

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 17, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP1217**

**Cir. Ct. No. 2002CV1927**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**L.P. MOORADIAN COMPANY,**

**PLAINTIFF-APPELLANT,**

**V.**

**MEDNIKOW PROPERTIES, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Brown County:  
JOHN D. MCKAY, Judge. *Judgment reversed in part and cause remanded with directions; modified and, as modified, affirmed; reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. L. P. Mooradian Company appeals a declaratory judgment dismissing its complaint against Mednikow Properties, Inc. Mooradian

argues the circuit court erred by declaring that an addendum to a commercial lease agreement between the parties is an unambiguous right of first refusal. We agree. That part of the judgment is therefore reversed and the matter remanded to the circuit court for further proceedings. Mooradian also contends the circuit court erred by concluding that Dan Braun and Jody Bruley were incompetent to testify regarding communications or transactions they had with Isadore Mednikow. We affirm, as modified, that part of the judgment striking portions of Bruley's affidavit and reverse that part of the judgment striking the challenged portions of Braun's supplemental affidavit.

### **BACKGROUND**

¶2 In 1965, Ken Braun purchased the business currently known as L. P. Mooradian Co., located at 773 Potts Avenue in Ashwaubenon. Ken leased the building from Mednikow Properties, Inc., whose principal shareholder was Isadore Mednikow. In 1998, Ken sold Mooradian to his children, Dan Braun and Jody Bruley. Shortly thereafter, Braun and Bruley entered into a new commercial lease agreement with Mednikow for the properties located at 771 and 773 Potts Avenue.

¶3 Mednikow died in July 2001 and his nephew, Leland Rogers, came to the business. Following Mednikow's death, Mooradian informed Rogers that it wished to exercise its right to purchase the property under an addendum to the lease. When Rogers refused, Mooradian filed an action for declaratory judgment. The circuit court construed the addendum solely as an unambiguous right of first refusal. The court additionally concluded that Braun and Bruley were incompetent under the dead man's statute to testify regarding communications or transactions they had with Isadore Mednikow. This appeal follows.

## DISCUSSION

### A. Right of First Refusal and Option to Purchase

¶4 Mooradian argues the circuit court erred by declaring that the addendum to the commercial lease agreement is an unambiguous right of first refusal. The interpretation and construction of a contract is a question of law that we review without deference to the circuit court. *Zimmerman v. DHSS*, 169 Wis. 2d 498, 507, 485 N.W.2d 290 (Ct. App. 1992). “The ultimate aim of all contract interpretation is to ascertain the intent of the parties.” *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). “When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.” *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. However, when the terms of a contract are “reasonably or fairly susceptible to more than one construction,” the contract is ambiguous. *Maas v. Ziegler*, 172 Wis. 2d 70, 79, 492 N.W.2d 621 (1992). “When a contract provision is ambiguous, and therefore must be construed by the use of extrinsic evidence, the question is one of contract interpretation for [a fact finder].” *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

¶5 Here, the subject addendum to the lease provided:

It is mutually agreed by both the Landlord and Tenant that said Tenant shall have a right of first refusal to purchase the property located at 771 and 773 Potts Avenue, in the Village of Ashwaubenon, Wisconsin, at the assessed value at the time of the purchase, should the property be offered for sale or is [sic] a buyer is interested to purchase same or upon death of the principal shareholder of Mednikow Property, Inc.

¶6 The circuit court construed the clause to mean that if Mednikow decided to sell the property, Mooradian’s right of first refusal would be triggered if one of the following alternatives occurred: (1) the property is offered for sale; (2) a buyer is interested in purchasing the property; *or* (3) the principal shareholder dies. Mooradian argues, however, that this interpretation of the addendum renders meaningless the phrase “upon the death of the principal shareholder of Mednikow Properties, Inc.” It claims the addendum also created an option to purchase. We agree.

¶7 This court construes contracts to avoid a construction that renders one or more of its provisions meaningless. *See Maas*, 172 Wis. 2d at 80-81. A “right of first refusal” is defined as the right “to have first opportunity to purchase real estate when such becomes available, or right to meet any other offer.” BLACK’S LAW DICTIONARY, 1191 (5<sup>th</sup> ed. 1979). If the death of the principal shareholder does not render the property “available” for purchase, then using the term “right of first refusal” when there is no other offer on the table is nonsensical. The addendum, while inartfully drawn, is necessarily an option to purchase upon the death of the principal shareholder. Because we are satisfied that the addendum is both an unambiguous right of first refusal *and* an option to purchase, we reverse that part of the circuit court’s judgment.

¶8 In its decision, the circuit court acknowledged a number of other issues raised by Mednikow. Specifically, Mednikow argued that: (1) its principal shareholder is Mednikow’s, Inc., a corporation that cannot die; (2) the addendum was void because there was no consideration paid for it; (3) the addendum was void because it was obtained by undue influence; (4) the death clause must be struck as an impermissible restraint on alienation; (5) Mooradian waived its right to exercise its rights under the addendum by its delay and failure to tender

payment; (6) the sale price must be reformed to reflect the fair market value; and (7) the duration of any rights created under the addendum must be limited to the term of the lease. Because we conclude the addendum also created an option to purchase, on remand, the circuit court will have to address these issues.

## B. Dead Man's Statute

¶9 Mooradian contends the circuit court erred by striking portions of Braun's and Bruley's affidavits under the dead man's statute, WIS. STAT. § 885.16.<sup>1</sup> The statute provides, in relevant part:

No party or person in a party or person's behalf or interest ... shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased ... in which the opposite party derives his or her title ... from, to or under such deceased or insane person, ... unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and when only in respect to such transaction or communication of which testimony is so given or in respect to matter to which such testimony relates.

¶10 “Although the wording of the [dead man's] statute is cumbersome, the core meaning is that it disqualifies a witness to a transaction or communication with a decedent from testifying about that transaction or communication in his or her favor, or in the favor of any party to the case claiming under the witness.” *Bell v. Neugart*, 2002 WI App 180, ¶17, 256 Wis. 2d 969, 650 N.W.2d 52. The admission of evidence is within the circuit court's discretion and its rulings in that

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

regard will not be overturned on appeal unless the court misused its discretion. *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 139, 403 N.W.2d 747 (1987).

¶11 Mooradian challenges the court's decision to strike the following portions of Bruley's affidavit:

Upon learning that the renters of 771 Potts were leaving, my brother and I approached Isadore Mednikow ("Izzy") about renting the whole building consisting of the addresses of 773 and 771 Potts Avenue.

[W]e met with Attorney Tom Olejniczak for potential options we could pursue to protect our business and interest. Attached hereto and incorporated herein by reference, as Exhibit "4" is a letter from me to Izzy dated April 23, 1999, outlining the discussions we had with Attorney Olejniczak regarding what we should look for in a lease with Izzy. His advice included: "(1) Having the lease rewritten for a period of ten years; (2) [rewriting] the Addendum to Lease to list L. P. Mooradian Co., a Wisconsin Corporation, instead of "D/B/A" and [adding] in if you become deceased, we would have right to purchase the property; (3) [i]f we would occupy the entire building and make improvements, we should have an agreement to protect our investment if we were forced to relocate."

These concerns were discussed with Izzy regarding the expense of the improvements and it was agreed that the new Lease and the Memorandum of Lease, as identified above, would be executed in order to protect this investment.<sup>2</sup>

Mooradian contends that these statements should not have been stricken because they do not address the execution or enforcement of the lease but, rather, the renting of 771 Potts Avenue, Mooradian's conversations with its then attorney

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<sup>2</sup> The circuit court's decision struck sentence no. 6 in ¶13 of Bruley's affidavit. Both parties agree, however, that the circuit court likely intended to strike sentence no. 7. instead because sentence no. 7 is the only sentence in that paragraph addressing conversations with Isadore Mednikow. Because this appears to be a clerical error, upon remittitur, the court shall enter an amended judgment striking sentence no. 7, rather than sentence no. 6, in ¶13 of Bruley's affidavit.

concerning options to protect itself, and its reasons for wanting an option to purchase. The lease and its addendum, however, are part of the same series of negotiations. Because the dead man's statute disqualifies Bruley from testifying in her favor about transactions or communications with Isadore Mednikow, we affirm, as modified, that part of the judgment striking portions of her affidavit.

¶12 Mooradian also contends the circuit court erroneously struck the following portions of Braun's supplemental affidavit:

Our discussions with Izzy regarding the addendum in question first began before April 1999. In April 1999, we sent a proposed lease for Izzy's review. (See affidavit of Jody Bruley).

On occasion, we took Izzy to Sammy's Pizza because he liked their chicken alfredo. However, we never discussed the subject lease or its addendum at Sammy's Pizza. All discussion of the subject lease and the addendum, along with the signing of the lease, took place at L.P. Mooradian's place of business.

Mooradian contends that these statements are admissible under WIS. STAT. § 885.16 as a response to Mednikow's trial brief. Mooradian persuasively argues that Mednikow has waived the benefit of the statute as applied to these statements by "opening the door" with statements made in its trial brief. Because Mednikow fails to address this argument in its respondent's brief, it is deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). That part of the judgment striking these statements in Braun's supplemental affidavit is therefore reversed.

*By the Court.*— Judgment reversed in part and cause remanded with directions; modified and, as modified, affirmed; reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.



