COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1753

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

STEPHEN EINHORN,

PLAINTIFF-APPELLANT,

V.

JAMES D. CULEA, NORTHERN LABS, INC., AND NORTHERN LABS MANUFACTURING, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

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

PER CURIAM. Stephen Einhorn has appealed from a judgment and an order dismissing his complaint against James D. Culea, Northern Labs, Inc., and Northern Labs Manufacturing, Inc. In his complaint, Einhorn, who is a minority stockholder in Northern Labs, Inc. and Northern Labs Manufacturing,

Inc. (the companies), sought an injunction requiring the companies to file a registration statement and thus to permit a public offering of Einhorn's stock in the companies. In addition, he sought a judgment determining that Culea, the majority shareholder in the two companies, breached a fiduciary duty to him by failing to cooperate in effectuating the public sale. The trial court granted summary judgment dismissing the complaint. We affirm the judgment and the order.

Our review of the trial court's grant of summary judgment is de novo. *See* ***Millen v. Thomas,*** 201 Wis.2d 675, 682, 550 N.W.2d 134, 137 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***id.*** When, as here, both parties move for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues, although always subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. *See* ***id.*** at 682-83 and n.2, 550 N.W.2d at 137.

The material facts pertaining to this case are undisputed. Einhorn's injunction demand was based on allegations that Culea and the companies had breached section 4.5 of the Stockholders' Agreement entered into on February 18, 1986 (the 1986 agreement), which granted each stockholder the right to demand upon written notice to the companies that the companies establish an employee stock ownership plan (ESOP) for purposes of purchasing the stockholder's shares of stock, or that the companies file a registration statement to effect the sale of the stockholder's shares by public offering.[1] These rights were subject to a provision

[1] The 1986 stockholders' agreement initially applied only to Northern Labs, Inc. In the January 2, 1988 amendment to the stockholders' agreement, the terms of the 1986 agreement were extended to Northern Labs Manufacturing, Inc.

providing Culea and the companies with the right and option to purchase the stockholder's stock at its fair market value for 120 days after the stockholder's demand for a public offering or establishment of an ESOP. The 1986 agreement also provided that Culea would cooperate with the stockholder making the demand to effectuate the ESOP or public offering, and that Culea and the companies agreed to use their best efforts to effectuate sale of the shares through the ESOP or public offering.

The stockholders of the companies subsequently unanimously agreed to elect S corporation status for the companies, thereby obtaining certain tax benefits. In conjunction with electing to convert the companies to S corporations, in 1988 the stockholders also executed an Amendment to Stockholders' Agreement (the Amendment). Section 3 of the Amendment provided that "[n]o stockholder … shall make or permit any transfer of stock in the Corporation, or take any other action, which would have the effect of terminating the S corporation election which has been made by the Corporation." The Amendment further provided that this provision would be effective "only so long as the holders of a majority of the outstanding shares of stock of the Corporation do not elect to terminate or revoke its election to be treated as an S Corporation." The Amendment provided that the remaining terms of the 1986 agreement, except as specifically amended, were ratified and continued in force.

If contractual language is unambiguous, it must be enforced as written. *See* ***Dykstra v. Arthur G. McGee & Co.,*** 92 Wis.2d 17, 38, 284 N.W.2d 692, 702-03 (Ct. App. 1979), *aff'd*, 100 Wis.2d 120, 301 N.W.2d 201 (1981). Contractual language is ambiguous only when it is reasonably susceptible of more than one construction. *See* ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Construction of a contract, including the determination

of whether its terms are ambiguous, is a legal question which we decide de novo. *See* ***id.*** We are required to determine not necessarily what the parties to a contract intended to agree to, but what, in a legal sense, they did agree to as evidenced by the language they saw fit to use. *See* ***Miller v. Miller***, 67 Wis.2d 435, 442, 227 N.W.2d 626, 629 (1975).

We agree with the trial court that under the unambiguous language of the Amendment and the 1986 agreement, Einhorn is precluded from demanding a public offering of his stock at this time or from demanding that Culea or the companies cooperate to effectuate such a sale. Einhorn is a sophisticated investor and, like all of the other stockholders, voted to change the companies from C corporations to S corporations. Einhorn also expressly agreed in the Amendment to take no action which would have the effect of terminating the companies' S corporation status until the majority shareholders (i.e., Culea) elected to terminate it. These terms are clear and unambiguous. Because it is also undisputed that pursuant to federal law a public sale of the stock would terminate the companies' S corporation status, the 1986 agreement and the Amendment must be read together to provide that Einhorn may not demand a public offering of his stock under section 4.5 of the 1986 agreement until the companies are no longer S corporations.

Einhorn contends that the agreements, when read together, are either ambiguous concerning his right to demand a public offering or should be interpreted in his favor as a matter of law. He relies on section 4 of the Amendment, which provided that the remaining terms of the 1986 agreement "except as specifically amended herein, are ratified and shall continue in full force and effect and shall govern in all respects the ownership and transferability of shares" of the companies.

Contrary to Einhorn's argument, we do not construe this provision as rendering the agreements either ambiguous or as mandating judgment in his favor. Rather, we conclude that the provision limiting a stockholder's right to take any action which would terminate the S corporation specifically amended the rights provided under section 4.5 of the 1986 agreement until such time as the companies are no longer S corporations. The rights accorded under section 4.5 of the 1986 agreement remain, subject only to the subsequent Amendment limiting the exercise of those rights while the companies remain in S corporation status. Such a construction gives meaning to every part of the 1986 agreement and Amendment, which is consistent with the requirement that we consider the parties' contract as a whole, s*ee* ***Campion v. Montgomery Elevator Co.,*** 172 Wis.2d 405, 416, 493 N.W.2d 244, 249 (Ct. App. 1992), and give reasonable meaning to every provision of the contract, *see* ***Maas v. Ziegler***, 172 Wis.2d 70, 79, 492 N.W.2d 621, 624 (1992).

The fact that this construction of the agreement and Amendment may for now prevent Einhorn from executing his rights under section 4.5 of the 1986 agreement does not render the agreements ambiguous. Moreover, because the agreement and Amendment, read together, are unambiguous, the parole evidence cited by Einhorn cannot be relied on to establish an understanding at variance with the terms of the written documents. *See* ***Conrad Milwaukee Corp. v. Wasilewski,*** 30 Wis.2d 481, 488, 141 N.W.2d 240, 244 (1966).

As pointed out by the trial court, because Einhorn has forfeited his right to demand a public offering of the stock until the companies' S corporation status has terminated and has granted Culea as majority stockholder the right to determine when S corporation status should be terminated, it follows that Culea has not breached a fiduciary duty to Einhorn by failing to cooperate to effectuate a

public sale. Einhorn's second cause of action therefore was also properly dismissed by the trial court.[2]

By the Court.—Judgment and order affirmed.

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

[2] It is possible that Einhorn has some other remedy, such as a stockholder's derivative action, against Culea or the companies. However, we cannot and need not make such a determination within the context of this appeal.