

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT K. NARDI,

Plaintiff/Counter-Defendant-
Appellee,

v

SATELLITE SERVICES, INC.,

Defendant/Counter-Plaintiff-
Appellant,

and

WALLACE D. STEINHOFF and MICHAEL C.
HENRICKSEN,

Defendants-Appellants.

UNPUBLISHED

May17, 2007

No. 269197

Marquette Circuit Court

LC No. 03-040723-CK

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting judgment in favor of plaintiff in the amount of \$477,883.84, including interest. This case arises out of a dispute with regard to a deferred compensation agreement. We affirm.

Plaintiff was hired in 1988 by closely held corporation Satellite Services, Inc. (SSI) as a controller. Defendants Wallace Steinhoff and Michael Henricksen are majority shareholders in SSI. In 1997, plaintiff was promoted to president of the company. That same year the parties entered into the contract at the heart of this litigation. The contract provides in relevant part as follows:

4. *Payment of Incentive Compensation.* In addition to the compensation described above, the Company shall annually issue to the Employee its non-voting common stock in the amount equivalent to Two (2%) Percent of the total outstanding common stock for each full Five Hundred Thousand (\$500,000.00) Dollars of Incentive Income the Company earns in a calendar year. Incentive Income is defined as the Company's net income reported on its audited financial

statements plus the amount of salaries and wages paid to the Company's class A shareholders in their capacity as employees or directors of the Company. The Company shall not be obligated to issue a cumulative amount of more than ten (10%) percent of all of the outstanding common stock of the company.

5. *Restrictions on Stock.* Any stock issued pursuant to this agreement shall contain the following restrictions:

a) Upon complete termination of employment or service as an employee, officer or director of the Company for any reason other than under the terms of section 6(b) [sic],^[1] below, the stock shall be returned to the Company. No consideration shall be paid by the Company for such return.

b) In the event of the complete termination of employment or service as an officer or director of the Company because of retirement after the Employee has attained a combination of years of age and years of service with the Company equal to or in excess of 60, death, permanent total disability or having his employment terminated by the Board of Directors without cause, the Company shall purchase the stock from the Employee. The purchase price shall be the applicable portion of the sum of:

- 1) the projected future profits of the Company as determined in the Company's annual budget approved by the Board of Directors for the current fiscal year, before accounting for payments made to the Company's Class A shareholders (in any capacity), discounted to present value using a discount rate of nine (9%) percent per annum; and
- 2) the shareholder's equity determined on Company's audited financial statements of the previous December 31.

* * *

6. *Covenant Not to Compete.* The employee shall not, directly or indirectly, either as an equity owner, employee, salesperson, consultant, director, lender, or in any other capacity, engage in or be interested in any business that competes with the business of Company. In the event of the breach of this covenant, in addition to any other remedy which may be available under law or equity, the Employee shall return of [sic] the stock to the Company without consideration. This covenant shall be effective for a period of ten (10) years after the Employee last provides services to the Company; provided, however that this covenant shall not be effective if the Employee is terminated by the Company's Board of Directors without cause or if there is a change of more than 50% in the

¹ The record demonstrates the reference to section 6(b) is a typographical error. The reference should be to section 5(b).

membership of the Company's Board of Directors.

Plaintiff left SSI in November 2002. Pursuant to the compensation agreement, plaintiff received eight percent of the company's non-voting stock for the four years he worked under it. When plaintiff left SSI, the parties were unable to reach an agreement with regard to the value of plaintiff's shares in the corporation. After leaving SSI, plaintiff went to work for the Marquette-Alger Regional Educational Service Agency.

Plaintiff filed the present lawsuit, asserting claims for breach of contract, breach of fiduciary duty, and stock repurchase. SSI filed a counterclaim for breach of fiduciary duty. In their motion for directed verdict, defendants asserted that the unambiguous contractual language required plaintiff to completely retire from working life to invoke SSI's duty to repurchase the stock. Defendants argued that because plaintiff worked elsewhere after leaving SSI, the company was not required to repurchase his shares. The trial court rejected this argument, concluding that the agreement was "clear and unambiguous as to the triggering event of retirement," and determined that plaintiff had met the years of service and age combination that triggered SSI's duty to purchase plaintiff's stock in the company. The jury returned a verdict finding that defendants breached the compensation agreement by failing to purchase back plaintiff's shares at a price determined under it, and that Steinhoff and Henricksen had breached their fiduciary duties to plaintiff as a minority shareholder. The jury rejected plaintiff's claim for accumulated vacation pay and defendants' counterclaim for breach of fiduciary duty.

Defendants argue that the trial court erred by concluding that the contract required SSI to purchase plaintiff's stock when he took a different job after leaving SSI. We disagree. The goal of contract interpretation or construction is to give effect to the intent of the parties. *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). In this case, the trial court correctly determined that the parties did not dispute any of the material facts, and that the contract language was not ambiguous because it was not open to multiple and equally plausible meanings. See *Mayor of Lansing v Michigan Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

Resolution of this issue turns on the meaning of the word "retirement," which is not defined in the contract. Defendants argue that "retirement" means that plaintiff was required to stop working in any occupation. However, the word "retirement" means "removal or withdrawal from an office or active service." *Random House Webster's College Dictionary* (1997). As noted by the trial court, however, today Americans often continue working in some capacity after they have begun drawing retirement benefits from a previous employer. See *Derr v Murphy Motor Freight Lines*, 452 Mich 375, 391 n 6 (Mallett, J.); 550 NW2d 759, amended 453 Mich 1204 (1996). Therefore, the modern understanding of the word "retirement" is an employee's withdrawal from a particular "office" to collect vested benefits that have accrued to the employee, usually from years of faithful service. The contract's other provisions support this definition of the word "retirement." The contract's inclusion of a covenant not to compete and the covenant's lengthy term of years suggest that, even after plaintiff's "retirement" he might still remain an attractive candidate for employment by a competitor. Moreover, the express description of when the "retirement" provision would take effect strongly suggests that the parties intended to spell out how the benefit would vest, and plaintiff undeniably met those conditions. Under the contract's clear language and the undisputed facts, plaintiff retired from

his position at SSI, so his termination was attributable to “retirement.”²

Nevertheless, defendants argue that the trial court’s interpretation impermissibly renders the phrase “because of retirement” nugatory, because the contract already provides that there must be a complete termination of employment or service before SSI is required to purchase plaintiff’s shares. We disagree. The phrase “because of retirement” limits SSI’s duty to purchase plaintiff’s stock unless plaintiff voluntarily leaves the company after he had the requisite combination of age and years of service. If not for the “retirement” language, SSI would be required to purchase plaintiff’s shares if its board terminated plaintiff, with cause, after he attained the combination of age and years of service. Without the language, plaintiff could quit his job, leverage his relationship with SSI to obtain a position as an “outside” consultant, and still demand repurchase of the stock. In any case, the “retirement” language required plaintiff to voluntarily and permanently remove himself from his old position, so the trial court’s application of the term to the undisputed facts did not render it nugatory.

Defendants further argue that the contract was intended to create a long-term employment relationship, which could only be effectuated if defendants’ interpretation of “retirement” is adopted. However, the contract was structured to provide plaintiff a maximum of only ten percent of the company’s stock. At the rate of two percent a year, the contract apparently only provided an incentive for five years, presuming the company met minimum income eligibility targets. Even under defendants’ interpretation of the agreement, the company was required to purchase plaintiff’s shares as soon as he met the required years of service and age combination if he chose not to work anywhere else. Therefore, defendants’ argument regarding the parties’ inferable intentions lacks merit.

Defendants next assert that the tax consequences intended by the parties are effectuated only if defendants’ interpretation of the agreement is enforced. However, this argument suffers from the same defects as the argument regarding the parties’ intended length of service. Assuming *arguendo* that plaintiff had not reentered the general work force, defendants would still be liable to buy plaintiff out, and the tax consequences would be identical. Moreover, the tax consequences cited by defendants have no effect until the benefit completely vests. Plaintiff’s right to resell the stock did not vest until he voluntarily and permanently left SSI, so his accumulation of the necessary total of years did not irreversibly vest his right to the benefit. For example, SSI could have terminated plaintiff with cause and recovered the stock without payment after he reached the required total of years. Therefore, the trial court did not err by concluding as a matter of law that plaintiff’s departure from SSI was “because of retirement.”

Defendants also assert that the trial court erred by permitting plaintiff’s expert witness, a certified public accountant, to testify to an erroneous statement of tax law. Plaintiff argues that defendants cannot support this claim of error because the challenged testimony came out on cross-examination of plaintiff’s expert witness. See *Lewis v Legrow*, 258 Mich App 175, 210;

² This interpretation of the contract also prevents it from violating MCL 445.774a(1), which does not allow an employer to place permanent, blanket restraints on a former employee’s ability to obtain new employment.

670 NW2d 675 (2003). In any event, the expert's testimony was not that plaintiff accurately calculated the value of the shares when making his tax elections. Instead, his testimony indicated that plaintiff did not act in *bad faith* by *intentionally* overestimating the amount SSI owed him for his shares. Therefore, the testimony was not a clear misstatement of the law and was only included to assist the trier of fact in determining a factual issue. MRE 702. Defendants then introduced testimony from their own expert indicating that if the calculation under the contract was greater than that declared by plaintiff in his tax returns, plaintiff would not have been in compliance with the Internal Revenue Code. In the end, however, defendants' expert conceded that he could not say whether plaintiff treated the shares properly for tax purposes. Under the circumstances, defendants fail to show that the challenged testimony prejudiced their substantial rights, so reversal is not required. MRE 103.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis