

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

GREGORY JACKSON, ET AL,
Plaintiffs,

v.

**Case No. 15-147195-CB
Hon. James M. Alexander**

KIKO DAVIS, ET AL,
Defendants.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant Kiko Davis's motion for summary disposition. Plaintiffs filed this case seeking specific performance of a stock purchase agreement, whereby Plaintiffs would purchase the Defendant Trust's shares in Defendant First Independence Corporation. First Independence owns a controlling interest in First Independence Bank.

Count I of Plaintiff's First Amended Complaint seeks an order compelling the Trust to sell the shares to Plaintiffs in accordance with a November 3, 2014 Stock Purchase Agreement. In the alternative, Count II of the Complaint seeks money damages for breach of said Agreement.

Defendant's motion is based on the argument that the November 3, 2014 Stock Purchase Agreement expired by its own terms when Plaintiffs failed to obtain Federal approval and close the sale by February 28, 2015. But Plaintiffs respond that the parties verbally agreed to reinstate said Agreement and extend the closing date.

Defendant now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Plaintiffs seek summary under MCR 2.116(I)(2).

It is undisputed that the November 3, 2014 Stock Purchase Agreement expired by its own terms when closing did not occur by February 28, 2015. The parties dispute, however, whether there was an oral agreement to reinstate the Agreement to extend the closing date.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[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.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

In support of her position, Defendant cites to Section 12.5 of the Agreement, which provides: “MODIFICATIONS AND WAIVERS. This Agreement may not be modified except in a writing duly executed by the Parties. Any waiver must be in writing.” And, Defendant argues, it is undisputed that there was never any **written** agreement to reinstate the Agreement or extend the closing date.

Plaintiffs respond the Agreement itself allows the parties to agree to extend the closing date – pointing to Section 3.1, which provides that closing must happen within ten days of federal approval and shall occur no later than February 28 “[u]nless Purchasers and Seller otherwise agree.” And Plaintiffs claim that, on March 6, 2015, the parties otherwise agreed.

Plaintiffs further argue that our Supreme Court has held that “parties to a contract are free to mutually waive or modify their contract notwithstanding a written modification or anti-waiver

clause,” quoting *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). The *Quality Products* Court reasoned that, when deciding such a case:

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.

And Plaintiffs claim that the parties reached a verbal agreement to extend the closing date on March 6, 2015. In support, Plaintiffs point to the Affidavit of Plaintiff Anthony Adams, in which, Mr. Adams asserts that “on [or] about March 6, 2015, Kiko Davis, the trustee of the Davis Trust, and I, on behalf of plaintiffs, agreed to reinstate the Agreement and extend the Closing Date until a reasonable time after the Fed approved the sale.”

Plaintiffs also point to a same day memo from First Independence Bank’s CEO, Barry Clay, to the boards of the Bank and First Independence Corporation that “the parties have verbally reached an agreement to Reinstate the Stock Purchase Agreement with some modifications.” In the following few days, Plaintiff claims that several other emails from the Trust’s attorney evidence that an agreement had been reached to reinstate the prior Agreement and extend the closing date.

While the parties were also in negotiations to reduce the purchase price, in his Affidavit, Mr. Adams claims that the March 6 “reinstatement” agreement “was independent of [the parties’] discussion of . . . other issues.”

Plaintiffs further argue that “all parties acted consistent with [the] understanding that the Closing Date had been extended” – pointing to continuing information flow, consulting, and financials sharing between the parties. Plaintiffs also claim that their \$50,000 deposit was never

returned.

According to her Affidavit, Ms. Davis claims that “[t]he parties never reached agreement on the terms of an acceptable reinstatement agreement.” Instead, Defendant argues, the parties were simply involved in negotiations to reinstate the same, which never came to fruition. In support, Defendant cites to several emails and draft agreements exchanged between the parties in the months after the February 28 date passed.

But Defendant’s argument appears, in part, to ignore Plaintiff’s assertion that the March 6 verbal agreement was to reinstate the November 3, 2014 Stock Purchase Agreement. And this agreement was “independent of” the parties’ negotiations on a new, separate agreement. As a result, the back-and-forth negotiations are not necessarily contradictory of Plaintiffs’ position.¹

In her Reply Brief, Defendant resorts to attacking the credibility of Plaintiffs’ affiant. But it is well settled 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, supra* at 625, citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Despite Defendant’s plea otherwise, when ruling on a summary motion, the Court cannot ignore the evidence that Plaintiffs present in support of their claim that the parties verbally agreed to reinstate the November 2014 Stock Purchase Agreement and extend the closing date. And this

¹ For the same reasons, the Court rejects Defendant’s consideration and indefiniteness arguments. These arguments appear founded on the claim that the March 6 verbal agreement was related to an entirely new agreement. But Plaintiffs claim that the March 6 verbal agreement was related to the reinstatement of the November 3 Agreement – only to extend the closing date to a reasonable time after federal approval. And the November 3 Agreement

evidence precludes summary disposition under (C)(10).

For all of the foregoing reasons and viewing all evidence in the light most favorable to the Plaintiffs, the Court finds that there remain material questions of fact in dispute such that Defendant is not entitled to judgment as a matter of law. As a result, Defendant's motion for summary disposition under (C)(10) is DENIED.

For the same reasons, Plaintiffs' summary request under (I)(2) is also DENIED.

IT IS SO ORDERED.

January 27, 2016
Date

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

specifically provided that the parties could "otherwise agree" to extend the closing date. Section 3.1.