**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 21, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-3081** **Cir. Ct. No. 99-CV-1287**

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

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**JEANETTE SCHWARZBACH AND STEVEN SCHWARZBACH,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**DIANE REESE, D/B/A WILMOT MOUNTAIN, INC., WILMOT SKI HILLS AND HICKORY HILLS, WILMOT MOUNTAIN, INC., WILMOT SKI HILLS AND HICKORY HILLS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Kenosha County: LEO F. SCHLAEFER, Reserve Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeanette and Steven Schwarzbach appeal from a judgment dismissing their complaint against Diane Reese for specific performance of a Stock Purchase Agreement or for damages based on promissory estoppel.

The issues are whether the circuit court erroneously exercised its discretion in striking the Schwarzbachs' amended complaint, whether the Stock Purchase Agreement was enforceable, and whether by any other promises Reese was obligated to secure for the Schwarzbachs an ownership interest in the Wilmot Mountain ski hill.

¶2 Reese held the controlling stockholder interest in Wilmot Mountain, Inc. (WMI), a family-held corporation which operated a ski hill on property owned by the Wilmot Ski Hills and the Hickory Hills partnerships. In November 1998, Steven Schwarzbach was named as president of WMI. At that time, the parties entered into a Stock Purchase Agreement. Reese agreed to sell the Schwarzbachs 452 shares of WMI common stock and the Schwarzbachs agreed to buy the minority partnership interests in Wilmot Ski Hills and Hickory Hills held by Michael Reese, soon to be Reese's ex-husband. The ski hill was in financial trouble and it was anticipated that with an ownership interest, the Schwarzbachs would bring in investors and capital to cover WMI's debt.

¶3 The Schwarzbachs never acquired the anticipated ownership interest in WMI. Financial troubles continued and attempts to refinance corporate obligations proved to be difficult. The corporation defaulted on its lease and was evicted from the property.

¶4 On December 15, 1999, the Schwarzbachs filed this action and immediately sought injunctive relief to prevent the sale of the ski hill to any third party. They also sought specific performance of the Stock Purchase Agreement and, in the alternative, reimbursement for personal contributions to the operation of the ski hill made in anticipation of acquiring an ownership interest, including unpaid salary and income Steven lost by diverting time from his law practice to ski

hill operations. By consent of the parties, sale of the ski hill was prohibited until Reese's motion for summary judgment was decided. The circuit court granted Reese's motion for summary judgment upon concluding that a condition precedent to the transfer of shares under the Stock Purchase Agreement was not satisfied and that only an unenforceable agreement to agree existed with respect to any obligation to employ alternative methods to confer an ownership interest to the Schwarzbachs. The Schwarzbachs' motion for reconsideration was also denied.

¶5 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2) (1999-2000).[1]

¶6 The Schwarzbachs sought to recover for breach of contract. The principal issue is whether the Stock Purchase Agreement was enforceable and we address that first. Reese and other family members holding stock in WMI had entered into a shareholders' Buy-Sell Agreement which required a shareholder to offer stock first to the corporation or other shareholders before transferring it to any other person. The Reese-Schwarzbach Stock Purchase Agreement recognized

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the need for shareholder consent.[2] Paragraph seven provided in part: "It is understood by the parties that certain terms and provisions of the Buy Sell agreement may have to be satisfied so that Diane is free to transfer said common stock and that Diane S. Reese would proceed with due diligence in the performance of any conditions necessary to effectuate this agreement." Paragraph eight explained that the closing would take place within thirty days after: "a) Diane's divorce, b) legal separation from Mike Reese, c) *consent of all shareholders*, d) or April 1, 1999, d) or within thirty (30) days after all conditions necessary for closing have been met, whichever date comes sooner." (Emphasis added.)[3] Consent of the shareholders was a condition precedent to enforcement of the Stock Purchase Agreement. The agreement states so unambiguously and no question of fact exists as to whether consent was a condition.

¶7 A condition precedent delays the enforceability of the contract until the condition is fulfilled. ***Woodland Realty, Inc. v. Winzenried***, 82 Wis. 2d 218, 223, 262 N.W.2d 106 (1978). It is undisputed that the consent of all shareholders was never obtained, specifically, Reese's estranged son would not agree to the sale

[2] We recognize that the shareholders' Buy-Sell Agreement merely created preemptive rights. Reese was only selling her shares as a means to refinance WMI obligations and bring in working capital to keep the ski hill operating. She had no interest in having her stock bought by any other shareholder, thereby diluting her controlling interest. Thus, the sale to the Schwarzbachs could only be achieved if all the shareholders consented and agreed not to exercise their preemptive rights.

[3] The recitals at the beginning of the Stock Purchase Agreement also recognized the existence of the Buy-Sell Agreement "by and among the corporation of Wilmot Ski Hills and all shareholders of the corporation which created certain rights, privileges and obligations among the parties."

of her shares. The condition of shareholder consent was never fulfilled and the Stock Purchase Agreement was not enforceable by specific performance.[4]

¶8 The Schwarzbachs argue that the Stock Purchase Agreement required a transfer of an ownership interest by other means. They characterize the agreement as "manifestly … ambiguous" and graft upon it oral discussions regarding alternative methods of making them shareholders in the event shareholder consent was not achieved. Specifically, they contend that discussions about the formation of a new corporation or issuing common stock to Steven Schwarzbach as a key employee in order to avoid preemptive rights were binding obligations because the Stock Purchase Agreement incorporated the obligation to proceed by alternative methods.

¶9 The parol evidence rule prohibits expansion of the contract beyond its written word.

> When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 607, 288 N.W.2d 852 (1980). Where, as here, the contract includes an integration clause, evidence of contemporaneous or prior oral agreements relating to the same subject matter are not admissible.[5] ***Id.*** at 608. Despite the Schwarzbachs' contention that when the

[4] The Schwarzbachs contend that the sale of the land (the partnership interests) was unconditional and did not require shareholder consent. However, that sale agreement was part of the Stock Purchase Agreement and cannot be extracted from it and separately enforced.

[5] The Stock Purchase Agreement provided: "This agreement constitutes the entire agreement between the parties with respect to its subject matter."

agreement was signed the parties were aware that shareholder consent was not likely and that certain terms were omitted because of the rush to complete the agreement, the written contract cannot be expanded to include those things they claim were omitted.

¶10 Even in the absence of the integration clause, any agreement to proceed by alternative methods was too indefinite at the time that the Stock Purchase Agreement was signed to be enforceable as part of that contract. The proposals to merge a newly formed corporation with WMI or to issue newly authorized stock to Steven Schwarzbach as a key employee did not come to light as viable alternatives until several months after the Stock Purchase Agreement was signed. Indeed, special counsel was retained to advise the parties on what course of action could be taken to avoid the preemptive rights under the shareholders' Buy-Sell Agreement. Further, the alternative methods which the Schwarzbachs now look to have terms vastly removed from the Stock Purchase Agreement.[6] Finally, the fact that the parties were never able to find acceptable terms under either alternative method also demonstrates the uncertainty of any agreement to proceed by alternative methods. These facts establish that at the time the Stock Purchase Agreement was signed, any promise to proceed by alternative methods if shareholder consent was not obtained was nothing more than an agreement to agree. An agreement to agree is unenforceable. ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962).

[6] For example, the issuance of stock to Steven Schwarzbach as a key employee excluded participation by Jeanette Schwarzbach and required Reese not to sell a portion of her shares but purchase more shares.

¶11 In the absence of an express contract, the Schwarzbachs turn to promissory estoppel as a means for establishing an entitlement to an ownership interest in WMI. We agree with the Schwarzbachs' initial contention that an agreement to agree does not necessarily preclude recovery for promissory estoppel. *See* ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 817 (7th Cir. 1987) ("Even when a contract fails to become effective as a whole, particular terms may bind under the doctrine of promissory estoppel."). *See also* ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 425-26, 321 N.W.2d 293 (1982) (whether a party may recover under the doctrine of promissory estoppel where a contract exists must be determined on a case-by-case basis).

¶12 Promissory estoppel requires a promise reasonably expected to induce some action or forbearance by the promisee, actual action or forbearance, and the need to avoid injustice by enforcement of the promise. ***Id.*** at 422. "The first two requirements are issues of fact while the third requirement, that enforcement of the promise is necessary to avoid injustice, involves a policy decision by the court." ***Id.*** Of particular relevance here is that in determining whether an injustice can only be avoided by enforcement of the promise, "the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence" and "the reasonableness of the action or forbearance" are appropriate considerations. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 92, 440 N.W.2d 825 (Ct. App. 1989).

¶13 The circuit court concluded that any promise by Reese to secure the Schwarzbachs an ownership interest in WMI despite the lack of shareholder consent was "hedged with conditions and uncertainties" such that promissory estoppel was barred as a matter of law. The uncertainty of terms bears directly on

whether enforcement of the agreement is required to avoid an injustice. While the parties engaged in negotiations for an alternative deal, the Schwarzbachs cannot point to a definite promise that induced their claimed forbearance.

¶14 The Schwarzbachs' contention on appeal that they were "led down a primrose path" ignores the realities established in the summary judgment record. The Schwarzbachs knew the terms of the shareholders' Buy-Sell Agreement. They also were aware that shareholder consent was unlikely. Possible alternative methods were so uncertain that special counsel was retained to explore and explain them. In February 1999, the Schwarzbachs acknowledged that Reese had encumbered WMI in ways that affected their potential interest. In correspondence sent at the end of March 1999, Steven Schwarzbach characterized a shareholders' derivative suit as a "virtual certainty" if certain corporate changes were forced upon the nonconsenting shareholders. In May 1999, Steven indicated his unwillingness to loan WMI money until the closings for the purchase of stock and land were completed. The record establishes that the Schwarzbachs could not, as a matter of law, reasonably rely on the vague promises, if any, to secure them an ownership interest outside the failed Stock Purchase Agreement. No one, much less an attorney such as Steven, could reasonably act in forbearance when the corporate interest had not yet been conveyed and great uncertainty existed about whether it could be. The circuit court properly exercised its discretion in determining that promissory estoppel would not lie because of the uncertainty.

¶15 The final issue is whether the Schwarzbachs' amended complaint should have been struck because not timely filed. WISCONSIN STAT. § 802.09(1) permits a party to amend the complaint without permission of the court within six months of the filing of the complaint. Within that six-month window, the Schwarzbachs moved the court for permission to file an amended complaint. The

circuit court informed the Schwarzbachs that leave of court was not necessary. However, because discovery and a hearing on Reese's motion for summary judgment had been accelerated, the Schwarzbachs were concerned about having an opportunity to file an amended complaint prior to the hearing on the motion for summary judgment. The summary judgment motion hearing was rescheduled and the parties stipulated to a schedule. The Schwarzbachs agreed that their amended complaint would be filed by April 5, 2000.[7] The amended complaint was not filed until April 6, 2000. Reese moved to strike the amended complaint as untimely filed and the motion was granted.

¶16 The Schwarzbachs claim that they should have been granted leave to file their amended complaint because the one-day delay did not create any prejudice. They explained to the circuit court that the discovery on which their amended complaint depended was late in being supplied and that Steven Schwarzbach had been unexpectedly delayed in an Illinois court on April 5, 2000, and unable to reach the courthouse before closing.

¶17 The issue is whether the circuit court erroneously exercised its discretion in not granting permission for the amended complaint after the deadline established by court order.[8] ***Goff v. Seldera***, 202 Wis. 2d 600, 616, 550 N.W.2d 144 (Ct. App. 1996). The court found that even if needed discovery was not

[7] The time for filing an amended answer and amended motion for summary judgment was set to April 14, 2000. The Schwarzbachs had until April 24 to file a response to the motion for summary judgment, with a reply due by May 1. The summary judgment motion hearing was set for May 17, 2000.

[8] WISCONSIN STAT. § 802.09(1) provides that the amended complaint may be filed as a matter of course within six months "or within the time set in a scheduling order." The six-month window no longer applied once a scheduling order established the time for filing the amended complaint.

provided as anticipated, the Schwarzbachs failed to timely move the court to extend the time for filing the amended complaint. The court also found that the complaint had not been provided to opposing counsel until well after business hours on April 5, 2000. No excusable neglect was found.

¶18 We conclude that the circuit court properly exercised its discretion in striking the amended complaint based on its late filing. The case had been accelerated for possible disposition and the deadline imposed was one the Schwarzbachs agreed to. Also, when the deadline was established, the Schwarzbachs knew their amended complaint would add a new claim and name an additional party, one known to them since at least February 2000.[9] They did not establish that the delay in discovery made it impossible for them to timely file the amended complaint. The subsequent adjournment of the summary judgment hearing and the circuit court's recusal have no bearing on the timeliness of filing and whether the Schwarzbachs demonstrated excusable neglect.

*By the Court.*—Judgment affirmed.

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

[9] At a motion hearing held on February 9, 2000, Steven Schwarzbach indicated that he had found out that a new corporation, D.S.R., had been formed to run the ski hill. D.S.R., L.L.C. was the new party added by the amended complaint.