IN THE COURT OF APPEALS
AT KNOXVILLE

		E1999-02550-COA-R3-CV
REUBEN N. PELOT, III	)	KNOX COUNTY CHANCERY
	)	03A01-9903-CH-00066
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. JOHN F. WEAVER,
	)	CHANCELLOR
	)	
NICHOLAS S. CAKMES	)	
	)	
Defendant-Appellee	)	REVERSED AND REMANDED

JACK B. DRAPER AND DAN D. RHEA OF KNOXVILLE FOR APPELLANT

H. BRUCE GUYTON AND DAVID T. LEWIS OF KNOXVILLE FOR APPELLEE

O P I N I O N

Goddard, P.J.

The plaintiff-appellant filed suit to enforce a Shareholders Agreement which required that the final payment for his stock be based upon an appraisal of the corporation's worth. The trial court directed him to accept as a final payment for his stock, the amount specified in a modification of the original Agreement. From this order the plaintiff-appellant appeals.

I. FACTS

On May 13, 1986, Dr. Reuben N. Pelot, III, D.D.S., had his dentistry practice professionally appraised by a consulting firm known as Blair, McGill and Company. The purpose of that appraisal was to determine the fair market value of Dr. Pelot's

practice in anticipation of an eventual sale of the practice to a new associate dentist, Jeffrey M. Clark.

Blair, McGill and Company appraised the fair market value of Dr. Pelot's practice to be $228,000 as of March 31, 1986. The report utilized three separate methods to determine fair market value, namely: cost value or excess earnings approach, market approach, and income or cash flow approach. The value derived from each method was weighed respectively at 20%, 35% and 45% to produce a composite value.

Based on the Blair, McGill report, Dr. Pelot sold one-third of the stock in the professional corporation to his new associate, Dr. Clark, for one-third of the appraised value, or $76,000. Shortly thereafter, in November 1987, Dr. Clark decided to quit the practice. With Dr. Pelot's approval, Dr. Clark sold his one-third interest to an acquaintance, Nicholas Cakmes, D.D.S., the defendant in this suit. Dr. Cakmes paid Dr. Clark the same amount that Dr. Clark had paid Dr. Pelot in November 1986, that is $76,000.

On November 25, 1987, Dr. Pelot and Dr. Cakmes executed an eight page "Shareholders Agreement." The Agreement had been drafted by the dentists' legal counsel. In this Agreement, Dr. Pelot agreed to sell his remaining two-thirds interest in the professional corporation to Dr. Cakmes in two separate installments. The first purchase was scheduled for December 31, 1991. The second purchase was scheduled for December 31, 1996.

Section 1(c) of the Agreement provided that the purchase price for the two installment sales was to be governed by the following provision:

> The purchase price for the second and final stock purchases shall be established by a competent appraisal, and the method or procedure for such valuation shall be the same as that which was utilized by Blair, McGill and Company, Gastonia, North Carolina, and confirmed by written report dated May 13, 1986. Such appraisal shall be undertaken and completed within sixty (60) days of the date upon which the stock sale is scheduled to occur. Unless prohibited by applicable tax laws and/or regulations, the costs of each such appraisal shall be treated as a business expense of the PC and paid as such.

The Agreement also contained various miscellaneous provisions, one of which provided as follows:

> (C) This Agreement may not be modified or terminated orally, and no modification, termination, or waiver shall be valid unless in writing signed by the party against whom the same is sought to be enforced.

On December 31, 1991, the first sale under the Agreement was completed. Dr. Pelot, out of concern for the cost of the appraisal and Dr. Cakmes' new family obligations, simply sold the second one-third of the stock in the corporation to Dr. Cakmes at the same price that Dr. Clark paid in 1986. In connection with this sale, Dr. Pelot went to the bank with Dr. Cakmes and agreed to co-sign the promissory note that Dr. Cakmes executed in order to borrow the $76,000 from a bank.

This transaction made Dr. Cakmes the majority, controlling shareholder in the practice and made Dr. Pelot the

minority shareholder. From 1991 to 1996, the value of the professional corporation grew substantially.[1]

On October 28, 1996, Dr. Cakmes prepared the following letter after consulting with Steve Harb, his CPA. The letter reads as follows:

> October 29, 1996
>
> Mr. Tom Vester
> NBC Knoxville Bank
> 1111 Northshore Drive
> Knoxville, TN 37919
>
> Dear Tom,
>
> As requested, the following information regarding my loan application is provided.
>
> The loan amount of $76,000 is the agreed upon amount needed to purchase the final one-third (1/3) shares of stock of Pelot and Cakmes Dental Associates, P.C. from Dr. Pelot. The loan transaction will occur on the 31st day of December, 1996.
>
> Enclosed are the corporation's P&L, balance sheet and tax returns for the past three years. In addition, my personal financial statements and tax returns for the past two years are enclosed.
>
> Sincerely,
>
> s/ Nicholas S. Cakmes, DDS
> Nicholas S. Cakmes, DDS
>
> ACKNOWLEDGED AND AGREED:
>
> s/Reuben N. Pelot III
> Reuben N. Pelot, III, DDS

October 29, 1996, fell on a Tuesday. Traditionally, Tuesdays were very busy days in the dental practice. That afternoon, while Dr. Pelot was in the lounge of the dental office drinking a cup of coffee between seeing patients, Dr. Cakmes

[1]Dr. Pelot testified that he knew of nothing to indicate that the value of the corporation was less than $228,000 as of October 29, 1996. Dr. Cakmes testified that he thought the practice had progressed and expanded and grown in the five-year period between December 31, 1991 and December 31, 1996.

handed the letter to Dr. Pelot. Dr. Pelot signed the letter in the space prepared by Dr. Cakmes and handed the letter back to Dr. Cakmes. According to Dr. Pelot, there was no discussion of the contents of the letter. Even though the letter was addressed to his banker, Dr. Cakmes kept the original letter in his possession and sent the bank a copy of the letter.

At no time prior to the signing of the letter, or after the signing of the October 29th letter, had Dr. Pelot ever agreed by words or actions to forgo the appraisal of the dental practice and accept $76,000 for the last one-third of his stock. In fact, Dr. Pelot informed Dr. Cakmes that an appraisal would be required to set the price for Dr. Pelot's remaining stock and that Dr. Cakmes should not borrow any funds to purchase the stock without the appraisal.

On Thursday, December 19, 1996, Dr. Pelot and Dr. Cakmes met. Dr. Pelot again advised Dr. Cakmes that an appraisal should be done. During that meeting Dr. Cakmes did not inform Dr. Pelot of the October 29th, letter and that they allegedly had agreed that the price of the last one-third of the corporate stock would be $76,000.

On Monday, December 23, 1996, Dr. Pelot and Dr. Cakmes again met. Dr. Cakmes presented the October 29th letter to Dr. Pelot. claiming the letter was a waiver of the appraisal requirement of the parties' Agreement and advised Dr. Pelot that the appraisal was not going to take place. Dr. Pelot immediately made a copy of the letter.

By letter dated December 27, 1996, Dr. Pelot notified Dr. Cakmes that an appraisal would be required and that the October 29th letter did not constitute a waiver or modification of the original Agreement.

Dr. Pelot insisted that an appraisal be conducted as required by the Agreement within the 60 day window of December 31, 1996. Dr. Cakmes, who was the majority stockholder, refused to do so. Dr. Pelot then proceeded to obtain an appraisal. Using the Blair, McGill methodology the value of the practice was placed at $596,000; a substantial increase over the 1986 appraisal of $228,000.[2] The value of one-third of the stock under this appraisal is $198,666.67, a considerable increase of $122,666.67.

Dr. Cakmes received $76,000 from the bank prior to December 31, 1996. Dr. Cakmes, however, did not tendered a check for $76,000 to Dr. Pelot until the April 23, 1997, shareholders'

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[2]Several appraisals are in the record as to the value of the dental practice as of December 31, 1996.

Bible Harris Smith, P.C. utilized a weighted computation of the following valuations with their respective weights:

Valuation approach	Value	Weight	Weighted Value
Excess Earnings	$ 765,565.00	.20	$ 153,113.00
Market Approach	452,556.00	.35	158,395.00
Cash Flow Method	673,444.00	.45	303,050.00
Rounded Market Value of Assets to be Sold			$ 614,500.00

Mark King, utilizing a weighted computation as in the Blair, McGill original valuation, determined as follows:

Valuation approach	Value	Weight	Weighted Value
Excess Earnings	$ 719,426.00	.20	$ 143,885.00
Market Approach	452,556.00	.35	158,395.00
Cash Flow Method	653,213.00	.45	293,946.00
Rounded Market Value of Assets to be Sold			$ 596,000.00

Stanley C. Roy determined that the practice had a net tangible asset value of $211,807.00. Adding the excess earnings valuation of $162,790.00 to the net tangible asset value of the dental practice, Mr. Roy determined that the practice was worth $374,687 or $375,000.

meeting. Dr. Pelot never accepted the check; he returned it to Dr. Cakmes advising him that the amount of the check was insufficient.

Dr. Pelot, a practicing dentist for 35 years, planned the sale of his dentist practice as a retirement plan for himself. An employment agreement with the professional corporation prohibits Dr. Pelot from setting up a new office for himself or working for a different Knoxville dentist's office in competition with the professional corporation.

When Dr. Cakmes refused to purchase the stock at the appraised value, Dr. Pelot sued for breach of contract to purchase the stock. Dr. Cakmes counter-sued claiming that Dr. Pelot breached the Agreement to sell, breached the employment agreement, and sought damages for intentional interference with contract and intentional interference with prospective economic advantage.

II. HOLDING OF THE CHANCERY COURT

Chancellor Weaver dismissed Dr. Pelot's complaint and ordered Dr. Pelot to transfer his remaining stock in Pelot & Cakmes Dental Associates, P. C. to Cakmes upon the payment of $76,000. The Chancellor found that the October 29th letter was a valid modification of the Agreement and binding and enforceable on the parties and the language in the letter stating "[t]he loan amount of $76,000.00 is the agreed upon amount needed to purchase the final one-third (1/3) shares of the stock," constituted a bilateral or mutual agreement between the parties that the price

was $76,000 in lieu of the value which might be shown by an appraisal.

The Chancellor rejected Dr. Pelot's argument that there was no consideration for the modification, finding that each of the parties gave up the right under the Agreement to have the purchase price established by a competent appraisal. The Chancellor found that the appraised value of the remaining stock could have been more or less than the "agreed amount of $76,000." He dismissed Dr. Cakmes' counter-claims without prejudice.

Dr. Pelot filed a motion to alter or amend the judgment which was denied by the Chancellor. A timely appeal then was filed by Pelot.

III. ISSUES

We restate the appellant's issue as whether the junior shareholder's signature on the letter to the senior shareholder's bank constituted an unambiguous and enforceable waiver of the appraisal requirement of the parties' formal stock sale contract.

The issues as stated by the appellee are as follows:

1. Whether the trial court properly held that Plaintiff/Appellant was bound by the plain and unambiguous written agreement entered into with Defendant/Appellee to sell his remaining shares of the stock in Pelot & Cakmes Dental Associates, P.C. for the stated price of $76,000?

2. Whether the parties' written agreement to sell the stock for $76,000 was supported by consideration?

3. Whether the appeal by Plaintiff/Appellant is frivolous under Tennessee Code Annotated Section 27-1-122 so as to entitled Defendant/Appellee to the recovery of damages?

IV. LAW AND DISCUSSION

Our standard of review is *de novo* upon the record, with a presumption of correctness of the findings of fact by the trial court. Unless the evidence otherwise preponderates against the findings, absent an error of law, we must affirm the trial court's judgment. Rule 13(d), Tennessee Rules of Appellate Procedure.

In a *de novo* review, the parties are entitled to a reexamination of the whole matter of law and fact. Where the evidence preponderates against the finding of the chancellor, it is our duty to enter such decree as the law and evidence warrant. Perry v. Carter, 188 Tenn. 409, 219 S.W.2d 905 (Tenn. 1949); Toomey v. Atyoe, 95 Tenn. 373, 32 S.W. 254 (Tenn. 1895); American Buildings Co. v. White, 640 S.W.2d 569 (Tenn. Ct. App. 1982); Thornburg v. Chase, 606 S.W.2d 672 (Tenn. Ct. App. 1980); Rule 36(a), Tennessee Rules of Appellate Procedure.[3]

The record before us exhibits the unilateral action of Dr. Cakmes' deciding that he was not going to have an appraisal

[3]Rule 36. Relief; Effect of Error.
(a) Relief To Be Granted; Relief Available. The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact. . ..

of the dental practice in accordance with the original Agreement and that he did not intend to pay Dr. Pelot the actual value of the remaining stock in the dental practice as of December 31, 1996.

Five years before, when Dr. Cakmes was still a recent graduate from dental school, Dr. Pelot excused the appraisal required by the Agreement and even went to the bank and co-signed a note to enable Dr. Cakmes to purchase the second one-third of the dental practice. These actions by Dr. Pelot resulted in Dr. Pelot becoming the minority stockholder of the dental practice.

We have reviewed the record before us carefully and have determined that the October 29th letter is ambiguous. We find that the wording, "loan amount of $76,000 is the agreed upon amount needed to purchase the final one-third (1/3) shares of the stock of Pelot and Cakmes Dental Associates, P. C. from Dr. Pelot," could be interpreted two ways. The wording could be construed as Dr. Cakmes stating to the bank that he needed to borrow *only* $76,000; not that the last one-third of the stock was being sold for $76,000.

Dr. Cakmes was the drafter of the letter. Ambiguous language in a contract is construed against the drafter. Beasley v. Horrell, 864 S.W.2d 45 (Tenn. Ct. App. 1993); Jackson v. Miller, 776 S.W.2d 115 (Tenn. Ct. App. 1989); Reliance Ins. Co. v. Olsen, 678 S.W.2d 59 (Tenn. 1984).

> "Modification of an existing contract cannot be accomplished by the unilateral action of one of the parties. There must be the same mutuality of assent and meeting of minds as required to make a contract. New

> negotiations cannot affect a completed contract unless they result in a new agreement. Neilson, etc., Canning Co. v. F. G. Lowe & Co., 149 Tenn. 561, 260 S.W. 142. And a modification of an existing contract cannot arise from an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed. Anderson v. Reed, 133 Okl. 23, 270 P. 854; Continental Supply Co. v. Levy, 121 Okl. 132, 247 P. 967.

Zussman v. Lake-Spiro-Shurman, Inc., 63 Tenn. App. 113, 469 S.W.2d 671, 676 (1970), quoting with approval from Balderacchi v. Ruth, 36 Tenn. App. 421, 256 S.W.2d 390, 391 (1952).

Since the language is ambiguous, there can be no meeting of the minds between Dr. Pelot and Dr. Cakmes. Since there is no meeting of the minds, there can be no valid contract. The requirements for a valid contract as well as modifications of a contract are well-settled:

> While a contract may be either expressed or implied, or written or oral, it must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced.

Higgins v. Oil, Chemical and Atomic Workers Intern. Union, Local No. 3-677, 811 S.W.2d 875, 879 (Tenn. 1991, quoting with approval from Johnson v. Central National Ins. Co., 210 Tenn. 24, 356 S.W.2d 277, 281 (1962). We do not find that the facts of this case, plainly and simply, establish a meeting of the minds or mutual assent between Dr. Pelot and Dr. Cakmes to forego the appraisal.

> "[O]ne of the elements essential to the formation of a contract is a manifestation of agreement or mutual assent by the parties to its terms, and the failure of the parties to agree upon or even discuss an essential term of a contract may indicate that the mutual assent required to make or modify a contract is lacking."

Jamestowne On Signal, Inc. v. First Federal Savings & Loan Association, 807 S.W.2d 559, 566 (Tenn. Ct. App. 1990) quoting with approval from The Delcon Group, Inc. v. Northern Trust Corp., 543 N.E.2d 595, 600 (Ill. App. 1989). Therefore, there was no modification of the Agreement by the October letter. Hence, no contract between the parties ever arose.[4] Dr. Cakmes perpetrated his misrepresentation by presenting a letter addressed to Dr. Cakmes' banker to Dr. Pelot. While addressed to Dr. Cakmes' banker the original of the October 29th letter was never given to his banker. Dr. Cakmes presented the letter to Dr. Pelot during a busy time of day. There was neither discussion concerning the contents of the letter or discussion as to whether Dr. Pelot would accept $76,000 for his last one-third payment of the sale of the dental practice. Dr. Cakmes testified that there had been no discussion or agreement as to Dr. Pelot's acceptance of only $76,000 for the final payment of the shares prior to the letter being presented to Dr. Pelot. There was no discussion of the contents of the letter then, or afterward, until December 23, 1996, when Dr. Cakmes presented a copy of the letter to Dr. Pelot, stating that there would be no appraisal. Until the original Agreement was terminated by mutual assent, Dr. Pelot had a right to insist upon an appraisal of the dental practice and payment according to the Agreement.

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[4]Dr. Cakmes had the burden of showing the modification of the contract by mutual assent, which he has not done. There was never mutual assent or meeting of the minds concerning the foregoing of an appraisal as of December 31, 1996. Rather, there is proof that Dr. Cakmes knowingly, or without belief in its truth, or recklessly, whether it be true or false, made a false representation to Dr. Pelot that this was a routine letter to his banker about obtaining a loan. It was, at the least, a questionable method of attempting to obtain a modification of the Agreement.

Since "equity regards that as done which, in good reason and good conscience, ought to have been done,"[5] we will treat as having been done those acts which Dr. Cakmes prevented from occurring.[6] Utilizing these principles of equity, and in the interest of justice and efficient utilization of the resources of the judicial system, we will next address the issues dealing with the value of the dental practice.

During a considerable portion of the trial of the matter, the parties presented appraisal evidence. There were two appraisals made by the parties of the valuation of the dental practice as of December 31, 1996. It is clear from the footnote 1 in the Chancellor's Memorandum Opinion filed January 29, 1999, that the appraisal obtained by Dr. Pelot most closely conformed to the original appraisal methodology.[7] In the interest of judicial economy and based upon the competent evidence presented at trial level, we hold that the appraisal performed by Mark King in the amount of $596,000, is the one on which the valuation of Dr. Pelot's last one-third of the stock should be based. Dr. Cakmes is to pay to Dr. Pelot one-third of $596,000 or

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[5]Gibson's Suits in Chancery, 7th Ed., § 21.

[6]Gibson's Suits in Chancery, 7th Ed., § 24.

[7]Dr. Pelot's appraisal was rendered by his accountant, Mark King. However, Mr. King did not interview management or analyze current trends in the economy and industry. In his deposition submitted at the trial on December 4, 1998, Charles Blair [DDS], who performed the original appraisal in 1986, referred to as the "Blair, McGill appraisal," testified that "[i]f Mr. King did not include analysis of current trends and conditions or interview the president of the corporation in his appraisal methodology, he did not follow to the letter my methodologies or procedures for valuation in 1986." However, it is clear that Dr. Blair is of the opinion that the appraisal rendered by Mr. King for Dr. Pelot more closely conformed to the original appraisal methodology utilized by Blair, McGill and Company in 1986 than the appraisal rendered by Stanley C. Roy for Dr. Cakmes. Dr. Blair testified, "I believe that the report of Mark W. King more closely conformed to the original appraisal methodology than Stanley C. Roy." Among other things Dr. Blair is of the opinion that Mr. Roy's approach was in error because he used "an ADA survey to come up with an appropriate compensation level" and because Mr. Roy used only one approach to determine value, the capitalized excess earnings plus net tangible asset value approach. Conversely, the 1986 Blair, McGill methodology utilized three approaches: the income approach, the market approach and the excess earning approach, with weighing. [Footnote 1, Chancellor Weaver's Memorandum Opinion, January 29, 1999].

$198,666.67, plus prejudgment interest, for the stock presently held by Dr. Pelot.

In conclusion, as to appellant's issue, we are aware that Dr. Cakmes testified at one point as to the signing of the October 29th letter as follows:

> A I approached Dr. Pelot and I said, "Dr. Pelot, I'm fine with -- as our shareholders agreement and I need to get an agreed amount of price to take to the bank so we can file a loan application so our agreement can be settled December 31st. And as in the shareholders agreement, it allowed for 60 days and that was the approximate time that's to be done."

He, however, modified this answer in later testimony:

> Q Was anything at all discussed about valuation at the time you presented this letter to him and he signed it and returned it to you?
>
> A Not at this point.

However, the Chancellor, although he quoted the earlier testimony, did not make a finding of fact accrediting this testimony in either the original memorandum opinion or the opinion overruling a motion to alter and amend. In fact, the opposite might be inferred:

ORIGINAL MEMORANDUM OPINION

> In anticipation of the final stock purchase scheduled in the Shareholder Agreement for December 31, 1996, and in consultation with his accountant, Dr. Cakmes prepared a letter to Mr. Tom Vester of NBC Knoxville Bank concerning financing for Dr. Cakmes' purchase. On October 29, 1996, Dr. Cakmes handed the

> letter to Dr. Pelot who signed the letter under the words, “ACKNOWLEDGED AND AGREED.”
>
> OPINION ON MOTION TO ALTER AND AMEND
>
> Upon the parties’ testimony, this Court finds that Dr. Cakmes handed the above writing of October 29, 1996, to Dr. Pelot; that Dr. Pelot, without discussion, read and signed the document; and that Dr. Pelot handed the document back to Dr. Cakmes. (Emphasis added).

Because of our finding that the language in the letter was ambiguous and therefore there was no mutual assent or meeting of the minds, we need not address the appellee’s issues other than to observe that this appeal is obviously not frivolous.

V. CONCLUSION

The trial court is reversed. This matter is remanded to the trial court for such further proceedings as may be necessary consistent with this opinion and collection of costs below. Costs on appeal are adjudged against Dr. Cakmes and his surety.

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Houston M. Goddard, P.J.

CONCUR:

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Charles D. Susano, Jr., J.

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D. Michael Swiney, J.