

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**LORNE B. GOLD,
Plaintiff,**

v.

**Case No. 15-146008-CB
Hon. James M. Alexander**

**MICHIGAN SURGERY SPECIALISTS, PC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on cross motions for summary disposition. Plaintiffs Jeffrey Gorosh, Robert Barbosa, and Lorne Gold (as the Court-Appointed Receiver over the assets of John Wagner, Jr.) filed separate lawsuits generally seeking the same relief – to compel Defendant Michigan Surgery Specialists to redeem their 1,200 shares of the business. These lawsuits were consolidated into the present action.

Specifically, all Plaintiffs argue that Defendant is required to repurchase their shares and the per-share price should be \$1,000. Defendant does not dispute that it must repurchase each Plaintiff’s shares, but it argues that the per-share price is \$125. The price-per-share value was initially set in the parties’ July 1, 2003 “Buy/Sell Agreement.” It provides, at 2.(a), in relevant part (emphasis added):

The “Agreed Value” shall mean the value of a share of common stock of the Corporation as set by the Shareholders of the Corporation **as set forth on Exhibit B**. The Shareholders may annually review the Agreed Value. In the event the Shareholders revise the Agreed Value such revised Agreed Value shall be the Agreed Value from that date until revised again in accordance with this Agreement.

The Agreed Value on Exhibit B is listed at “\$125/share.” Because the Agreement further provides (at paragraph 17) that it “may be amended only by written agreement signed by all parties of this Agreement or their personal representatives, successors, or assigns,” and this never happened, Defendant argues that the \$125/share price is appropriate.

But Plaintiffs claim that the parties later mutually agreed waive the written modification clause and modify the per-share price to \$1,000.

Generally, in order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

It is also well-settled that “parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause.” *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003) (emphasis in original).

Indeed, in their filings, both sides rely on *Quality Products*, in which, our Supreme Court reasoned that the focus in such a case must be on “mutual assent” – reasoning “[w]here mutual

assent does not exist, a contract does not exist. Accordingly, where there is no mutual agreement to enter into a new contract modifying a previous contract, there is no new contract and, thus, no modification.” *Quality Products*, 469 Mich at 372-73.

The Supreme Court continued:

mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract. **This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract.** *Quality Products*, 469 Mich at 364-365 (emphasis added).

In *City of Grosse Pointe Park v Michigan Muni Liab & Prop Pool*, 473 Mich 188; 702 NW2d 106, 124 (2005), our Supreme Court again explained why the “clear and convincing” standard was added in such a case, reasoning that, in *Quality Products*:

We recognized that the anti-modification clause contained in the written contract was presumptive of the parties’ intent as a matter of law, but also that ‘the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed.’ We held, therefore, that contracting parties are always entitled mutually to modify the underlying contract, but the party asserting that a modification has occurred must present clear and convincing evidence to that effect. *Grosse Pointe Park*, 473 Mich at 219-220, quoting *Quality Products*, 469 Mich at 372-373.

Plaintiffs claim that the \$125/share price was modified to \$1,000/share based on the affirmative conduct of the parties. Under *Quality Products*, “where course of conduct is the alleged basis for modification, a waiver analysis is necessary.” *Quality Products*, 469 Mich at 374.

a waiver is a voluntary and intentional abandonment of a known right. This waiver principle is analytically relevant to a case in which a course of conduct is asserted as a basis for amendment of an existing contract because it supports the mutuality requirement. Stated otherwise, when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied. *Quality Products*, 469 Mich at 374; citing

Roberts v. Mecosta Co. Hosp., 466 Mich. 57, 64 n. 4, 642 N.W.2d 663 (2002);
People v. Carines, 460 Mich. 750, 762 n. 7, 597 N.W.2d 130 (1999).

To their respective ends, both sides move for summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

But, in this context, this standard is comingled with Plaintiff's burden to establish waiver of the written modification clause by clear and convincing evidence. And neither party addresses the appropriate standard for analyzing the clear and convincing burden when considering a motion for summary disposition brought under (C)(10).

In other contexts, Michigan Courts have applied the following standard: "In considering a motion for summary disposition, a court must consider whether the evidence is sufficient to allow a rational finder of fact to find [the disputed issue] by clear and convincing evidence." *Ireland v Edwards*, 230 Mich App 607, 622; 584 NW2d 632, 640 (1998), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).¹

¹ The *Ireland* Court noted, at 230 Mich App at 622 n 13:

It appears that there was a conflict of opinion in this Court on this subject. Compare *Spreen v. Smith*, 153 Mich.App. 1, 7, 394 N.W.2d 123 (1986) (clear and convincing evidence not required to withstand a motion for summary disposition), with *Lins* n. 4, *supra* at 433-434, 342 N.W.2d 573 (clear and convincing evidence required). However, *Anderson* clearly resolved this conflict, finding the clear and convincing evidence standard relevant to the resolution of a motion for summary disposition. *Anderson, supra* at 254, 106 S.Ct. 2505. We believe that some Michigan cases decided before *Anderson* are now of questionable precedential value regarding the quantum of evidence necessary to establish actual malice, because they failed to apply the clear and

Because Plaintiff must establish, by clear and convincing evidence, a mutual agreement to waive the written modification clause, this is the standard that the Court will apply to the current summary motions.

1. Plaintiff's argument

Plaintiffs claim, **with evidentiary support**, the following establishes that the parties mutually agreed to waive the written modification clause and increase the per-share price to \$1,000.

After the parties entered into the July 1, 2003 Buy-Sell Agreement, Defendant acquired Great Lakes Rehabilitation Hospital in Southfield. And Defendant also owns, through a wholly-owned subsidiary, Oakland Regional Hospital. After these acquisitions, Plaintiffs claim that Defendant's shareholders "invested significant sums to extensively renovate Oakland Regional Hospital, and the surgery department opened in March 2006.

With its opening, Plaintiffs claim that Defendants shareholders recognized that the value of their shares "increased significantly from the original agreed value of \$125/share." In September 2006, Defendant's executive committee voted to form a committee to update the Buy Sell Agreement. During partners' meetings of November 16 and 21, 2006, modifications to the Buy-Sell Agreement, including specifically "the monetary figure in the buy sell" were discussed.

In 2008, Defendant had the company valued, which came back at a total value of \$22 million. The shareholders then discussed amending the "Agreed Value" in the Buy Sell Agreement to the "Appraised Value" and had an amended Buy Sell drafted to so reflect.

convincing evidence standard. See, i.e., *Steadman v. Lapensohn*, 408 Mich. 50, 54-55, 288 N.W.2d 580 (1980).

At a November 11, 2010 Board Meeting, a majority of the board voted to revise the Agreed Value of the company's stock from \$125 to \$1,000 per share. The Board unanimously approved the November Board minutes at the December 16, 2010 board meeting. The December 16, 2010 Board Minutes further reflect the "\$1.2 million to buy in/buy out" valuation. Around the same time, Defendant's CPA, Earl Romans, prepared a majority of the personal financial statements for Defendant's physician shareholders, which showed valuations based on \$1,000 per share.

Defendant also appeared to act as if the higher valuation was adopted. The January 15, 2011 Board Minutes reflect that the company paid Dr. Pierret a buy-out due to his retirement at a much higher value than \$125/per share. To effectuate the same, Defendant's attorneys prepared a Shareholder Separation and Stock Redemption Agreement that provided that "[Defendant] shall purchase and redeem the Shares from Pierret for the total aggregate sum of One Million Two Hundred Thousand and 00/100 Dollars (\$1,200,000.00) ("Purchase Price")."

While this Redemption Agreement was never executed because the parties negotiated different purchase terms, emails from Pierret's counsel and Defendant's attorneys indicate that the \$1.2 million buy-out price would not be reduced. A May 19, 2011 Partner's Meeting confirmed the \$1.2 million buy-out of Dr. Pierret, which passed unanimously.

An October 13, 2011 Board Meeting also acknowledged that the partners "agreed" to the \$1,000 per/share valuation, and an Amended Buy Sell Agreement was drafted to so reflect. And a 2011 "Marketing Strategy" prepared by physician shareholder Dr. Samson Samuel also acknowledged: "Now having debated, discussed and agreed on the buy sell document, each shareholder owns 1,200 shares and the agreed value is \$1000 per share. The purchase price [of] each shareholder's 1,200 shares is \$1,200,000.00."

For unknown reasons, Defendant did not actually purchase Pierret's shares for \$1.2 million. Instead, Dr. Pierret hired a new attorney, who did not know of the prior agreement and unanimous shareholder vote. Ultimately, Dr. Pierret's new attorney threatened to sue, and Defendant paid \$710,000 to redeem Dr. Pierret's shares (\$560,000 of which was structured to be non-taxable). Plaintiffs claim that this effectively resulted in the same net to Dr. Pierret as if his shares were purchased at the agreed \$1,000 per/share.

2. Defendant's argument

Defendant, on the other hand, argues that "there is no clear and convincing evidence that the parties mutually agreed to waive the written modification requirement." In support, Defendant argues that the parties prepared many **written drafts** to the Buy-Sell Agreement, but none were ever effectuated. If the parties wished to waive the written modification clause, Defendant claims that written drafts would not have been prepared.

Defendant also cites to the depositions of several physician shareholders that claim that the Agreed Value was never actually changed because they couldn't come to an agreement. The Court will note that such testimony appears to conflict with meeting minutes that appear to show that the \$1,000 per-share price vote was unanimous.

Finally, Defendants argue that "every shareholder terminated after July 2003 has had his shares redeemed for \$125.00 per share." In support, Defendants cite to the redemption agreements for Drs. Spoor and Pierret, and check copies for Dr. Plomaritis.

But the January 1, 2005 Redemption Agreement for Dr. Spoor predates Plaintiffs' claimed earliest agreement to change the value by over a year-and-a-half. As a result, it is not compelling. And, as stated, Plaintiff has a different interpretation of Dr. Pierret's buy-out.

Finally, with respect to Dr. Plomaritis, there is no negotiated redemption agreement – just checks appearing to total \$150,000. And Dr. Plomaritis testified at deposition that he was owed additional sums.

3. Unanimous Approval?

The Court will initially note that it rejects Plaintiffs' argument that the Buy-Sell Agreement permits modification of the Agreed Value without unanimous approval. Plaintiff bases this argument on the lack of "unanimous approval" language found in other provisions of said Agreement. But Paragraph 2.(a) of the Agreement provides that the Agreed Value may be revised "in accordance with this Agreement." This language implicates Paragraph 17's amendment language, which requires "written agreement signed by all the parties."

4. Conclusion.

With respect to Plaintiffs' burden to establish, by clear and convincing evidence, a mutual agreement to waive the written modification clause and modify the agreed value, the Court finds that Plaintiffs have presented sufficient evidence to allow a rational finder of fact to find waiver and modification by clear and convincing evidence.

Plaintiffs, however, have not succeeded on establishing their entitlement to summary at a matter of law. But it is close. Plaintiffs have presented a compelling argument, based on extensive evidence, including (1) **unanimous** approval of meeting minutes that provided for the \$1,000 per/share price, and (2) a subsequent preliminary agreement to buy out Dr. Pierret at said price. While Dr. Pierret ultimately executed a Redemption Agreement that indicated a \$125/share price, he was actually paid much more. And Plaintiffs have presented evidence that

could persuade a rational finder of fact that the deal structure and amount paid to Pierret was an effort to hide Defendant's redemption at the higher price.

But whether Plaintiffs ultimately can establish, by clear and convincing evidence, that the parties mutually agreed to waive the written modification clause and amend the Agreed Value is appropriately a question for the trier-of-fact.

For the foregoing reasons, both Plaintiffs' and Defendant's motions for summary disposition are DENIED.²

IT IS SO ORDERED.

July 13, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

² The Court also notes that both parties' filings contain evidentiary support for their assertions as to mutual assent – as well as challenges to certain of the other's deponents' credibility. It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *White*, 275 Mich App at 625.