**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**December 5, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2006AP423** **Cir. Ct. No. 2004CV4935**

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

---

**EPIK CORPORATION, A WISCONSIN CORPORATION,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PERRY M. ANKERSON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Perry M. Ankerson appeals the trial court's grant of summary judgment ordering him to sell back to the EPIK Corporation his shares of its stock. Ankerson also appeals the trial court's denial of his motion for partial

reconsideration. Ankerson claims that the trial court erred because there were genuine issues of material fact. We agree, reverse the orders granting EPIK summary judgment and denying Ankerson's motion for partial reconsideration, and remand for further proceedings.

I.

¶2 Ankerson was the president of EPIK and owns approximately three percent of its stock. The remaining shares were owned by William D. Kolb and CCP Limited Partnership. Ankerson's stock is subject to ownership-and-transfer restrictions in a Stock Repurchase Agreement because he was what the Agreement calls "an 'Employee Shareholder.'"[1] Paragraph 4(a) of the Agreement thus requires that Ankerson sell, and EPIK buy, Ankerson's shares if he no longer works for Epik:

> If the employment of a Shareholder who is employed by the Corporation (an "Employee Shareholder") is terminated (i) voluntarily or involuntarily …, the Employee Shareholder shall sell to the Corporation and the Corporation shall purchase from the Employee Shareholder all of the Stock owned by the Employee Shareholder and all of his Spouse's interest in the Stock, if any. The purchase price for the Stock shall be at the price and on the terms and conditions set forth in sections 7 and 8 hereof. Provided, however, that such obligation to purchase the Stock shall be subject to the restrictions and limitations set forth in section 10 hereof.

Paragraph 7(c) provides: "If the Purchase Price has not been stipulated within 16 months prior to a Purchase Event [that is the cessation of employment] and a

[1] The parties refer to two Stock Repurchase Agreements: a May 8, 1998, Stock Repurchase Agreement and a September 14, 1998, Stock Repurchase Agreement. The material provisions of the Agreements are the same.

Purchase Event occurs, *the Purchase Price shall be the fair market value per share as determined by the Board of Directors in good faith* as of the Purchase Event." (Brackets and emphasis added.) According to Paragraphs 8(a) and (b), the Purchase Price is to be paid in "Cash at Closing … in an amount equal to … 20% of the Purchase Price" with the balance of the purchase price to be "evidenced by a promissory note payable in four equal annual installments of principal and interest." Paragraph 9 provides that the closing "shall be within 60 days of the Purchase Event," and under Paragraph 10, if EPIK could not:

> satisfy the conditions precedent to acquisition of its own shares under the Wisconsin Business Corporation Law, or is restricted from making such purchase under any agreement with the Corporation's institutional lenders, the Corporation shall purchase as many shares as it shall have legal capacity to purchase and the purchase commitment hereunder shall remain in effect as to any unpurchased shares.

According to Paragraph 14, "[i]f a controversy arises concerning the right or obligation to purchase or sell any of the Stock, such right or obligation shall be enforceable in a court of equity by a decree of specific performance."

¶3 A majority of EPIK's shareholders voted to end Ankerson's employment, effective July 31, 2001. On March 25, 2004, Daniel J. Jagla, EPIK's new president, sent a letter to Ankerson telling him that EPIK was exercising its right under the Stock Repurchase Agreement to buy Ankerson's stock. The letter said that EPIK's Board of Directors had "in good faith … determined the value of [Ankerson's] stock to be $24,650" and told Ankerson that EPIK would "commence appropriate legal action if the executed stock transfer agreement is not returned to us by April 8, 2004."

¶4 Ankerson refused to sell his stock to EPIK, and, on June 2, 2004, EPIK sued Ankerson for breach of contract. In its complaint, EPIK requested specific performance of the Stock Repurchase Agreement and a declaration that Ankerson had to sell his stock to EPIK for $24,650.

¶5 EPIK sought summary judgment, alleging, among other things, that it had determined the fair market value of Ankerson's stock in good faith. In support of its motion, EPIK attached an affidavit from Jagla and a "Summary of Analysis to Determine the Value of Ankerson's Shares" prepared by him, which valued Ankerson's stock at $33,057. Jagla's affidavit explained that, "[t]he final total of $24,650 included a deduction of $8,407, which EPIK claimed that Ankerson owed it as a result of alleged improper reimbursements Ankerson received from the company."

¶6 Ankerson opposed summary judgment, contending, as relevant here, that material issues of fact existed as to whether EPIK acted in "good faith" when it valued his stock at $24,650, or $163.13 per share. In support, Ankerson attached an affidavit in which he questioned Jagla's calculations and assertions of good faith. He also averred that he did not at any time "during [his] employment with EPIK … claim or receive any inappropriate or improper reimbursements."

¶7 As we have seen, the trial court granted EPIK's motion for summary judgment. It concluded that there were no genuine issues of material fact as to whether: (1) EPIK had determined the fair market value of Ankerson's stock in good faith, and (2) the $8,407 deduction EPIK took against the value of Ankerson's shares was proper.

¶8 Ankerson sought reconsideration and also asked the trial court to order that interest from September 30, 2001, sixty days after he was terminated, be

added to the purchase price of his stock. The trial court denied the motion and ordered Ankerson to tender his stock to EPIK.

II.

¶9 Our review of the trial court's grant of summary judgment is *de novo*, and we use the same methodology as did the trial court.[2] ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987).

> Under that methodology, the court first examines the pleadings to determine whether claims have been stated and a material issue presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits or other evidence for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party made a *prima facie* case, the court examines the opposing party's affidavits for evidentiary facts or other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.

***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511, 383 N.W.2d 916, 917 (Ct. App. 1986).

[2] EPIK claims that we should review the trial court's grant of summary judgment for an erroneous exercise of discretion because this case involves the equitable remedy of specific performance. EPIK is only partially correct. This case involves a two-part standard of review: (1) we review the trial court's grant of summary judgment *de novo*, and, if we determine that summary judgment was appropriate, (2) we review the trial court's decision to grant equitable relief for an erroneous exercise of discretion. *See, e.g.*, ***Socha v. Socha***, 204 Wis. 2d 474, 478, 555 N.W.2d 152, 154 (Ct. App. 1996). We conclude that the trial court erroneously granted summary judgment. Accordingly, we do not reach the issue of equitable relief. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶10 As we have seen, Ankerson asserts that the trial court erred when it granted EPIK's motion for summary judgment and denied his motion for partial reconsideration because he contends: (1) there are genuine issues of material fact as to whether EPIK determined the fair market value of his stock in good faith; (2) EPIK is not entitled to an $8,407 set-off; and (3) he should get interest on the purchase price of his stock. We address each assertion in turn.

A. *Stock Value.*

¶11 Ankerson argues that summary judgment was inappropriate because his affidavit creates genuine issues of material fact as to whether EPIK determined the fair market value of his stock in good faith. We agree.

¶12 As material, Jagla alleged in his affidavit that he concluded that Ankerson's stock was worth $24,650, and that:

- He "presented [his] conclusions to EPIK's Board of Directors and the Board approved making a purchase demand for $24,650 in a letter delivered to Ankerson on March 24, 2004 [*sic* – should be March 25, 2004]."

- "EPIK has purchased the shares of the other individual shareholder, Mr. [William D.] Kolb. EPIK paid Mr. Kolb [*sic* – should be Ankerson] according to the very same good faith fair market value analysis that it applied to Mr. Kolb. The only difference in the Purchase Price was that EPIK did not apply a discount for improper reimbursements to Mr. Kolb since Mr. Kolb had no such improper reimbursements."

Jagla also alleged in his "Summary of Analysis to Determine the Value of Ankerson's Shares" that:

- In establishing "a valuation as of July 31, 2001 … I came upon and reviewed the work done in July, 2001, by Cedar Creek Partners [a general partner in CCP Limited Partnership] in valuing its portfolio as of June 30, 2001. The underlying assumptions utilized in that analysis and the conclusions appear reasonable."

- "When I completed my analysis, the resulting common equity valuation of Art Etc[, a subsidiary of EPIK,] as of June 30, 2001, was $1,091,000. When combined with the $77,000 cash balance at EPIK, it resulted in an EPIK stock valuation of $1,168,000."

- "I chose not to apply … any of the $152,000 in litigation and related costs to date incurred by EPIK to defend actions subsequently taken by Mr. Ankerson."

¶13 As material, Ankerson averred the following in contradiction to Jagla's affidavit and "Summary of Analysis to Determine the Value of Ankerson's Shares":

- "[T]he Jagla affidavit is misleading and false in implying that Mr. Jagla presented a good faith fair market valuation of my stock to EPIK's Board *before* his demand letter of March 24, 2004 [*sic* – should be March 25, 2004]. Mr. Jagla avoids saying exactly when he supposedly presented his conclusions and supplies no board minutes to confirm that such a presentation was in fact made or that the board in fact approved his letter." (Emphasis in original; exhibit reference omitted.)

- "The purchase of Mr. Kolb's stock is not an indicator of the fair market value of my stock because: … The buy-back of Mr. Kolb's stock was not a

'fair market' transaction because it is too far removed in time from the July 31, 2001 valuation date for my stock and because EPIK provides no evidence that the Kolb transaction was arms-length and that Kolb was fully informed of all information about EPIK and Art Etc. to fairly evaluate his stock."

- Jagla's "Summary of Analysis to Determine the Value of Ankerson's Shares" "states that Cedar Creek evaluated its portfolio of companies (including EPIK) as of June 30, 2001 and purports to have relied on the 'underlying assumptions utilized in that analysis and the conclusions' which appeared 'reasonable.' However, Mr. Jagla does not disclose what value was given to EPIK at that date, close enough to the required July 31, 2001 date here to be relevant. Instead, in evaluating my stock Mr. Jagla applies cash and other factors that are not only questionable on their merits but are from much later dates, thus invalidating his entire methodology."

- "Mr. Jagla's evaluation of EPIK is based on the alleged value of EPIK's subsidiary, Art Etc., as of June 30, 2001 ($1,091,000) plus EPIK's alleged cash balance ($77,000). Mr. Jagla fails to disclose the date of that cash balance. That was clearly not EPIK's cash balance on the valuation date. EPIK's federal income tax return for the period May 1, 2001 to April 30, 2002, which was provided to me in discovery, shows cash balances on May 1, 2001 of $267,557 and on April 30, 2002 of $335,669. As president of EPIK until July 31, 2001, I know its cash balance did not materially fluctuate during May, June and July of 2001. EPIK's cash balance was not $77,000 on July 31, 2001 or at any other relevant time."

- "I never sued EPIK. I filed a shareholder's derivative action in [*sic*] behalf of EPIK against Cedar Creek Partners and CCP Limited Partnership (Milwaukee County Circuit Court Case No. 02 CV 1226) in which EPIK was a nominal party only. No relief was sought against EPIK by any party. It is evident that the Cedar Creek defendants misappropriated money from EPIK to pay their own defense costs. Furthermore, my action against the Cedar Creek defendants was not filed until February 1, 2002, six months after my termination and four months after the deadline for purchasing my stock had passed. No relevant litigation expense was or could have been incurred at or before the required July 31, 2001 valuation date."

- "I know that EPIK has very valuable assets in addition to the Art Etc. stock that Mr. Jagla disregards: EPIK had large tax loss carry forwards resulting from the losses and bankruptcy of another EPIK subsidiary (Universal)."

- "EPIK's action is based on the September 14, 1998 Stock Repurchase Agreement…. Both [the May 8, 1998, and the September 14, 1998,] versions value my stock at $1,000 per share. In May 1998 and July 2001 Art Etc. was EPIK's main asset. Art Etc. was profitable and increased in value during that period."

Jagla responded to Ankerson's affidavit by disputing some of Ankerson's averments. Who is correct—Jagla or Ankerson—must be resolved at trial. *See* ***Jahns v. Milwaukee Mut. Ins. Co.***, 37 Wis. 2d 524, 530, 155 N.W.2d 674, 678 (1968) (summary judgment procedure is not to be a trial on the affidavits).

¶14 Ankerson has asserted facts sufficient to put the issue of EPIK's good faith into dispute. His affidavit raises significant questions regarding Jagla's calculations, and, as he points out, there is no summary-judgment material

showing that EPIK's Board of Directors adopted Jagla's calculations in good faith. *See* ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 296, 531 N.W.2d 357, 366 (Ct. App. 1995) ("Summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy."); ***Bass v. Ambrosius***, 185 Wis. 2d 879, 890, 520 N.W.2d 625, 629 (Ct. App. 1994) (resolution of complex legal issues generally requires full exposition of facts at trial).

B. *Deduction.*

¶15 Ankerson claims that the trial court erred when it granted EPIK the $8,407 deduction. Ankerson points out that EPIK did not allege in its complaint against him that it had actually valued his stock at $33,057 and then deducted $8,407 for improper expenses.

¶16 Pleadings must contain "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." WIS. STAT. RULE 802.02(1)(a). Further, "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds." RULE 802.02(5)(b). Whether a complaint states a claim is a question of law that we review *de novo*. *See* ***Sheboygan County v. D.T.***, 167 Wis. 2d 276, 282–283, 481 N.W.2d 493, 496 (Ct. App. 1992).

¶17 EPIK's complaint did not mention or even allude to the $8,407 deduction. Rather, it merely asserted that "the Board of Directors had in good faith determined the value of the Stock held by Ankerson to be $24,650." As revealed by Jagla's affidavit in support of EPIK's motion for summary judgment, this was misleading to say the least because the first time EPIK mentioned the

deduction in this lawsuit was in that affidavit. The validity of the deduction is separate from EPIK's determination of the fair market value of Ankerson's stock under the Stock Repurchase Agreement. Accordingly, if EPIK seeks a set-off, it had to plead one. *See* ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶36, 284 Wis. 2d 307, 329, 700 N.W.2d 180, 190–191 (notice pleading rule requires plaintiff to set forth a statement of circumstances, occurrences, and events in support of claim presented).

C. *Interest.*

¶18 Ankerson contends that the trial court erred when it denied his request for interest under Paragraph 8(b) of the Stock Repurchase Agreement, which provides, as material: "The principal balance shall bear interest from the date of Closing until fully paid at a rate equal to 5% per year." In light of our decision to reverse and remand for further proceedings, the issue of interest is premature. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

*By the Court.*—Orders reversed and cause remanded.

Publication in the official reports is not recommended.