COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1240 **Cir. Ct. No. 00-CV-1275**

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

CARL G. NORDHOLM,

PLAINTIFF-APPELLANT,

V.

HERLACHE INDUSTRIAL SUPPLY CO., INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: J. D. McKAY, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Carl Nordholm appeals a summary judgment dismissing his complaint against Herlache Industrial Supply Co., Inc. Nordholm brought this action to determine the proper stock valuation provision in Herlache's Stock Restriction and Purchase Agreement. Nordholm argues that the record is insufficient to establish that he waived his right to or was estopped from pursuing

a second stock valuation. We agree. Because the record gives rise to competing inferences regarding the elements of waiver and equitable estoppel, we reverse the summary judgment and remand for further proceedings.[1]

BACKGROUND

¶2 In 1993, Nordholm, David Reiss and Michael Miller acquired Herlache Industrial Supply Co., Inc., with Nordholm owning 400 shares of stock, Reiss owning 267 shares, and Miller owning 333. The parties entered into a stock restriction and purchase agreement that allowed for involuntary termination of employment. It contained the following provisions: "[I]n the event that any Shareholder's employment with the Corporation ceases due to an involuntary termination, the Corporation shall purchase all of the stock of such Shareholder by paying such Shareholder the purchase price as determined in Article 7."

¶3 Article 7, section 3, reads: "Within ninety (90) days following the end of each fiscal year commencing September 30, 1994, the Shareholders and the Corporation agree to redetermine the purchase price of each share of stock" and indicate such value by endorsement. If the shareholders fail to establish a new value for the stock within the ninety days, then the value

> shall be determined by adjusting the purchase price most recently agreed upon by the Shareholders and adjusting such value, given the current year's financial information, as determined by the certified public accountant then servicing the Corporation, in accordance with generally accepted accounting principles.

[1] Nordholm also argues that the stock restriction and repurchase agreement is ambiguous. Because the trial court disposed of the case on the issues of waiver and estoppel, and did not resolve the ambiguity issue, we do not address it.

¶4 In October 1998, the parties executed an endorsement stating that the stock price was $1,635 per share. There was no valuation in 1999 or 2000. In March 2000, Miller and Reiss terminated Nordholm's employment. Subsequently, all three shareholders agreed that Schenck and Associates would value the stock according to Article 7, section 6, of the stock restriction and purchase agreement. Their meeting minutes state: "[T]he Shareholders also agreed that depending on the results of the valuation, a second party may need to be brought in."

¶5 In April 2000, all three shareholders signed an engagement letter with Schenck and Associates to conduct a valuation of the current share price. All three met with Schenck and Associates to clarify the valuation method it would use. The engagement letter described Schenck's responsibilities and stated: "We understand that our valuation conclusion will be used for determining the value in accordance with the Stock Restriction and Purchase Agreement."

¶6 The letter was signed by Schenck and Nordholm, Miller and Reiss. Pursuant to Schenck's duties under the engagement letter, it valued the stock price at $921.71 per share. Nordholm objected to this valuation, claiming Schenck did not use appropriate valuation methods. Nordholm commenced this action seeking a determination of the appropriate valuation method pursuant to Article 7 of the stock restriction and purchase agreement and to permit a second valuation using that method.

¶7 Nordholm alleged that Schenck's appraisal methods did not conform to Article 7, section 6, of the agreement. The complaint states: "The appraisal, as a determination of the purchase price, does not adjust the value of shareholder equity determined in 1998 by increasing or decreasing the agreed shareholder

equity using current year financial information of the Defendant." It also asserts that the appraisal failed to consider all relevant information and did not apply appropriate valuation standards. Nordholm claimed that if proper standards were applied, the price per share for the fiscal year ending in 1999 was $1,710.

¶8 The parties filed cross-motions for summary judgment. The circuit court determined that it was undisputed that the engagement letter waived Nordholm's rights to seek a second appraisal and that Nordholm was equitably estopped from pursuing a second valuation. It entered summary judgment dismissing his complaint. Nordholm appeals the judgment.

STANDARDS OF REVIEW

¶9 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08. We apply summary judgment principles in the same way as the trial court. ***Green Spring Farms***, 136 Wis. 2d at 315. If the facts adduced on summary judgment permit more than one reasonable inference, then courts must deny summary judgment. ***Acharya v. Carroll***, 152 Wis. 2d 330, 341, 448 N.W.2d 275 (Ct. App. 1989).

DISCUSSION

1. Waiver

¶10 Nordholm argues that the letter engaging Schenck to perform a valuation fails to establish as a matter of law that he waived a right to seek a second valuation. Nordholm essentially maintains that the letter's purpose was to

describe Schenck's responsibilities and not to impose a binding value. On the other hand, Herlache argues, in effect, that by signing this letter Nordholm agreed that the Schenck valuation would be binding. We conclude that the engagement letter alone is insufficient to establish as a matter of law that Nordholm waived a right to seek a second valuation.

¶11 Waiver is defined as a "voluntary and intentional relinquishment of a known right." ***Milas v. Labor Ass'n of Wisconsin***, 214 Wis. 2d 1, 9, 571 N.W.2d 656 (1997). Intent to relinquish the right is an essential element of waiver. ***Id.*** Although under some circumstances intent may be inferred as a matter of law from the parties' conduct, ***id.*** at 10, when competing inferences arise, the issue of intent presents a factual dispute. Our supreme court declared: "While it is true the 'actions sometimes speak louder than words'[,] intention is a subjective state of mind to be determined upon all of the facts including the declarations of the person inquired about. We have stated—'... the issue of ... intent is not one that properly can be decided on a motion for summary judgment.'" ***Lecus v. American Mut. Ins. Co.***, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (1977).

¶12 The engagement letter sets out certain assumptions and conditions with respect to Schenck's responsibilities, as well as its fees. It provides: "We understand that our valuation conclusion will be used for determining the value in accordance with the Stock Restriction and Purchase Agreement." We conclude the engagement letter is unclear whether it was intended to vary from the procedures outlined in the stock purchase agreement. As a result, the letter fails to establish that Nordholm intended to waive the provisions of the stock purchase agreement.

¶13 Also, we are not satisfied that the phrase "will be used for determining the value" is intended to bind the parties to Schenck's determination. To "use" may be defined as to "employ" or to put into service. WEBSTER'S THIRD NEW INT'L DICTIONARY 2523 (unabr. 1993). Thus, the letter may be interpreted to mean that the parties would use Schenck's valuation in reaching an agreement as to value. Consequently, competing inferences arise from the engagement letter, and Nordholm's intent presents a question of fact inappropriate for summary judgment resolution.

2. Equitable Estoppel

¶14 Next, Nordholm contends that the record is insufficient to support the application of equitable estoppel to bar his claim. We agree. The estoppel doctrine, also called equitable estoppel or estoppel *in pais,* focuses on the conduct of the parties. ***Milas***, 214 Wis. 2d at 11. The elements of equitable estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment. ***Id.*** at 11-12.

¶15 Herlache claims that the "unequivocal and unambiguous engagement letter, by which Mr. Nordholm, Mr. Reiss, and Mr. Miller agreed that the Schenck valuation would be controlling," makes no mention of a second valuation and therefore supports the application of equitable estoppel. We are unpersuaded. The engagement letter does not expressly or unambiguously state that the Schenck valuation would be controlling. In order to reach this interpretation of the letter, Herlache must reject an inference that the engagement letter was intended to

describe Schenck's duties vis-á-vis Herlache, rather than bind Nordholm to Schenck's determination.[2] Because more than one inference is reasonable, the letter is ambiguous. *See* ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987). Consequently, extrinsic evidence is permissible to ascertain the parties' intent. *See* ***id.***

¶16 Nordholm offered extrinsic evidence regarding his intent in the form of meeting minutes that state that he would be entitled to bring in another party to perform the valuation. This evidence permits an inference that the Schenck valuation would be non-binding. Consequently, the evidence raises a genuine issue of fact as to what, if any, action or non-action on Nordholm's part induced reasonable reliance. Because competing inferences raise a fact issue, *see* ***id.***, summary judgment is precluded.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] In addition, the record is unclear whether Schenck followed the procedures set out in the engagement letter and the letter fails to indicate that Nordholm waived any right to challenge its determination on this basis.