

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

HENRI JAMES DEMIL, and individual, SARAH
MAE DEMIL, an individual, HANNAH RENE
DEMIL, an individual and SAVANNAH LYNN
DEMIL, an individual

Plaintiffs,

vs.

Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation
and ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.

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OPINION AND ORDER

Defendants have filed a motion for reconsideration of the Court's August 11, 2014 Opinion and Order granting Plaintiff Michael Demil summary disposition of his oppression claim.

In the interests of judicial economy the factual and procedural statements set forth in the Court's August 11, 2014 Opinion and Order are herein incorporated.

Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be

granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Arguments and Analysis

In their motion, Defendants first contend that the evidence does not support a finding that shareholder employment compensation is determined upon approving a budget that keeps the previous compensation levels the same. The Court based its decision to grant Plaintiff M. Demil summary disposition of his oppression claim based on Defendant R. Demil's unilateral decisions related to the wage determinations of RMD's shareholder employees. While Defendants do not dispute that Defendant R. Demil has annually approved RMD's budget, and that the budget includes the wages of shareholder employees, they contend that Defendant R. Demil determining that the wages should stay the same as the prior year(s) does not constitute a "determination of salary or wages" within the meaning of the Stock Agreement and RMD's Articles of Incorporation. However, the Court remains convinced that determining that wages should stay the same is still a determination. RMD's governing documents do not differentiate or specify that only decisions changing the compensation levels for shareholder employees must be unanimous. Rather, Article III (d) of RMD's amended articles of incorporation and Stock Agreement provide:

The Articles of Incorporation of RMD Holdings, Ltd. shall further be amended to provide that the determination of wages, salaries bonuses and fringe benefits paid directly to a shareholder of record must be approved by the unanimous vote of all owners of common stock of RMD Holdings, Ltd. prior to the payment of said

compensation. (See Exhibits C and D to Defendant R. Demil's motion for summary disposition.)

RMD's governing documents do not limit the scope of decisions related to wages, salaries, bonuses and fringe benefits paid to shareholders that must be made unanimously. Further, Webster's Dictionary defined "determination" as "the act of officially deciding something." See *Random House Webster's College Dictionary* (2014). In this case, Defendant R. Demil has, on an annual basis, officially decided to keep the salaries of shareholder employees the same by unilaterally adopting the budget. While Defendants' position could have been supported had the provisions in question included narrower language, the Court remains satisfied that under the language of the governing documents determinations to keep wage levels the same required unanimous approval. Accordingly, the Court is convinced that Defendants' contention is without merit.

While Defendants are correct that it is the Court's obligation to determine the intent of the contracting parties, if the language of the contract is unambiguous the Court must construe and enforce the contract as written. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Therefore, an unambiguous contractual provision is reflective of the parties' intent as a matter of law, and that intent will be enforced unless it is contrary to public policy. *Id.* Indeed, "[t]he goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. [The Court] must enforce the clear and unambiguous language of a contract as it is written." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).

In this case, the Court is convinced that the plain language of the governing documents requires unanimous approval for determinations of shareholder wage levels. While Defendants dispute the scope of the provisions at issue, the Court does not find the provisions at issue

ambiguous. Consequently, the Court need not explore parole evidence in order to interpret the documents at issue. For these reasons, the Court remains satisfied that Defendants' position is without merit.

Defendants also contend that the Court's decision to grant Plaintiff M. Demil summary disposition of his shareholder oppression claim deprived them an opportunity to prove their affirmative defenses. First, Defendants contend that Plaintiff M. Demil waived, and is estopped from claiming oppression arising from any improper determination of shareholder wages/compensation. A waiver is an intentional and voluntary relinquishment of a known right or privilege. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Hamacher*, 432 Mich 157, 170 n 3; 438 NW2d 43 (1989) (Levin, J). Defendants contend that Plaintiff M. Demil waived his right to vote by leaving the 2012 shareholder meeting, not objecting to keeping the wages the same, accepting his own salary in 2012 and January 2013, not objecting to the payment of other shareholder employees, and by filing for an injunction requiring Defendants to reinstate his wages.

In order for a course of conduct to constitute a waiver, it is insufficient that a party was aware of the other's activity that was inconsistent with the contract; rather, there must be clear and convincing evidence the other party "affirmatively accepted" the inconsistent activity. *Quality Prods, supra*, at 374. In this case, Defendants have failed to establish that Plaintiff M. Demil affirmatively accepted Defendant R. Demil's decision to unilaterally adopt RMD's budget. At best the evidence presented by Defendants establishes that Plaintiff M. Demil was aware that a budget had been passed without his approval. However, such evidence is insufficient to establish that Plaintiff M. Demil affirmatively accepted Defendant R. Demil's

unilateral decision. Consequently, the Court is satisfied that Defendants' contention that Plaintiff M. Demil waived his rights is without merit.

Defendants also contend that Plaintiff M. Demil should be estopped from claiming oppression based on the improper determinations. Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002). In this case, Defendants merged their waiver and estoppel arguments and do not address the elements required to establish estoppel. A party may not merely state a position and then leave it to the Court to rationalize and discover the basis for the claim, nor may he leave it to the Court to search for authority to sustain or reject his position. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Due to Defendants' failure to properly support their estoppel defense, the Court declines to entertain the merit of such a defense.

Defendants also contend that the defense of unclean hands bars Plaintiff M. Demil's oppression claim. Specifically, Defendants contend that Plaintiff M. Demil has competed with RMD via his involvement with Fenton Excavating & Construction, Inc. However, Defendants have failed to establish how Plaintiff M. Demil's alleged competition is improper. Consequently, Defendants have failed to establish the Court committed palpable error in granting Plaintiff M. Demil summary disposition of his oppression claim based on the doctrine of unclean hands.

Finally, Defendants contend that the Court improperly found that Defendant R. Demil willfully oppressed Plaintiff M. Demil's right to vote. To prove statutory oppression, a plaintiff

must prove that the defendant engaged in conduct that is “willfully unfair and oppressive” to the shareholder. MCL 450.1489. Defendants contend that Defendant R. Demil’s behavior was not unfair or oppressive because Plaintiff M. Demil was given an opportunity to vote at the 2012 shareholder meeting but chose to leave. However, even if true, the fact remains that Defendant R. Demil has also unilaterally approved RMD’s budget for 2013 and 2014 without giving Plaintiff M. Demil the opportunity to exercise his right to vote. The fact that Defendant R. Demil willfully declined to involve Plaintiff M. Demil is evidenced by the fact that he has not been given an opportunity to vote since the 2012 meeting. Accordingly, the Court is convinced that there is a sufficient basis to find that Defendant R. Demil has willfully oppressed Plaintiff M. Demil’s right to vote.

Conclusion

For the reasons discussed above, Defendants’ motion for reconsideration of the Court’s August 11, 2014 Opinion and Order is DENIED. The parties shall, not later than October 10, 2014, submit to the Court their proposed terms of a buy-out pursuant to MCL 450.1489(e). The proposals shall include the method by which the buy-out should be effectuated, the date they believe a potential appraisal should be based on, the appraiser they suggest if an appraisal is ordered, as well as any support for their positions/requests. This date may not be extended except by leave of the Court.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: September 29, 2014

JCF/sr

Cc: *via e-mail only*

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