STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1440

Re-Solutions Intermediaries, LLC,
Respondent,

vs.

Heartland Financial Group, Inc.,
Appellant,

Christopher McDaniel,
Defendant.

Filed March 30, 2010
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CV-08-28665

Thomas W. Pahl, Jeffrey D. Klobucar, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondent)

W. Patrick Judge, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Heartland Financial Group, Inc., challenges the district court's grant of summary judgment in favor of respondent Re-Solutions Intermediaries, LLC, on

appellant's claim that respondent breached its contract to provide assistance in identifying and acquiring an insurance company for acquisition by appellant. Appellant argues that the contract was ambiguous and that the issue therefore was not suitable for summary judgment.

Because the contract terms were not ambiguous and the district court did not err in its interpretation of the law, we affirm.

D E C I S I O N

We review the district court's summary judgment decision de novo, to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 77 (Minn. 2002).

"The construction and effect of a contract are questions of law for the court, but where there is ambiguity and construction depends upon extrinsic evidence and a writing, there is a question of fact for the jury." *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). Thus, if a contract is ambiguous, the terms and existence of a contract must be determined by a jury, *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992), and the matter is not appropriate for summary judgment.

A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). The language of a contract is given its plain and ordinary meaning. *Id.* A contract must be read as a whole and in a manner that gives meaning to all of its

provisions. *Id.* Finally, contract terms may not be construed to give a harsh or absurd result. *Id.*

Appellant asserts that the district court erred in determining that the parties' contract is not ambiguous, basing its argument on the following contract clause:

> [Respondent] shall be entitled to its fee upon the introduction to [appellant] *and/or* assistance with the purchase of the Insurance Firms which [appellant] actually acquires. No fee is payable unless the acquisition is made, except to the extent required for reimbursement of Expenses incurred by [respondent] as hereinafter provided.

(Emphasis added.) Appellant argues that the contract is ambiguous because of the term "and/or" included in the description of the services to be rendered by respondent. Appellant asserts that the phrase can be read conjunctively—respondent must both identify *and* assist with the acquisition of a company to earn its fee—or disjunctively—respondent can either identify or assist in the acquisition of a company or do both but any of these actions earns respondent its fee. Thus, appellant argues, the contract is ambiguous because it is reasonably susceptible to more than one interpretation.

Both Minnesota courts and courts of foreign jurisdictions have looked skeptically on the phrase "and/or." *See, e.g., Podany v. Erickson*, 235 Minn. 36, 40-41, 49 N.W.2d 193, 196 (1951) ("In the light of the extreme need for precision and accuracy in the choice of language in legal documents, it is regrettable to note the persistence with which the 'and/or' expression is used by trained legal draftsmen."); *Bank Bldg. & Equip. Corp. v. Georgia State Bank*, 132 Ga. App. 762, 765, 209 S.E.2d 82, 84 (1974) (noting that the phrase "and/or" was "purposely ambiguous"); *Jones v. Servel, Inc.*, 135 Ind. App. 171,

178, 186 N.E.2d 689, 693 (1962) (determining that the phrase "and/or" was ambiguous and must be construed in a way "as will best effect the purpose of the parties as gathered from the contract taken as a whole").

But it is possible to phrase a contract in the alternative, allowing the promisor to elect between two or more options. In *Meiners v. Kennedy*, 221 Minn. 6, 20 N.W.2d 539 (1945), Meiners agreed to act as Kennedy's agent in the sale of a piece of property. Kennedy agreed to pay Meiners $3,000, either by paying cash or by signing over to Meiners a note in the amount of $3,000 issued by the purchasers. *Id.* at 7-8, 20 N.W.2d at 540. Rather than pay Meiners, Kennedy prevented the purchasers from completing the transaction. *Id.* at 8, 20 N.W.2d at 540. The supreme court concluded that

> where a promise is in the alternative to do one or the other of certain things, the promisor ordinarily has the right to elect which one of the alleged promises he will perform; but, if he disables himself from performing one of the alternatives, the other becomes a fixed obligation.

Id. at 10, 20 N.W.2d at 541. While the court found a breach because Kennedy failed to perform either alternative, the important point is that it is possible to frame a contract that can be performed in alternative ways.

In *First Nat'l Bank of Breckenridge v. Thorpe Bros.*, 179 Minn. 574, 229 N.W. 871 (1930), the supreme court upheld a contract in which the seller of land agreed to convey title to either the defendant or someone designated by him. *Id.* at 575, 229 N.W.at 872. The defendant designated a straw buyer who was wholly incapable of performing the defendant's end of the bargain. *Id.* at 576, 229 N.W. 872. The supreme court, with a remarkable lack of sympathy, stated, "Plaintiff knew the contract. There

was no fraud or deception. The language is plain" and affirmed the contract based on the fact that the contract permitted alternative performance, which was duly done. *Id.* at 577, 229 N.W. at 873.

This position is further supported by the plain and ordinary meaning of the phrase "and/or." *See Brookfield Trade Ctr.*, 584 N.W.2d at 394 (stating language of a contract is to be given its plain and ordinary meaning). "And/or" is defined as a term "[u]sed to indicate that either or both of the items connected by it are involved." *The American Heritage Dictionary* 68 (3rd Ed. 1992). According to the plain language of this contract, respondent could satisfy its contractual obligations in any of three alternative ways: by introducing appellant to a target firm, by assisting in its purchase, or by doing both.

The district court is bound to consider the language of the written contract and may accept extrinsic evidence only if it is unable to discern the parties' intent through the written language of the contract. *Alpha Real Estate Co. v. Delta Dental*, 671 N.W.2d 213, 221 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). Although in retrospect agreement to alternative performances is imprecise and unwieldy, we permit parties to freely negotiate and voluntarily agree to contract terms, and we do not interfere in that process absent fraud, duress, or criminal conduct. *See Metro. Sports Facilities Comm'n v. General Mills, Inc.*, 470 N.W.2d 118, 124 (Minn. 1991).

Appellant argues that the court erred by not construing the language of the contract against respondent, its drafter. If there is an ambiguity in a contract, it can be construed against the drafter. *Premier Bank v. Becker Dev., LLC*, 767 N.W.2d 691, 698 (Minn. App. 2009); *see also Beattie v. Prod. Design & Eng'g, Inc.*, 293 Minn. 139, 149,

198 N.W.2d 139, 144 (1972) ("[W]e must construe a contract in a manner designed to achieve the purpose of the contracting parties; if doubt remains, we must construe the contract against the party who drafted it."). But if the contract is not ambiguous, this rule of construction does not apply. Further, this rule has less application as between parties of equal bargaining power or sophistication. *See* 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.27 at 282-83 (Joseph M. Perillo, ed., rev. ed. 1998) (discussing use of *contra proferentem* doctrine as a tool in contract interpretation; generally, noting its use if other methods of construction fail and citing comment that "rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position but it is not limited to such cases."); *see also Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc.*, 646 N.W.2d 904, 910 (Minn. App. 2002) (discussing claim of a contract of adhesion and noting that "[a]n agreement between parties with business experience is not the product of unequal bargaining power.")

We conclude that the district court did not err by determining that this contract was not ambiguous and that under the unambiguous terms of the contract, respondent was permitted to perform in the alternative; therefore, the district court did not err by granting summary judgment in favor of respondent.

By notice of review, respondent challenged the district court's decisions on its claims of fraudulent inducement, promissory estoppel, and rescission. At oral argument, respondent agreed to withdraw these challenges. We therefore decline to address them.

Affirmed.