COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1837 **Cir. Ct. No. 2002CV350**

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

CHIBARDUN TELEPHONE COOPERATIVE, INC. AND CITIZENS RSA #1 CELLULAR TELEPHONE, INC.,

PLAINTIFFS-APPELLANTS,

V.

CENTURYTEL WIRELESS OF WISCONSIN RSA #1, LLC,

DEFENDANT-RESPONDENT,

WISCONSIN RSA #1 LIMITED PARTNERSHIP,

DEFENDANT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Chibardun Telephone Cooperative, Inc., and Citizens RSA #1 Cellular Telephone, Inc., (collectively, "Chibardun") appeal the circuit court's summary judgment dismissing their breach of contract claims against CenturyTel Wireless of Wisconsin RSA #1, LLC ("CTW"). Chibardun claims that a stock sale, upstream of CTW, triggered a right of first refusal clause in a partnership agreement to which both Chibardun and CTW are parties. The court concluded that under the agreement's unambiguous terms, the right of first refusal was not triggered and that Chibardun was not otherwise entitled to equitable relief. We agree with the circuit court and affirm the judgment.

Background

¶2 Chibardun and a predecessor of CTW, along with other telephone companies, were parties to a 1989 partnership agreement establishing the Wisconsin RSA #1 Limited Partnership ("WRSA"), a company that provided cellular service to Polk, Burnett, Barron, and Washburn Counties. The agreement included a right of first refusal, which stated in part:

> 11.3 Other Transfers – Right of First Refusal. There shall be no other sale, exchange or other transfer or assignment of the whole or any portion of any Partner's Interest without the prior written consent of the General Partners …. Before any Partner sells, exchanges or transfers any part of its Partnership Interest under this Section 11.3, it shall offer, by giving written notice to the other Partners, that interest to all of the Partners for the price at which and the terms under which the offeror has offered in writing to pay for such interest.…

¶3 CTW, established in 1998, was part of a long corporate family tree. CenturyTel, Inc., ("CenturyTel") fully owned CenturyTel Wireless, Inc. ("CT Wireless"). CT Wireless fully owned CenturyTel Wireless of Louisiana, Inc. The Louisiana company fully owned Pacific Telecom Cellular, Inc., and Universal

Cellular, Inc. Those two companies jointly owned UC/PTC of Wisconsin, LLC. UC/PTC fully owned CTW.

¶4 Under the partnership agreement, CTW holds approximately 42.2% of WRSA in this case. Chibardun owns a combined total of 15.6% of WRSA, while other members not parties to this action own the remaining 42.2%. CTW appears to have been primarily responsible for day-to-day management of WRSA.

¶5 In 2002, CenturyTel—CTW's great, great, great-grandparent company—sold CT Wireless in a stock transaction to AllTel Communications, Inc. ("AllTel"). When it heard of the pending sale, Chibardun notified CT Wireless that it intended to exercise its right of first refusal and although Chibardun does not document CT Wireless's response, we infer that CT Wireless did not believe the option applied.[1]

¶6 After the sale, all of the upstream businesses remained unchanged, except that AllTel became the ultimate parent instead of CenturyTel.[2] Significantly, CTW continued to own its portion of WRSA. Chibardun argues, however, that the sale resulted in a personnel change at CTW, which meant a "different management philosophy" for WRSA.[3] Chibardun complains that the

[1] In its brief, Chibardun states it notified CTW of its intent, but the referenced letter is addressed to CT Wireless. While we assume this is merely a scrivener's error given the similarity of company names, and it has no bearing on the outcome of this case, it is a significant difference given the corporate structure of the CenturyTel companies and the matter in dispute.

[2] In addition, companies with CenturyTel in the name had to replace it with AllTel because AllTel did not acquire the rights to the CenturyTel brand name. While CTW thus had to change its name, we will continue to refer to it as CTW.

[3] Evidently, WRSA has actually been managed by a parent of one of the partners, and it appears that CT Wireless may have been managing WRSA on CTW's behalf. Thus, when CT Wireless became AllTel Wireless, the management change was effectuated.

company began to lose money as a result of the style change. Consequently, Chibardun filed suit, seeking an order allowing it to purchase CTW's portion of WRSA.

¶7 The parties filed competing summary judgment motions. Chibardun contended that substance should control over form and the substance of the sale to AllTel was that CTW's share of WRSA was transferred out of the original partners' control. CTW argued that although the upstream company changed, CTW itself still holds its interest in WRSA and the right of first refusal was never triggered. The court agreed with CTW and granted summary judgment in its favor.

Discussion

¶8 We review summary judgments de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Interpretation of a contract is a question of law that we review de novo as well. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (1987). Neither party here claims the contract is ambiguous and we conclude it is not. When a contract is unambiguous, we must construe it according to its plain meaning. *See* ***id.***

Contract Language

¶9 In its written decision, the court characterized the issue as "whether the sale of stock of a limited partner triggers the right of first refusal or if the trigger must be a sale of the partnership interest as stated in the Partnership

Agreement," and noted that a stock sale of a partner is different than the sale of the partnership interest. Chibardun argues that substance should control over form and, substantively, the sale of CT Wireless introduced a stranger into the partnership.[4]

¶10 We point out first that it was not the stock of CTW that was sold. CenturyTel sold its stock in CT Wireless—four corporate rungs above CTW. CTW never sought to divest itself of its interest in WRSA and still owns its portion. Indeed, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary." ***Dole Food Co. v. Patrickson***, 538 U.S. 468, 475 (2003). It is therefore difficult to see how, under the right of first refusal, the CT Wireless sale equates to a "sale, exchange or other transfer or assignment" of WRSA out of CTW's control.

¶11 The partnership agreement clearly and unambiguously refers to "sale, exchange or other transfer or assignment" of any partner's "Partnership Interest" in WRSA. The circuit court and CTW both point out that, had Chibardun wanted upstream transfers to trigger the right of first refusal, the partnership

[4] The court relied on ***Columbia Propane L.P. v. Wisconsin Gas. Co.***, 2003 WI 38, 261 Wis. 2d 70, 661 N.W.2d 776, for the proposition that stock and asset transfers are fundamentally different transactions in business law and that the distinction must be maintained. It also relied on a Dane County circuit court case as persuasive authority for its conclusion that an upstream stock sale did not trigger the right of first refusal, although it was possible an asset sale could. Chibardun does little to explain the difference between stock and asset sales, except to rehash its substance-over-form argument. This does little, however, to overcome the unambiguous contract language or ***Dole Food Co. v. Patrickson***, 538 U.S. 468 (2003) (*see infra*, ¶10). Moreover, given the de facto management arrangement for WRSA by parents of the partners, broader drafting to address upstream changes would have been precedent.

agreement could have been so drafted.[5] "[C]ourts cannot insert what has been omitted or rewrite a contract made by the parties." ***Levy v. Levy***, 130 Wis. 2d 523, 533-34, 388 N.W.2d 170 (1986). This contract by its plain language merely limits CTW's transfer of its interest in WRSA. We agree with the circuit court's conclusion that because CTW still owns its partnership interest, the right of first refusal was never triggered and, consequently, there is no breach of contract.

Equitable Relief

¶12 Chibardun also contends it is entitled to equitable relief. It argues that CTW is an alter ego of CenturyTel or CT Wireless such that all three should be treated as a single entity for interpreting the right of first refusal and, therefore, we can pierce the corporate veil.

¶13 "The alter ego doctrine enables a court to disregard the corporate form when it is used to accomplish an improper [or unlawful] purpose."[6] ***Olen v. Phelps***, 200 Wis. 2d 155, 163, 546 N.W.2d 176 (Ct. App. 1996). The alter ego doctrine is typically employed to pierce the corporate veil of a controlled entity to reach the controlling entity, but the doctrine can be applied in reverse. ***Id.***

¶14 Alter ego requires proof of the following:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked

[5] Indeed, at the time of the sale, downstream subsidiaries of CT Wireless were parties to approximately thirty-two cellular partnership agreements, all of which were examined by CT Wireless or the downstream subsidiaries. Rights of first refusal, broader than the right in this case, were triggered by the stock sale in nine of those agreements.

[6] Considering the partnership agreement's unambiguous language, we question whether Chibardun should even pass the "improper or unlawful purpose" step.

> so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Consumer's Co-op v. Olsen, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988) (citation omitted).[7] The circuit court determined, and we agree, that Chibardun cannot meet the second prong.

¶15 As the circuit court explained, Chibardun has produced "simply no competent evidence to support Plaintiffs' claim that CenturyTel, Inc. structured the ALLTEL deal for anything other than legitimate business purposes …." Indeed, while CTW changed its name, it still owns its portion of WRSA.

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[7] Chibardun would have us instead apply fifteen factors as listed in ***Cemetery Servs., Inc. v. Wisconsin Dept. of Reg. & Lic.***, 221 Wis. 2d 817, 826-27, 586 N.W.2d 191 (Ct. App. 1998). It appears, however, that the first fourteen of these would fit into the first prong from ***Consumer's Co-op v. Olsen***, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988). The fifteenth goes to the fraud question. Moreover, these fifteen factors come from ***Sabine Towing & Transp. Co. v. Merit Ventures, Inc.***, 575 F.Supp. 1442, 1446-48 (E.D. Tex. 1983). That case explained:

> A trial court should pierce the corporate veil … when the subsidiary conducts business in a manner that clearly indicates that the parent is an alter ego of the subsidiary. … Once [an alter ego relationship] is established, it will be appropriate to disregard a corporate entity *when it appears a corporation was organized for fraudulent or illegal purposes*. Furthermore, it is quite clear that the veil should be pierced when it will prevent manifest injustice to third parties.

Id. at 1446 (emphasis added; citations omitted). The court also explained that, historically, courts have used anywhere from fifteen to twenty-five different factors. ***Id.*** We think the ***Cemetery Services*** court simply used ***Sabine Towing*** to delineate factors that fit within ***Consumer's Co-op***'s three prongs.

¶16 To the extent Chibardun complains about the personnel change that accompanied the name change, arguing it shows a substantive takeover, there is still no demonstration of fraud. Chibardun offers no authority for the proposition that a corporation can be expected to keep its officers indefinitely. To the extent Chibardun complains CTW is a paper corporation only, somehow designed as an additional layer of protection for CenturyTel's attempt to dispose of WRSA, CTW's creation predates the sale to AllTel by approximately four years. Chibardun provides nothing to suggest the creation of CTW was made in anticipation of the CT Wireless sale to AllTel.

¶17 Chibardun also suggests that CTW's "use of the corporate fiction of a stock purchase sale by the parent" constitutes a breach of a good faith duty. The contract is unambiguous, and there is no prima facie violation of the contract or the corresponding duty. There is no showing of fraud, and thus no basis for equitable relief. We cannot say there is a breach of the good faith duty.

¶18 Chibardun argues this is a case where there is a breach of good faith of the substance, despite technical compliance with the form. *See* ***Bozzacchi v. O'Malley***, 211 Wis. 2d 622, 626, 566 N.W.2d 494 (Ct. App. 1997). What it essentially argues is that the upstream transfer of CT Wireless had undesirable results downstream. However, the partnership agreement did not incorporate upstream stock sales as a trigger for the right of first refusal, and a good faith obligation simply does not function to create rights not explicitly included in the contract. *See* ***Cousins Subs Sys., Inc. v. McKinney***, 59 F.Supp.2d 816, 821 (E.D. Wis. 1999).

By the Court.—Judgment affirmed.

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