**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON**

ANTHONY ALLOR,
Plaintiff/Counter-Defendant
v
BERNARD J. WENDT
Defendant/Counter-Plaintiff/
Third-Party Plaintiff,
v
ALLOR MANUFACTURING, INC,
Third-Party Defendant
_____/

Case No. 19-30182-CB

Consolidated for Purposes of Discovery Only With:
Case No. 19-30195-CB and
Case No. 19-30322-CB

Hon. Michael P. Hatty

BAR HOLDINGS, INC,
Plaintiff
v
BERNARD J. WENDT, ANTHONY F. ALLOR, and RONALD PLESH,
Defendants,
and
RONALD PLESH,
Cross-Plaintiff
v
BERNARD J. WENDT,
Cross-Defendant
_____/

Case No. 19-30195-CB

Consolidated for Purposes of Discovery Only With:
Case No. 19-30182-CB and
Case No. 19-30322-CB

Hon. Michael P. Hatty

# OPINION AND ORDER AS TO CASE NO. 19-30195-CB ONLY: DEFENDANT PLESH'S MOTIONS FOR SUMMARY DISPOSITION AND TO STRIKE DEFENDANT WENDT'S MOTION FOR SUMMARY DISPOSITION, AND AS TO BOTH CASE NO. 19-30182-CB AND 19-30195-CB: DEFENDANT WENDT'S MOTIONS FOR SUMMARY DISPOSITION, TO COMPEL ARBITRATION, AND FOR LEAVE TO AMEND, AND DEFENDANT PLESH'S MOTION TO STRIKE DEFENDANT WENDT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse,
City of Howell, County of Livingston,
on the ninth day of September, 2019.

THIS MATTER comes before this Court on the motions described above. The parties having submitted briefs, which this Court has reviewed with the file, and having presented oral argument, this Court being otherwise fully advised in the premises, and for the reasons stated herein, GRANTS Wendt's motion for leave to amend and DENIES all of the parties' remaining instant motions. Wendt may file and serve its amended pleadings within 14 days of entry of this order. Such amendments are to be limited to the issue of arbitration and narrowed in scope as set forth herein.

**I**

On October 7, 2003, Bar Holdings; Allor, Wendt, and Plesh (or their respective predecessors in interest) entered into a shareholder's agreement (hereinafter "Agreement"), wherein the parties set forth "their entire agreement and understanding with respect to restrictions on the sale or transfer of the stock of [Bar Holdings] and the operation of [Bar Holdings]." Allor, Wendt, and Plesh were all identified as shareholders under the Agreement. At issue with respect to the instant motions is Section 5 of the Agreement, which is entitled "Put Option Upon Death, Disability or Termination," and describes the arrangement and procedure in the event a shareholder dies, becomes disabled, or their employment with the corporation is terminated. On the same date the parties entered into the Agreement, Wendt, Bar Holdings, and Allor Manufacturing (Bar Holdings is described as "Parent" of Allor Manufacturing therein) entered into an employment agreement, wherein Wendt was employed as vice president at an annual base salary of $150,000.

On September 2, 2015, a letter was delivered to the shareholders from Tony Allor on behalf of Allor Manufacturing. This letter informed the shareholders that each of their $150,000 annual salaries was being eliminated as part of a cost-savings measure. On January 16, 2016, counsel for Wendt sent a letter to an attorney named Joel Alam (it is unclear if Mr. Alam represented some corporate entity or Allor), indicating that Wendt was considering exercising the above-referenced "Put Option." On September 26, 2016, Anthony Allor, now identified as CEO of Bar Holdings, sent a letter to Wendt terminating Wendt's employment and notifying Wendt that he had sixty days from October 1, 2016 to exercise the "Put Option" under the Agreement. On November 21, 2016, counsel for Wendt responded to Allor's letter and issued notification of his triggering the "Put Option." On December 15, 2016, Mr. Alam responded to this letter to inform Wendt that Bar Holdings "engaged UHY Advisors to undertake a valuation of [Bar Holdings] for the purpose of supporting a fair offer… for the purchase of [the shares]." Mr. Alam informed Mr. Wendt that such a valuation was anticipated "within the next two weeks." On October 17, 2018, Bar Holdings and Wendt entered into an "Agreement to Appoint Independent Valuation Expert," wherein the parties thereto agreed to appoint Gary T. Frantzen to serve as the "independent valuation expert" and "determine the fair market value."

Mr. Frantzen issued his valuation on December 28, 2018, which determined a $784 per-share value of Bar Holdings' stock as of September 30, 2016. On January 3, 2019, counsel for Wendt communicated by letter to Bar Holdings that he was exercising his "Put Option" pursuant to this valuation. On January 24, 2019, an attorney named David Stone (again, it is unclear whether Mr. Stone was representing some corporate entity or Allor) informed Wendt that "Allor has met with the bank and is waiting to receive their consent as required under the [Agreement]."

The board of directors for Bar Holdings met on January 31, 2019. At this meeting, Allor moved "to vote on whether [Bar Holdings] agrees to the validity of the Put made by [Wendt]." The outcome of this was four-to-one that the company did not so agree, with Wendt as the sole vote in agreement. The board then considered a motion to authorize Allor, as CEO of Bar Holdings, "to defend or prosecute any cause of action he deems in the best interest of [Bar Holdings], [Allor Manufacturing], and [Plesh Industries]." This motion was carried in a similar four-to-one decision. This litigation then ensued.

**II**

**A**

In Case No. 19-30195-CB, Plesh brings a motion under MCR 2.116(C)(10), requesting that this Court determine as a matter of law that Wendt's put option should be terminated. Specifically, Plesh asserts that language contained in Section 5(e) of the Agreement provides that the valuation procedures at issue, as well as any sale of stock, requires his consent. Bar Holdings responds by concurring. Wendt disagrees with this argument, asserting that either Plesh is misinterpreting the language at issue or that the language is ambiguous and that this Court should not determine the issue this early in the litigation on motion for summary disposition. This Court agrees with Wendt.

**B**

A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); see also *Coblentz v City of Novi*, 475 Mich

558; 719 NW2d 73 (2006). "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." *Atty Gen v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 26–27; 783 NW2d 515 (2010). In reviewing a motion brought under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617–618; 537 NW2d 185 (1995). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

> As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion.
>
> *Vill of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

The question before this Court deals primarily with interpreting the language of an express contract:

> The goal of contract interpretation is to first determine, and then enforce, the intent of the parties based on the plain language of the agreement. If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce the language as written, unless the contract is contrary to law or public policy. Plain and unambiguous contract language cannot be rewritten by the Court under the guise of interpretation, as the parties must live by the words of their agreement. The meaning of clear and unambiguous contract language is a question of law.
>
> *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 130–31; 743 NW2d 858 (2007) (internal quotations omitted).

This same case also advises that "the parties' disagreement regarding the meaning of contract language does not, by itself create an ambiguity." *Id* at 133. Otherwise:

> A contract is ambiguous when two provisions irreconcilably conflict with each other or when a term is equally susceptible to more than a single meaning. However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear.
>
> *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 8 (2010); 792 NW2d 372 (internal quotations omitted).

**C**

The language at issue provides that "Payment of the Purchase Price shall be subject in each case to the consent of the senior lenders of the Parent, Plesh and Allor." Plesh interprets this language to provide that each "the Parent," "Plesh," and "Allor," as those terms are defined in the Agreement, must provide unilateral consent throughout the valuation procedure outlined in the agreement and prior to closing in order for the provisions of Section 5 of the Agreement to be enforceable. Wendt points out that the term "the Parent" is not defined in the Agreement, but that this term is defined in other agreements executed between the parties. This Court notes that Bar Holdings is identified as "Parent" in the previously discussed employment agreement. However, Bar Holdings is identified as the "Corporation" in the Agreement. Wendt further interprets the contract to provide that only the senior lender of "Parent," the senior lender of "Plesh," and the senior lender of "Allor" may object to the purchase price and closing, but that prior consent is not required. Wendt further responds by asserting that this language, at the very least, creates ambiguity, requiring this Court to ascertain the intent of the parties.

This Court will first determine which interpretations of this language are clearly unambiguous. First, there are three subsections over two pages of the Agreement addressing the procedure to determine the value of Bar Holdings. The only parties to the Agreement discussed

in these proceedings are Bar Holdings, identified in the agreement as the "Corporation" and the "Putting Shareholder," who in this instance is Wendt. There is no provision in these subsections for an individual shareholder, other than the "Putting Shareholder," to unilaterally influence these proceedings. Thus, these proceedings are not "subject… to the consent" of Plesh, or Plesh's "senior lender." The consent contemplated by this sentence of the Agreement is for the "[p]ayment of the purchase price," not the valuation proceedings. Further, as previously discussed, Wendt and Bar Holdings entered into an express agreement concerning such a valuation, and this Court has not been presented with any meritorious argument as to why such an agreement should not be enforceable.

The remaining issues to determine are (1) whether the consent discussed herein is that of the "senior lenders of 'the Parent,'" in addition to "Plesh" and "Allor," or the senior lender of "the Parent," the senior lender of Plesh, and the senior lender of Allor; (2) the identification of "the Parent;" (3) and how such consent is to be exercised. As to the first two of these issues, this Court is under the preliminary impression that "the Parent" is Bar Holdings and that the consent discussed under this provision of the Agreement is that of lenders. However, this Court is disinclined to make such a finding at this early stage of the litigation under a motion for summary disposition pursuant to MCR 2.116(C)(10).

For these reasons, Plesh's motion for summary disposition is DENIED without prejudice.

**III**

**A**

In Case Nos. 19-30182-CB and 19-30195-CB, Wendt brings a motion to compel arbitration, pursuant to the provisions contained in Section 5(c)(iii) of the Agreement, and a motion under MCR 2.116(C)(7), requesting that this Court dismiss the complaints asserted

against him in these cases. Plesh, Allor, and Bar Holdings respond substantively to this motion by asserting that this provision of the Agreement is inapplicable to the instant matter. Procedurally, the parties in opposition to this motion further provide that MCR 2.116(D)(2) and MCR 2.111(F)(3) prevent Wendt's motion as untimely raised. Wendt addresses these procedural matters by bringing a motion for leave to amend. This Court agrees with the substantive argument in response to the instant motion, at least for the time being. The procedural issues raised will be addressed after consideration of the merits.

**B**

A motion for summary disposition pursuant to MCR 2.116(C)(7) may be brought based on the grounds that entry of judgment, dismissal of the action, or other relief is appropriate because of an agreement to arbitrate or to litigate in a different forum. A motion to compel arbitration will be treated as a motion for summary disposition brought under MCR 2.116(C)(7). *DeCaminada v Coopers & Lybrand*, 232 Mich App 492, 591 NW2d 364 (1998). A party is not required to submit any material in support of a motion under MCR 2.116(C)(7); the motion can be evaluated on the pleadings alone. *Maiden* at 119. "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. "In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Yono v Dep't of Transp*, 495 Mich 982, 982-983; 843 NW2d 923 (2014); see also MCR 2.116(G)(5). "If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant [is entitled to summary disposition], the

burden shifts to the nonmvoing party to present evidence that establishes a question of fact." *Kincaid v Cardwell,* 300 Mich App 513, 537 n 6; 834 NW2d 122 (2013). "If the trial court determines that there is a question of fact as to whether the movant [is entitled to summary disposition], the court must deny the motion." *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010).

In *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 346, 725 NW2d 684 (2006), the Michigan Court of Appeals observed that "Michigan's public policy favors the enforcement of contractual forum-selection clauses." Thus, "assuming that certain exceptions do not apply, Michigan courts will enforce an express forum-selection clause as written." *Id. See also* MCL 600.745. MCR 2.116(C)(7) specifically recognizes that "other relief" besides dismissal may be appropriate. For example, under MCR 3.602(C), a stay of an action in which one or more issues are subject to arbitration may be sought, as opposed to dismissal. In addition, MCL 600.745(3) provides that when an action is brought in a Michigan court that is subject to a forum-selection clause, the court shall "dismiss or stay" the action unless one of the listed exceptions applies.

**C**

The arbitration language cited by Wendt in the instant motion relates only to the valuation proceedings contained in Section 5(c) of the Agreement. The Agreement contains no provision that provides any and all disputes arising out of the Agreement are subject to arbitration. Thus, even if valuation were an issue properly before this Court, the arbitration provision relied upon by Wendt would not be dispositive. Further, and as previously discussed herein, Wendt and Bar Holdings entered into an express agreement concerning such a valuation,

and this Court has not been presented with any meritorious argument as to why such an agreement should not be enforceable.

However, this Court can envision a scenario, though perhaps unlikely, that the validity or enforceability of the valuation agreement may come into question and that this Court might grant rescission of the valuation agreement previously agreed upon. In such an instance, and depending on other findings made based on arguments of the parties that may be raised, this might result in a stay being issued for the parties to arbitrate the purchase price as agreed to by the parties. Thus, consistent with *DeCaminada*, *supra*, this Court DENIES Wendt's motion to compel arbitration in favor of its motion for summary disposition. For the reasons stated herein, this Court DENIES Wendt's motion for summary disposition without prejudice.

**IV**

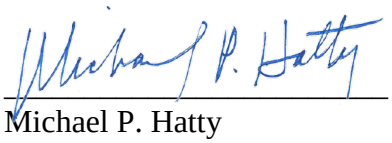
Leave to amend must be freely given when justice so requires. MCR 2.118(A)(2). MCR 2.118(A)(2) is "'designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.'" *Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *United States v Hougham*, 364 US 310, 316; 81 S Ct 13 (1960). Generally, a motion to amend should be granted. *Kostadinovski v Harrington*, 321 Mich App 736, 743; 909 NW2d 907 (2017). The motion should be denied only for particularized reasons, such as (1) undue delay, (2) bad faith, (3) dilatory motive, (4) repeated failure to cure deficiencies, (5) undue prejudice, or (6) futility. *Weymers v Khera*, 454 Mich 639, 658-660; 563 NW2d 647 (1997).

This Court finds that no party would be prejudiced by granting Wendt leave to amend their pleadings to specifically identify the parties' agreement to arbitrate the valuation if and when such an issue arises. This Court further finds that the interests of justice would be better served by having the parties follow through on this contracted means of dispute resolution in

such a scenario. In making this determination, this Court is mindful that such arbitration, if necessary, would be limited in scope, non-dispositive, and is not presently at issue. Accordingly, this Court GRANTS Wendt's motion for leave to amend, so that such amendments are narrowed in scope as set forth herein. Wendt may file and serve its amended pleadings within 14 days of entry of this order.

Based on the previous rulings provided herein, Plesh's motion to strike Wendt's motion for summary disposition is DENIED as moot.

**IT IS SO ORDERED.**



Michael P. Hatty
Circuit Court Judge