COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3371

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DOMENICK TIRABASSI AND ATTILIO J. CICCHINI,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

v.

RICHARD DECKER,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Richard Decker appeals from a judgment in favor of Domenick Tirabassi and Attilio Cicchini which requires him to offer his shares of Dairyland Greyhound Park, Inc. stock to them pursuant to the January 1989 Stockholders' Agreement (the Agreement) at a prescribed amount per share.

Tirabassi and Cicchini cross-appeal the trial court's construction of part of the Agreement as a stipulated damages clause. We reverse the trial court because we conclude that Decker's pledge of the stock to a bank as collateral for a personal loan did not trigger his obligation under the Agreement to offer the stock to Tirabassi and Cicchini. Because we so hold, we need not address the other issues on appeal or cross-appeal.

The following facts are undisputed. The parties are shareholders in Dairyland Greyhound Park. The Agreement governs disposition of shares of stock. Article 2, ¶ 2.4 provides that if one of the parties to this action "proposes to sell, transfer or otherwise dispose of his Shares during his lifetime, or if he is to be divested of his interest in his Shares through seizure or sale by legal process or any transfer through operation of law, [he] must first give a written offer to sell his Shares to [similarly classified shareholders, i.e., Tirabassi and Cicchini]."

In May 1990, Decker and his wife pledged Dairyland shares to First National Bank of Kenosha to secure a $200,000 personal loan. Decker did not offer Tirabassi and Cicchini the opportunity to purchase the stock before he made the pledge and they sued to enforce the Agreement which allows them to purchase the stock. They claimed that Decker breached the Agreement and sought damages and performance of his obligations thereunder. The trial court granted Tirabassi and Cicchini summary judgment on their claim that Decker breached the agreement by pledging the stock as collateral without first offering it to other shareholders in his class. Damages were determined at a later date. Decker appeals.

An appeal from a grant of summary judgment raises an issue of law which we review de novo by applying the same standards employed by the trial

court. *See* ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See* ***Streff v. Town of Delafield***, 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994).

Resolution of this appeal requires construction of the Agreement and application of the material, undisputed facts. Construction of a contract presents a question of law which we decide independently of the trial court. *See* ***Yee v. Giuffre,*** 176 Wis.2d 189, 192, 499 N.W.2d 926, 927 (Ct. App. 1993). The trial court concluded that Decker's stock pledge triggered the provisions of the Agreement which required him to offer the stock for sale to Tirabassi and others in the shareholders' class. The trial court reasoned that whether the pledge would ultimately have resulted in alienation of the stock was not determinative. Rather, the trial court focused on whether the parties, by their Agreement, intended to minimize all risks associated with placing the stock in a position which could have resulted in alienation.

We disagree with the trial court's analysis of the Agreement. Article 1 of the Agreement, General Restrictions on Disposition, states: "A Stockholder shall not, during his lifetime or upon his death, sell, transfer, give, assign, bequeath, pledge or otherwise encumber or divest himself of ownership or control of all or any part of his Shares, whether voluntary or by operation of law, except in accordance with the terms of this Agreement." Each subparagraph of Article 2, Restrictions on Disposition During Lifetime of Stockholders, including ¶ 2.4, sets forth the restrictions on each group of stockholders. The restrictions apply to those shareholders who propose "to sell, transfer or otherwise dispose of his Shares during his lifetime, or if he is to be divested of his interest in his Shares

through seizure or sale by legal process or any transfer through operation of law.... Such a shareholder must first give a written offer to sell his Shares to the other members of [the same stock class]." While Article 1 generally precludes a stock pledge, ¶ 2.4, which applies to the class of shareholders containing Decker, Tirabassi and Cicchini, precludes only sale, transfer, other disposition or involuntary divestment of interest. In contrast to Article 1, ¶ 2.4 does not mention pledge. Therefore, the ¶ 2.4 requirement that other shareholders in the class be offered the stock is limited to those situations when the shareholder sells, transfers, otherwise disposes or is involuntarily divested of his interest in the stock.

We reach this conclusion based on the principle of *expressio unius est exclusio alterius,* "a specific mention in a contract of one or more matters is considered to exclude other matters of the same nature or class not expressly mentioned, even when all such matters would have been inferred had none been expressed." ***Goebel v. First Fed. Sav. & Loan Ass'n,*** 83 Wis.2d 668, 673, 266 N.W.2d 352, 355 (1978). We cannot rewrite the contract to address what may have been the drafter's failure to use consistent language throughout the provisions of the Agreement to restrict disposition of the stock. *See* ***Hunzinger Constr. Co. v. Granite Resources Corp.,*** 196 Wis.2d 327, 340, 538 N.W.2d 804, 809 (Ct. App. 1995).

Decker's pledge of stock was not a triggering event under ¶ 2.4. He did not default on the loan. Therefore, he did not experience a divestment of his interest or seizure or sale of the stock by legal process. We acknowledge that federal courts have stated that the Securities Act of 1933 applies to a pledge of stock, *see* ***United States v. Gentile,*** 530 F.2d 461, 466-67 (2d Cir. 1976), and that the stock pledge may have had consequences under Wisconsin Administrative Code provisions relating to the ownership of Dairyland stock. However, we are

not concerned with these bodies of law. Rather, we are charged with construing the parties' Agreement; the rules of contract construction govern here. We also acknowledge that ¶ 2.8 of the Agreement refers to "pledge." However, based on our previous analysis, we conclude that Decker did not engage in activity which was prohibited under ¶ 2.4 for shareholders of his class.

Having concluded that Decker's stock pledge did not trigger his obligations under ¶ 2.4 of the Agreement, we need not address any issues relating to damages or construction of ¶ 2.8 which addresses disposition of stock in violation of the Agreement.

By the Court.—Judgment reversed.

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