STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ROBERT E. DEMIL,

Plaintiff,

vs. Case No. 2013-4291-CB

MICHEAL DEMIL and CRAIG FENTON

Defendants.

_____/

OPINION AND ORDER

The parties have filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). They have also each filed a response to the opposing party/parties' motion.

Factual and Procedural History

In February 2008, the parties requested that attorney Rogue Tyson, RMD Holdings, Ltd.'s corporate counsel, draft various documents regarding the corporate governance of Fenton Excavating & Construction, Inc. ("Fenton Construction"). Specifically, Mr. Tyson drafted the following documents, each of which was executed by each of the parties: (1) voting agreement (the "Voting Agreement"), (2) shareholder 488 agreement, (iii) buy-sell agreement, (4) capitalization agreement (the "Capitalization Agreement"), (5) assignment of assets agreement, (vi) transfer of assets agreement, and (vii) administrative services agreement. Pursuant to the parties' agreements, Robert E. Demil, Michael Demil and Craig Fenton were each 1/3 owners of Fenton Construction and each received an equal amount of shares, *inter alia*.

On October 24, 2013, Plaintiff filed his complaint in this matter. In his complaint, Plaintiff alleges that Defendants have violated the provisions of the Voting Agreement and Capitalization Agreement by issuing additional stock in Fenton Construction without the unanimous consent of all shareholders and by amending the bylaws of the company without the unanimous approval of all shareholders. Specifically, Plaintiff alleges that Defendant breached the contracts at issue by implementing decisions that were not passed unanimously and by failing to submit the parties' disputed votes to arbitration.

Plaintiff and Defendants have since filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10) and have each responded to the opposing motion. On October 6, 2014, the Court held a hearing in connection with the motions and took the matters under advisement.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

The first dispute is whether the Voting Agreement requires that all shareholder votes be approved or rejected by unanimous consent. Paragraphs 1 and 2 of the Voting Agreement provide:

> 1. The parties agree to vote their shares of stock in Fenton Excavating & Construction, Inc. so that each is elected a director of the corporation during the term of this agreement. On all other matters, each party will consult with the other and will act jointly in exercising his voting rights.
>
> 2. If the parties fail to agree concerning voting, the question in disagreement shall be submitted to arbitration to the American Arbitration Association in accordance with the Commercial Arbitration Rules, whose decision shall be binding on the parties, and each agrees to vote his shares according to the arbitrator's decision.

The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. *Dykema v Muskegon Piston Ring Co*, 348 Mich 129, 138, 82 NW2d 467 (1957). Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Zinchook v Turkewycz*, 128 Mich App 513, 340 NW2d 844 (1983).

As the Court indicated at the October 6, 2014 hearing, it is convinced that paragraph 1 of the Voting Agreement is ambiguous. While Plaintiff contends that the provision requires that all votes be unanimous, or submitted to arbitration, the term unanimous is not contained in paragraph 1 or 2 of the voting agreement. Had the parties intended to require unanimity they certainly could have included that requirement clearly. Indeed, the parties included unanimous voting requirements in connection with other portions of the agreements, including paragraph 5 of the Voting Agreement, which provides that: "this agreement may be amended only by the written consent of all parties." While the parties utilized stronger and unambiguous language in other portions

of the agreements, the terminology used in paragraph 1 of the Voting Agreement is anything but clear.

In his motion, Plaintiff contends that paragraph 2 would be rendered meaningless by anything less any a unanimous requirement. The Court disagrees. While unlikely, the parties could potentially support three different proposals, which would not satisfy even a majority approval requirement. Under such a scenario arbitration could be utilized, as provided in paragraph 2 to choose between the three proposals. While this type of situation would undoubtedly be rare, it is perceivable. Consequently, the Court is satisfied that paragraph 2 of the Voting Agreement is not rendered meaningless under Defendants' interpretation.

Plaintiff also asserts that MCL 450.1461 confirms that the language used in paragraph 1 requires unanimous approval of all votes. MCL 450.1461 provides:

> An agreement between 2 or more shareholders, if in writing and signed by the parties, may provide that in exercising voting rights, the shares held by them shall be voted as provided in the agreement, or as they may agree, or as determined in accordance with a procedure agreed upon by them. A voting agreement executed pursuant to this section, whether or not proxies are executed pursuant to the agreement, is not subject to sections 466 through 468. A voting agreement under this section shall be specifically enforceable.

Contrary to Plaintiff's position, section 461 does not require unanimity. Rather, section 461 states that an agreement may provide that shares held shall be voted as provided in the agreement, or as they may agree, or as determined in accordance with a procedure agreed upon by them. Accordingly, section 461 leaves the procedure for voting up to the discretion of the shareholders and would permit either interpretation advanced by the parties in this case. Consequently, Plaintiff's position is without merit.

In light of the Court's finding that the terms of the Voting Agreement are ambiguous, the issue as to interpretation is a question of fact. *Zinchook, supra*. In support of their proposed interpretations, the parties rely on competing affidavits. While Plaintiff appears to concede that Defendants' affidavits are admissible, Defendants challenge the affidavit of Mr. Tyson, the only affidavit submitted by Plaintiff. Specifically, Defendants contend that Mr. Tyson's affidavit should be stricken because it was not served 21 days prior to the hearing held in connection with this motion. The Court is not persuaded to strike the affidavit. The affidavit was filed 16 days prior to the hearing and Defendants have had the opportunity to, and have, filed additional briefing in connection with instant motions after the affidavit was filed. Accordingly, any prejudice that may have resulted from the tardy filing has been negated.

In addition, Defendants contend that Mr. Tyson was the drafter of the agreements, and that because he is an ally of Plaintiff the agreements should be construed against Plaintiff. However, it is undisputed that Mr. Tyson drafted the Voting Agreement at the request of all three of the parties. While there is evidence that Mr. Tyson has since aligned himself with Plaintiff, the fact remains that the Voting Agreement was not drafted by any of the three parties to this matter. For these reasons, the Court is convinced that the Voting Agreement should not be interpreted against Plaintiff.

Additionally, the Court has inquired as to instances in which decisions were made with less than a unanimous decision of the three shareholders. However, the only decision cited by either side is a vote of the directors in which the vote was 2 to 1. This instance is of minimal value, if any, as it did not involve a vote of the shareholders as

shareholders. Consequently, the vote in question does not provide clarity as to the ambiguous provisions discussed above.

Given the conflicting affidavits with respect to the ambiguous provision at issue, the Court is convinced that genuine issues of fact exist which preclude summary disposition.

The second issue in dispute is whether unanimous consent was needed in order to authorize additional shares in Fenton Construction. It is undisputed that at the time the company was incorporated 10,000 shares were authorized, but only 300 shares were issued (100 to each shareholder). The question before the Court is whether section 3 of the Capitalization Agreement requires that any decision regarding whether to issue additional shares previously authorized be made unanimously. Section 3 provides:

> The corporation shall have a singe class of capital stock, consisting of 10,000 shares. The stock will not have preemptive rights. All shares shall have equal rights and shall be entitled to vote on all matters submitted to Shareholders. The articles of incorporation provide that no additional shares shall be authorized for issuance without the unanimous written consent of each Shareholder.

In his motion, Plaintiff contends that the intent behind the restriction that "no additional shares shall be authorized for issuance without the unanimous consent of each Shareholder" was that shares could not be issued without unanimous consent.

In their motion, Defendants contend that the language in paragraph 3 unambiguously provides that only decisions authorizing additional shares above and beyond the 10,000 already authorized must be unanimous.

If contract language is unambiguous the Court must construe and enforce the contract as written. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Therefore, an unambiguous contractual provision is

reflective of the parties' intent as a matter of law, and that intent will be enforced unless it is contrary to public policy. *Id.* Indeed, "[t]he goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. [The Court] must enforce the clear and unambiguous language of a contract as it is written." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).

In this case, the parties' dispute falls on whether the phrase "authorized for issuance" includes decisions to issue shares already authorized or whether it refers only to the authorization of shares beyond the 10,000 authorized at the time of incorporation. After reviewing paragraph 3, the Court is convinced that the provision unambiguously provides that decisions regarding increasing the amount of authorized shares beyond 10,000 shares must be made unanimously, but that the condition does not apply to decisions to issue additional shares that have already been authorized. This conclusion is supported by the fact that the remainder of paragraph 3 addresses the amount of shares that have been authorized and does not even mention the portion of those shares that have been issued. In addition, the Michigan Court of Appeals, on at least one occasion has used a similar phrase to "authorized for issuance" in the context of shares that are authorized rather than shares that are issued. See *Dittrich v Cabana Mfg Corp*, unpublished per curium opinion of the Court of Appeals, decided May 12, 1998, (Docket No. 185155) ("Although Cabana's board authorized the issuance of the new shares, the new shares were never actually issued…") Based on its review of paragraph 3 and the language in *Dittrich*, the Court is convinced that a unanimous vote is only needed in order to authorize stock above the 10,000 shares authorized at the time of incorporation.

Accordingly, Defendants' motion for summary disposition must be granted to the extent that Plaintiff's breach of contract claims are based on the issuance of stock previously authorized.

Conclusion

Based upon the reasons set forth above, Plaintiff Robert E. Demil's motion for summary disposition is DENIED. In addition, Defendants' motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Defendants' motion for summary disposition is granted to the extent that Plaintiff's breach of contract claims are based on the issuance of stock previously authorized at the time of incorporation.

In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: November 24, 2014

JCF/sr

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