COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2451 **Cir. Ct. No. 2005CV606**

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

GERARDO MACHADO,

PLAINTIFF-APPELLANT,

V.

SHALLBETTER, INC., GREGORY J. SHALLBETTER, AND KURT KOEPPLER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: T. J. GRITTON, Judge. *Affirmed*.

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

¶1 ANDERSON, J. Gerardo Machado appeals from an order dismissing his claims against Shallbetter, Inc., Gregory J. Shallbetter, and Kurt Koeppler. Machado, a Shallbetter, Inc. stockholder, argues that Shallbetter and

Koeppler, also Shallbetter, Inc. stockholders, breached the parties' common stock redemption agreement when Shallbetter sold shares of stock to Koeppler without giving Machado the opportunity to purchase his proportionate shares of stock.

¶2 We hold that Shallbetter and Koeppler did not breach the redemption agreement. The redemption agreement grants a stockholder the right to purchase stock if the corporation was offered stock first and declined to purchase it, but it does not require the selling stockholder to first offer the shares to the corporation. The agreement permits a current stockholder to sell his or her shares of stock directly to another current stockholder. We reject Machado's other challenges to the circuit court's order and affirm.

FACTS

¶3 This is an appeal of a motion to dismiss for failure to state a claim. Thus, for purposes of this review, we accept as true the following facts. Prior to December 2003, Machado, Shallbetter and Koeppler were all stockholders of Shallbetter, Inc.[1] Machado held roughly five percent of the company's voting stock while Shallbetter and Koeppler held, respectively, approximately forty-four percent and fifty-one percent of the company's voting stock.

¶4 On December 19, 2003, Machado, Shallbetter and Koeppler entered into a "Redemption Agreement Regarding Common Stock." The redemption agreement reads in pertinent part:

[1] Machado was also an employee of Shallbetter, Inc. but was later terminated. In his complaint, Machado alleged that he was unlawfully terminated. The circuit court dismissed the claim, and Machado does not appeal that portion of the court's decision.

1. **Restriction on Transfer of Shares.** Except as hereinafter provided, each Shareholder agrees and covenants that he will not sell, pledge, encumber or otherwise transfer or dispose of, and will not permit to be sold, encumbered, attached, or otherwise transferred or disposed of in any manner, either voluntarily or by operation of law (all hereinafter collectively referred to as "transfer"), all or any portion of the Shares in the Corporation, now owned or about to be acquired by him or any other Shares in the Corporation at any time hereafter acquired by him, except in accordance with and subject to the terms of this Agreement.

   ….

2. **General Provisions on Transfer.** The transfer of any Shares shall be subject to the following conditions:

   (A) A Shareholder may offer in writing to sell to the Corporation, all but not less than all of his Shares in the Corporation, and upon a majority vote of the Board of Directors of the Corporation said offer shall be accepted or denied within thirty (30) days from delivery of said offer. Any such offers shall be transmitted by the proposed selling Shareholder to all other Shareholders in writing and by certified mail. The transmission of said offers shall only be effective upon receipt by all other Shareholders…. In the event that the Corporation elects not to purchase the Shares offered hereunder then the Corporation shall issue a written notice by certified mail to all Shareholders of such decision. Following receipt of said notice the Shareholders other than the offering Shareholder shall be offered these Shares under the Purchase Price … for a period of thirty (30) days following the receipt of said notice. The other Shareholders shall have the option to purchase these Shares in the same proportion that their shareholdings bear to each other at the time of receipt of said notice…. Any Shares not opted to be purchased by Shareholder(s) within the aforedescribed period shall then be offered to on a pro rata basis to those Shareholders who purchased the full number of Shares available to them after the initial offering …. Any Shares not purchased at the secondary offering shall be released from any restriction under the terms of this Agreement.

> (B) Sale or transfer of Shares to a party other than the Corporation or a current Shareholder shall be strictly prohibited without the prior written consent of all then current Shareholders of the Corporation.
>
> ….
>
> **11. Termination.** This Agreement shall terminate:
>
> (A) Upon the approval of said termination by Shareholders holding at least seventy five percent (75%) of the outstanding Shares of the Corporation.
>
> ….
>
> **12. Amendment.** This Agreement may only be amended in writing and with the approval of Shareholders holding at least seventy five percent (75%) of the outstanding shares of Class A Voting Common Stock of the Corporation.

¶5 On March 8, 2005, Shallbetter, Inc., Shallbetter, and Koeppler entered into a "Purchase and Sale Agreement." Pursuant to the terms of the purchase and sale agreement, Shallbetter would sell to Koeppler all of his shares of stock in the company. Section 6, entitled "Conditions Precedent to Closing," provides in subsection (f):

> Buyer, Seller, Machado and the Company shall cancel the December 19, 2003 Redemption Agreement among the Company, Seller, Buyer and Machado by execution of a Termination Agreement at closing and, in addition, by execution of such Termination Agreement the Seller shall be expressly released from the noncompete covenant set forth in that December 19, 2003 Redemption Agreement.

Section 7, entitled "Closing and Closing Documents" states in subsection (c): "Buyer, Seller, Company, and Machado shall execute a Termination Agreement to terminate the December 19, 2003 Redemption Agreement and Machado shall execute the consent required by Section 14 of this Agreement."

¶6 The purchase and sale agreement does not give Machado the right to purchase any stock. The agreement does state that it is "Joined in by Gerardo Machado for Purposes of Section 14." Section 14, entitled "Machado Consent," provides:

> Company, Seller, and Buyer acknowledge that Machado is executing this Agreement for the sole purpose of consenting to the sale of the Shares and Notes by Seller to Buyer and to the related terms and conditions of the Employment Agreement and the Lease and to confirm the cancellation of the December 19, 2003 Redemption Agreement at the closing. Machado shall have no liabilities or obligations pursuant to the terms of this Agreement except to execute a written consent at closing as provided in this Section and a Termination Agreement terminating the December 19, 2003 Redemption Agreement.

Machado, however, did not sign the purchase and sale agreement.

¶7 Shallbetter and Koeppler also entered into a "Termination Agreement," which stated, "[Koeppler and Shallbetter], representing more than 75% of the outstanding voting common stock of Shallbetter, Inc., hereby agree to terminate the December 19, 2003 Redemption Agreement between Shallbetter, Inc., [Koeppler, Shallbetter and Machado] effective as of March 18, 2005 as required by Section 6(f) of the Purchase and Sale Agreement executed March 8, 2005."

¶8 In October 2005, Machado filed a complaint with the circuit court, seeking, among other things, a declaration by the court that the stock sale is null and void for failure to comply with the redemption agreement and that he is entitled to proper notice of the sale of the stock and, upon proper notice, has a right to buy the stock pursuant to the terms of the redemption agreement. Shallbetter, Inc., Shallbetter, and Koeppler filed motions to dismiss. The circuit court granted their motions and dismissed Machado's complaint.

STANDARD OF REVIEW

¶9 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint to state a claim for which relief may be granted. ***Torres v. Dean Health Plan, Inc.***, 2005 WI App 89, ¶6, 282 Wis. 2d 725, 698 N.W.2d 107. When testing the legal sufficiency of a claim, all facts alleged in the complaint, as well as all reasonable inferences from those facts, are accepted as true. ***Id.*** A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstance. ***Id.*** The underlying legal question requires the interpretation of contracts, which is subject to de novo review. *See* ***Northern States Power Co. v. National Gas Co., Inc.***, 2000 WI App 30, ¶7, 232 Wis. 2d 541, 606 N.W.2d 613 (Ct. App. 1999).

DISCUSSION

Redemption Agreement

¶10 Machado maintains that the redemption agreement requires the selling stockholder to first offer to sell his or her shares of stock to the corporation. If the corporation declines the offer, the corporation must notice all stockholders of its decision. According to Machado, it is at this point that the selling stockholder must grant the other current stockholders the option of purchasing the shares in the same proportion that their stockholdings bear to each other. Machado argues that because Shallbetter and Koeppler failed to follow this procedure, they breached the redemption agreement and he is entitled to, among other things, a declaration by the court that the sale is null and void.

¶11 Machado misreads the redemption agreement. The procedure outlined above applies only if the selling stockholder first offers to sell the shares

of stock to the corporation and the corporation declines the offer. The stockholder is not required to offer to sell the shares of stock to the corporation. The agreement states that the stockholder "may" offer to sell the shares of stock to the corporation, which indicates that it is a permissive or discretionary provision. *Cf.* ***Town of Cedarburg v. Dawson***, 2004 WI App 174, ¶29, 276 Wis. 2d 206, 687 N.W.2d 841 (characterizing "may" as permissive and "shall" as mandatory in the context of statutory construction).

¶12 Further, the redemption agreement does not anywhere prohibit a selling stockholder from first offering to sell his or her shares of stock directly to another current stockholder. The redemption agreement only requires current stockholder consent to the transfer of shares of stock where the selling stockholder proposes to transfer the shares of stock to a third party. The redemption agreement therefore permitted Shallbetter to sell his shares of stock directly to Koeppler.

¶13 Machado maintains that the parties "inadvertently" used the word "may" in the agreement and that we must interpret "may" as mandatory. Machado advances several arguments in support. We are unpersuaded.

¶14 Machado opines that in order for the purpose of the redemption agreement, which was to benefit and protect the stockholders, to be upheld, the word "may" must be read as "shall." However, the agreement shows that the parties were aware of the different denotations attached to the two words. *Cf.* ***id.*** (in the context of statutory construction, recognizing that where "may" and "shall" are used in the same section, we infer that the legislature was aware of the difference between the two words). Indeed, the parties used the word "shall" multiple times in the same section of the agreement in order to better protect the

stockholders' interests. For example, the parties used the word "shall" to expressly protect stockholders in third-party transfer situations. Had the parties wanted to make the transfer restriction in question similarly mandatory, they could have done so by selecting the word "shall."[2]

¶15 Machado next points out that pursuant to WIS. STAT. §§ 180.0627(2) and (4)(a) (2003-04),[3] an agreement among stockholders of a corporation may obligate the selling stockholder to first offer the corporation an opportunity to acquire the shares of stock and that legal commentaries agree that stockholders, particularly in a corporation with few stockholders, may find it advantageous to include such a restriction. Sections 180.0627(2) and (4)(a), like the parties' agreement, is written using the permissive "may," meaning that the parties may lawfully choose to impose such a transfer restriction, but the parties are not required to do so. The parties in this case simply opted not to impose that particular transfer restriction.

¶16 Machado further argues that Shallbetter and Koeppler only required his consent to terminate the redemption agreement prior to the transfer of shares because they read the word "may" as mandatory. Simply because Shallbetter and Koeppler sought Machado's consent to the termination of the redemption agreement does not mean that they understood, or more importantly initially intended, the redemption agreement to require that consent or to confer a right

[2] In making this argument, Machado references a notation on the reverse side of the stock certificates which states that the shares represented by the certificate are subject to the redemption agreement. This notation, however, does not offer any guidance on the question of the proper interpretation of the agreement's specific provisions.

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

upon Machado to purchase proportional shares of stock. We find nothing in the purchase and sale agreement suggesting that this was the purpose for seeking Machado's consent.

¶17 Machado also maintains that the respondents failed to argue before the circuit court that the word "may" must be construed permissively. Machado reasons that, as a result, they were acknowledging that an offer to the corporation was a mandatory precondition to the transfer of shares of stock to another current stockholder and we must deem any argument to the contrary waived. Machado, however, fails to direct us to any place in the record where the respondents implicitly or explicitly made such a concession. Our review of the record reveals that the respondents simply chose to argue that *even if* Machado was correct and he had rights under the redemption agreement, Shallbetter and Koeppler properly terminated that agreement. Furthermore, although the general rule is that issues not presented to the circuit court will not be considered for the first time on appeal, ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997), the waiver rule generally applies only to appellants, and we will usually permit a respondent to employ any theory or argument on appeal that will allow us to affirm the trial

court's order, even if not raised previously, *see* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).[4]

Amendment of the Redemption Agreement

¶18 Machado maintains that Shallbetter and Koeppler modified the redemption agreement to require Machado's consent to the transfer of the shares of stock and to the termination of the redemption agreement simply by executing the purchase and sale agreement. The redemption agreement provides that it may be amended in writing with the approval of stockholders holding at least seventy-five percent of the outstanding shares of the corporation and Shallbetter and Koeppler together hold ninety-five percent of the shares of outstanding stock. However, the purchase and sale agreement specifically states that the parties "shall *cancel*" the December 19, 2003 redemption agreement. (Emphasis added). The purchase and sale agreement does not anywhere purport to *amend* the provisions of the redemption agreement to require Machado's consent to either the transfer of the shares of stock or the termination of the redemption agreement.

[4] Machado contends that the termination agreement did not effectively terminate the redemption agreement because the purchase and sale agreement required him to sign the termination agreement and he did not. Machado also argues that because Shallbetter and Koeppler breached the redemption agreement, they were without the authority to unilaterally terminate it. *See* SARAH HOWARD JENKINS, CORBIN ON CONTRACTS: DISCHARGE § 68.9 at 251 (rev. ed. 2003) (stating, in part, that "[a] party who has reserved a power of termination loses that power if it commits a total breach of the agreement"). Therefore, according to Machado, his right to purchase shares of stock survived the termination agreement and we must declare the sale null and void. Because we have rejected Machado's contention that the redemption agreement afforded him an opportunity to purchase shares of stock in the first instance, the effectiveness of the termination agreement is no longer an issue.

Breach of Fiduciary Duty

¶19 Machado also argues that Shallbetter and Koeppler breached their fiduciary duties when, in violation of the terms of the redemption agreement, they did not offer the shares of stock for sale first to the corporation and then to him. Because we conclude that Shallbetter and Koeppler did not breach the redemption agreement, Machado's challenge on this ground fails.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.