STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

RALPH ORLANDI and MARYELLEN ORLANDI,

Plaintiffs,

vs. Case No. 2019-000338-CB

ORLANDI GEAR COMPANY, INC., and MICHALE KELMIGIAN,

Defendants.
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OPINION AND ORDER

Defendants Orlandi Gear Company, Inc., ("the Company") and Michael Kelmigian ("Kelmigian"), (collectively "Defendants"), moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Ralph and MaryEllen Orlandi ("Plaintiffs") filed a response seeking denial of the motion and requesting judgment in their favor. Defendants subsequently filed a reply to the response.

I. Background

This is a breach of contract dispute. Although the parties' business relationship extends back into the late 1990s, their dispute in this case arises out of a December 2004 Loan and Restructuring Agreement ("Restructuring Agreement") between Defendants, Michael Schiavi ("Schiavi") and Ralph Orlandi ("Orlandi"). In the Restructuring Agreement, Orlandi agreed to reduce outstanding debt Defendants and Schiavi owed to him under a prior agreement in which Orlandi sold the Company to Kelmigian and Schiavi and loaned Kelmigian, Schiavi, and the Company over $2 million. In exchange for reducing the outstanding debt, the Company, with Kelmigian and Schiavi's personal

guaranty, agreed to provide Orlandi and his wife, MaryEllen Orlandi, certain medical and dental benefits until the Company was sold or liquidated.

In January 2017, Schiavi sold all of his shares in the Company to Kelmigian, making Kelmigian sole owner of the company.[1] Asserting that this sale triggered the end of the Company's obligation to pay Plaintiffs' medical and dental benefits under the Restructuring Agreement, Kelmigian notified Plaintiffs he would cease paying those benefits. This lawsuit followed.

On January 25, 2019, Plaintiffs filed a two-count complaint against Defendants for breach of contract and declaratory relief. On February 14, 2019, Defendants filed their motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiffs filed their response on March 4, 2019, requesting the motion be denied and seeking judgment in their favor, and Defendants subsequently filed a reply on March 6, 2019. The Court held a hearing on the motion and took the matter under advisement.

II. Standard of Review

Defendants' motion is filed pursuant to MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground the opposing party has failed to state a claim on which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006). It tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Carter*, Mich App at 427.

[1] At the time of the sale, Schiavi owned 67% of the equity of the Company; Kelmigian owned the remaining 33%.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. "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.* A court may enter judgment in favor of the opposing party if it determines "that the opposing party, rather than the moving party, is entitled to judgment . . . ." MCR 2.116(I)(2).

III. Law and Analysis

Section 5 of the Restructuring Agreement contains the disputed health and dental benefits requirement.[2] It states, in relevant part, "The [Company] will provide traditional Blue Cross Blue Shield medical health insurance and dental insurance to [Plaintiffs] until the [Company] is sold or liquidated." (Pltf's Resp, Ex 3, p. 3). The dispute here involves one issue: whether the Company was "sold" for purposes of Section 5 when Schiavi sold his stock to Kelmigian. If it was, as Defendants argue, then under Section 5, Defendants are no longer obligated to pay Plaintiffs' medical and dental benefits. If wasn't, then Defendants are still obligated to pay for those benefits.

The "main goal in the interpretation of contracts is to honor the intent of the parties."

[2] The parties refer to the various parts of the Restructuring Agreement as "Paragraphs," but the agreement uses "Sections" to refer to its various parts. For consistency with the Restructuring Agreement, this *Opinion and Order* will use the term "Sections."

Kyocera Corp v Hemlock Semiconductor, LLC, 313 Mich App 437, 446; 886 NW2d 445 (2015). "The words used in the contract are the best evidence the parties' intent." *Id.* "When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent." *Id.* "A contract is said to be ambiguous when its words may reasonably be understood in different ways." *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566, 596 NW2d 915 (1999) (citation and quotation marks omitted). However, "[i]f the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Wells Fargo Bank, NA v Cherryland Mall Ltd. Partnership (On Remand)*, 300 Mich App 361, 386, 835 NW2d 593 (2013). "The language of a contract should be given its ordinary and plain meaning." *Id.* Moreover, a contract must be construed as a whole to give each of its provisions the meaning intended by the parties. *See Leon v Detroit Harvester Co*, 363 Mich 366, 109 NW2d 804 (1961).

The parties agree resolution of this dispute turns on the interpretation of the word "sale" for purposes of Section 5 of the Restructuring Agreement.[3] Both parties agree the definition of the term "sale" is unambiguous, but they differ as to its exact meaning. Defendants assert the term "sale" for purposes of Section 5 means any transfer of stock for monetary consideration and a transfer of ownership. Plaintiffs, on the other hand, argue the term "sale" means a sale of substantially all of the Company's stock, and "substantially all" means 85% or more.

[3] Although the word "sold," not "sale," is used on Section 5, "sold" is the past tense and past participle of the verb "sell," which, in turn, means "To transfer (property) by sale." Merriam-Webster, *Sold* < https://www.merriam-webster.com/dictionary/sold > (last accessed March 18, 2019); Black's Law Dictionary (10th ed. 2014).

Although Section 5 of the Restructuring Agreement does not define the terms "sold" or "sale," the Restructuring Agreement as a whole does include language that reveals the parties' intended definition for those terms, particularly Sections 8 and 6. Section 8, entitled "Personal Guaranties," provides that Schiavi and Kelmigian are personally liable for the obligation under Section 5 to provide Plaintiffs' medical and dental benefits and under Section 6 to split the proceeds from a future sale of the Company. (Pltf's Resp, Ex 3, p. 5). Significantly, Section 8.a. provides that Schiavi and Kelmigian are not personally liable under Section 5 "for any obligations falling due after the [Company] ceases substantially all of its business operations, or after the *sale of substantially all of the stock of the [Company]*, or if Schiavi and Kelmigian are removed from control of the [Company] (without their consent)." (Id.) (emphasis added). Under the plain language of Section 8.a., if a stock sale occurs, only a sale of substantially all of the Company's stock will end Schiavi and Kelmigian's personal liability to provide medical and dental benefits to Plaintiffs under Section 5.

The Restructuring Agreement doesn't define "substantially all" in the context of a stock sale. Nor does it appear the term is defined in Michigan statutes or by Michigan state courts. However, as Plaintiffs point out, federal courts have identified "substantially all" as "one of those phrases with a special legal meaning." *Contl Can Co, Inc v Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep) Pension Fund*, 916 F2d 1154, 1158 (CA 7, 1990). It's a phrase that appears throughout the federal tax code and IRS regulations and is defined as 85% or more. *Id.* Federal courts have extended this definition into non-tax situations, such as pension and ERISA cases. *See id.*; *In re US Truck Co Holdings, Inc,* 341 BR 596, 603 (ED Mich, 2006); *Medina v Catholic Health*

Initiatives, 877 F3d 1213, 1229 (CA 10, 2017). Additionally, other state courts have similarly defined "substantially all." *See IPI, Inc v Burton*, 217 W Va 181, 186; 617 SE2d 531, 536 (2005) (holding the phrase "substantially all" in workers' compensation statute means "all but an insignificant amount"); *Theurer v Bd of Review Indus Com'n*, 725 P2d 1338 (Utah 1986) (holding newly practicing dentist's acquisition of 75% of former dentist's assets is not "substantially all" assets of former dentist); *James v McCoy Mfg Co*, 431 So2d 1147, 1149 (Ala 1983) (concluding 65% was insufficient to constitute "substantially all the assets" within context of unemployment statute); *Auclair Transp v Riley*, 96 NH 1, 69 A2d 861, 863 (NH 1949) (finding word "substantially" in unemployment compensation act "cannot be less than 90% [of the whole] in the ordinary situation").

"As a general rule, where terms having a definite legal meaning are used in a written contract, the parties to the contract are presumed to have intended such terms to have their proper legal meaning, absent a contrary intention appearing in the instrument." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390, 401 (1999). Because the term "substantially all" has a special legal meaning, particularly in the federal case law defining the term consistent with the tax code and regulations, it would be unreasonable to interpret the parties' use of the phrase "substantially all" for purposes of a stock sale to mean anything other than a sale of at least 85% of the Company's stock. Defendants have not provided any alternative to Plaintiffs' definition of "substantially all" as 85% or more of the Company's stock, nor is there anything in the Restructuring Agreement that shows the parties intended a definition different from the caselaw.

Turning to the relationship between Section 5 and Section 8, the two sections must be read in harmony. *See Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218, 219

(1989) ("A cardinal principle of construction is that a contract is to be construed as a whole, and all parts are to be harmonized as far as possible.") A harmonized construction of Sections 5 and 8 requires interpreting the "sale" language of Section 5 to mean a sale of substantially all of the stock of the Company consistent with Section 8. The reason for this harmonization is apparent when the Court considers Defendants' asserted definition of "sale".

Defendants argue the parties did not intend for the phrase "substantially all" to be included within the term "sale" for purposes of Section 5. Instead, they argue the parties intended the term "sale" to be defined broadly to mean any transfer of stock for monetary consideration and "an arrangement for the transfer of ownership." (Def's Mot, p. 5-6). Defendants support this argument by relying on IRS Publication 550 and an unpublished federal circuit court case, *City of Thousand Oaks v Verizon Media Ventures, Inc*, 69 Fed Appx 826, 827 (CA 9, 2003). Aside from the questionable precedential value of these sources, the definition Defendants propose would lead to situations where, as here, the Defendants' obligation under Section 5 conflicts with Section 8.[4] *See Arrow Sheet Metal Works, Inc v Bryant & Detwiler Co*, 338 Mich 68, 61 NW2d 125 (1953)("All provisions of the agreement between the parties . . . must be construed together in such manner, if possible, as to avoid a conflict.") Under Defendants' definition, a hypothetical cash sale of 51% of the Company's stock (i.e., a transfer of stock for monetary consideration and a "transfer of ownership") would, under Section 5, end Defendants' obligation to provide

[4] The Courts review of IRS Publication 550 (2017) did not reveal any definition of "sale" comparable to what Defendants assert here. *See* IRS, *Publication 550 (2017), Investment Income and Expenses*, <https://www.irs.gov/publications/p550> (last accessed March 18, 2019). Moreover, under the local rules for the U.S. Court of Appeals for the 9th Circuit, "Unpublished dispositions and orders of this Court are not precedent," except in limited circumstances, none of which are at issue here. CTA9 Rule 36-3.

medical and dental benefits. However, because a sale of 51% of the stock isn't a sale of "substantially all" of the stock under Section 8, Schiavi and Kelmigian would still be personally liable for the Company's obligation to provide medical and dental benefits to Plaintiffs. It would be unreasonable to conclude the parties' intended for such an inconsistent outcome.

The only way Defendants' asserted definition of "sale" for purposes of Section 5 can be reconciled with Section 8 is by ignoring the parties' use of the phrase "substantially all" in the stock sale provision of Section 8. Parties are not free to ignore language in a contract simply because it is inconvenient. *See Czapp*, 179 Mich App at 219 ("Every word must be taken to have been used for a purpose and no word should be taken as surplusage if the court can discover any reasonable purpose for it which can be gathered from the whole instrument.") Plaintiffs' assertion that "sale" for purposes of Section 5 includes the phrase "substantially all" harmonizes with Section 8 to yield consistent outcomes when both sections are applied to a given stock sale, such as the one here. Schiavi's stock sale of 67% of the Company does not reach the 85% threshold to qualify as a sale of substantially all of the company's stock, so under Section 5, the Company is obligated to continue providing Plaintiffs' medical and dental benefits and under Section 8, Schiavi and Kelmigian remain personally liable for that obligation.

The language in Section 6 further supports the conclusion that "sale" for purpose of Section 5 means "sale of substantially all stock." Section 6, entitled "Sale or Liquidation of Assets of the Company," provides for the distribution of sale proceeds "[i]f an agreement shall be made to sell or liquidate all or *substantially all* of the assets or *stock* of the [Company]" within a certain period. (Pltf's Resp, Ex 3, p. 3-4) (emphasis added).

Although the applicable period for Section 6 has expired, the inclusion of the phrase "substantially all" is indicative of the parties' broad intent to condition the parties' obligations and benefits under the Restructuring Agreement on the sale of "substantially all" of the Company's stock or assets. So in addition to harmonizing Section 5 with Section 8, interpreting "sale" for purposes of Section 5 to mean "sale of substantially all stock" is consistent with the parties' inclusion of the phrase "substantially all" in the sale proceeds language in Section 6.

Construing the unambiguous language of the Restructuring Agreement as a whole, the Court concludes that the parties' intended that "sale" for purposes of Section 5 means "sale of substantially all" the Company's stock and that "substantially all" means 85% or more. Because Schiavi's stock sale of 67% of the Company did not reach the 85% threshold to qualify as a sale of substantially all of the company's stock, the Company was not "sold" for purposes of Section 5. Accordingly, after Schiavi sold his stock to Kelmigian, Defendants are still obligated under Section 5 of the Restructuring Agreement to provide the required medical and dental benefits to Defendants.

IV. Conclusion

Based on the reasons set forth above, Defendants' motion for summary disposition is DENIED. Summary Disposition is GRANTED in favor of Plaintiffs as provided in MCR 2.116(I)(2). This Opinion and Order does not resolve the last pending claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: MAY 21 2019

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge