 (Wyo. 2006) ("The vast majority of courts have determined that a minority discount should not be applied to determine fair value of a minority shareholder's interest."); *Pueblo Bancorporation v. Lindoe, Inc*., 63 P.3d 355, 366-67 (Colo. 2003) (majority of decisions hold discounts for lack of marketability do not apply); *Arnaud v. Stockgrowers State Bank of Ashland Kansas*, 992 P.2d 216, 218 (Kan. 1999) ("Cases and commentators suggest that the majority of states have not applied minority and marketability discounts when determining the fair value of stock."); *Lawson Mardon Wheaton, Inc. v. Smith*, 734 A.2d 738, 748 (N.J. 1999) ("[E]quitable considerations have led the majority of states and commentators to conclude that marketability and minority discounts should not be applied when determining the fair value[.]"); *Charland v. Country View Golf Club, Inc.*, 588 A.2d 609, 613 (R.I. 1991) (finding that lack of marketability and minority discounts should not apply to fair value determination under dissolution statute); see also *HMO-W Inc. v. SSM Health Care System*, 611 N.W.2d 250, 255 n.5 (Wis. 2000) (holding that minority discounts are not appropriate when determining the value of minority shares in an appraisal action); *Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884, 889-90 (Iowa 1996) (disallowing a marketability discount

and holding that a marketability or minority discount would prevent a minority shareholder from receiving the fair value of their pro rata share); *Brown v. Allied Corrugated Box Co.*, 91 Cal. App. 3d 477, 486-87 (Ct. App. 1979) (rejecting use of discounts in action for election to purchase instead of dissolution). More recently, the First District in *Jahn v. Kinderman*, 351 Ill. App. 3d 15, 27-28, 814 N.E.2d 116, 126 (2004), noted in addressing *Independence Tube Corp.*, "the more prevalent current trend [is] toward rejection of such [lack-of-marketability] discounts in [corporate buyouts]."

¶ 25 This observation is important since it stands in direct opposition to defendants' contention that a valuation process which does not allow for discounting "is not rational, leads to completely absurd results, and should not be adopted." To be clear, we are not suggesting Illinois courts, in the absence of controlling contract language, should not allow such discounting. That issue is not before us. However, we conclude based on the above cases, plaintiffs' interpretation of the agreement that there should be no discounting of their minority interests, is reasonable. Here, it is apparent the parties to the agreement contracted to forego any discounting of minority interests.

¶ 26 Based on our reading of the agreement as a whole, we find the language at issue unambiguous, and there is no indication the parties intended anything other than what the plain, ordinary, and popular meaning of the language states, *i.e.*, no discounts are to be applied in valuing minority shares. Defendants' interpretation of the contract language would require this court to rewrite the agreement to make it more favorable for them. We decline to do so. See *Berryman Transfer & Storage Co. v. New Prime Inc.*, 345 Ill. App. 3d 859, 863, 802 N.E.2d 1285, 1288 (2004) (no court may rewrite the terms of a clear and unambiguous contract to make it more equitable for one of the parties). Had the parties intended to merely preclude the

minority-interest discount from being applied to minority interests, they could have easily accomplished this as evidenced by the two "restatements" proffered by defendants. See *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 301, 854 N.E.2d 800, 807 (2006) ("A presumption exists against provisions that easily could have been included in the contract but were not.").

¶ 27 Accordingly, we find the trial court properly granted summary judgment in favor of plaintiffs, and therefore, did not err in denying defendant's motion to reconsider.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment.

¶ 30 Affirmed.