IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

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**MACK BROWDER d/b/a MACK BROWDER & ASSOCIATES,**

Plaintiff-Appellant,

Vs.

C.A. No. 02A01-9502-CH-00016
Shelby Equity No. 102542

**LOGISTICS MANAGEMENT, INC.,**

Defendant-Appellee.



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FROM THE CHANCERY COURT OF SHELBY COUNTY

THE HONORABLE NEAL SMALL, CHANCELLOR

Jef Feibelman, Burch, Porter & Johnson of Memphis
For Appellant

John J. Heflin, III, Bourland, Heflin, Alvarez,
Holley & Minor, of Memphis
For Appellee

***REVERSED AND REMANDED***

Opinion filed:

**W. FRANK CRAWFORD,**
**PRESIDING JUDGE, W.S.**

**CONCUR:**

**ALAN E. HIGHERS, JUDGE**

**DAVID R. FARMER, JUDGE**

This case involves construction of a contract. Plaintiff-Appellant Mack Browder, doing business as Mack Browder and Associates (Browder), appeals the trial court's grant of summary judgment to Defendant-Appellee, Logistics Management, Inc. (LMI).

Mack Browder and Associates is a proprietorship engaged in representing owners of closely held businesses in locating potential buyers and in negotiating and closing the transaction. In February of 1990, Jim Alvarez, an attorney, approached Browder with a potential client who needed financing to start up a new business. In March of 1990, Browder met with Martin Harshberger and Alvarez (Harshberger's attorney) to discuss the possibility of Browder raising money for LMI, the business conceived by Harshberger and his partner, George Ramsburg. LMI's concept was to repair computer products and manage inventories for computer service companies, reducing the number of spare parts a company had to carry to support its product base in the field.

As a result of the meeting between Browder and Harshberger, Browder wrote the following letter to George Ramsburg, Vice-President of LMI, which states, in pertinent part:

> On March 1st . . . I met with Martin Harshberger in our office to discuss our assistance in providing financing to Logistics Management, Inc. Martin brought us a copy of the business plan and offering circular that had been put together by Sunbelt Financial Securities, Inc. to offer 12 1/2% convertible debentures in a maximum amount of $850,000 for this venture. Apparently, no effort was made to sell the debentures . . . .
>
> We have reviewed the materials furnished by you and Martin and believe we can assist in raising the capital specified in your materials . . . .
>
> Should a party or parties we introduce provide funding for your project within three years of the date of introduction by us, we shall be paid a fee of 8% of the gross consideration furnished by our lender/investor. Our fee is based upon the total consideration furnished. For example, should an individual provide $400,000 in cash and guarantee a $400,000 loan, our fee is based upon $800,000.
>
> * * * *
>
> The aforementioned fee shall be paid in full within three days of the initial provision of funds to Logistics Management Inc. The fee is payable in full at that time without regard to the fact that a portion of the funding commitment might be deferred. If during the first three years after initial funding, the amount of the financial commitment is increased, the additional fee due to us shall be paid within three business days of that increased commitment . . . .
>
> In the event that collection efforts are required with regard to our fee, you agree to reimburse us normal attorney and other collection costs. This agreement . . . is the sole agreement between the parties and cannot be modified except in writing.

By signing this letter, Ramsburg agreed that the letter was acceptable and set forth the complete agreement between the parties.

Following the formation of this contract, Browder met with Ramsburg, Harshberger, and investors approximately six times between March and May of 1990. In his efforts to procure financing for LMI, Browder contacted Huxley Nixon, an investment advisor in Atlanta. In his letter to Nixon, Browder stated that he had an agreement to be paid a fee by LMI "for securing the start up financing." Browder offered to pay Nixon a 3% commission on funds raised by investors located by Nixon. By May of 1990 Browder, with the help of investors found by Nixon, had secured $850,000.00 in start up financing. As specified by the parties' contract, Browder received a commission check representing 8% of the $850,000.00 raised.

On September 25, 1992, Browder wrote Ramsburg regarding his right, under the parties' March 7, 1990 contract, to receive commission on any additional financing raised through Browder's investors. Although additional funding within the first three years of LMI's operation was provided by some of the initial investors provided by Browder, LMI refused to pay Browder any additional commission and this suit ensued.

The trial court's order granting summary judgment to defendant reflects that the trial court considered the entire record in the case consisting of pleadings, affidavit of Huxley Nixon, depositions of Martin Harshberger and George Ramsburg, principals of defendant, and the deposition of plaintiff, Mack Browder. Plaintiff has appealed, and the only issue for review is whether the trial court erred in granting LMI's motion for summary judgment.

In ***Griswold v. Income Properties,*** No. 01-A-01-9310-CH-00469, 1995 Tenn. App. LEXIS 285 (M.S. May 3, 1995), this Court said:.

> Summary judgments are particularly suited for disposing of purely legal issues. ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); ***Bellamy v. Federal Express Corp.***, 749 S.W.2d 31, 33 (Tenn. 1988). Since the construction of a written contract involves legal issues, a contract construction case such as this one is particularly suited to disposition by summary judgment. ***Rainey v. Stansell***, 836 S.W.2d 117, 118-19 (Tenn. Ct. App. 1992); ***Anderson v. DTB Corp***., App. No. 89-172-II, slip op. at 5-6, 15 T.A.M. 19-6 (Tenn. Ct. App. Mar. 28, 1990) (Tenn. R. App. P. 11 application not filed).

Slip op. at 5.

A trial court should grant a motion for summary judgement when the movant

demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn.R.Civ.P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). On a motion for summary judgment, the trial court and the appellate court must consider the matter in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party and discard all countervailing evidence. ***Id.*** at 210-11. The phrase "genuine issue" as stated in Tenn.R.Civ.P. 56.03 refers to genuine, factual issues and does not include issues involving legal conclusions to be drawn from the facts. ***Id***. at 211. In ***Byrd***, the court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. ***Fowler v. Happy Goodman Family***, 575 S.W.2d 496, 498 (Tenn. 1978); ***Merritt v. Wilson Cty. Bd. of Zoning Appeals***, 656 S.W.2d 846, 859 (Tenn. App. 1983). In this regard, Rule 56.05 provides that a nonmoving party cannot simply rely upon his pleadings but must set forth **specific facts** showing that there is a genuine issue of material fact for trial. "If he does not so respond, summary judgment . . . shall be entered against him." Rule 56.05 (Emphasis in original).

The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and give effect to that intention consistent with legal principles. ***HMF Trust v. Bankers Trust Co.***, 827 S.W.2d 296 (Tenn. App. 1991).

The proper interpretation of a contract is a matter of law. ***Park Place Ctr. Enters., Inc. v. Park Place Mall Assocs. L.P.***, 836 S.W.2d 113, 116 (Tenn. App. 1992). In construing a contract, the words expressing the parties' intentions should be given their usual, natural and ordinary meaning. ***Taylor v. White Stores, Inc.***, 707 S.W.2d 514 (Tenn. App. 1985). In the absence of fraud or mistake, a contract must be interpreted and enforced as written, even though it contains terms which may seem harsh or unjust. ***Heyer-Jordan & Assoc. v. Jordan***, 801 S.W.2d 814, 821 (Tenn. App. 1990) (citing ***Ballard v. North American Life & Casualty Co.***, 667 S.W.2d 79, 82 (Tenn. App. 1983)). We must determine the rights of the parties based upon what they have put into the agreement. ***Cookeville P.C. v. Southeastern Data Sys.***, 884 S.W.2d

458, 461 (citing ***Mills-Morris Co. v. Champion Spark Plug Co.***, 7 F.2d 38, 39 (6th Cir. 1925)).

All provisions of a contract should be construed in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract. ***Bank of Comerce & Trust Co. v. Northwestern Nat'l Life Ins. Co.***, 160 Tenn. 551, 226 S.W.2d 135, 68 A.L.R. 1380 (1930). In ***Cocke County Board v. Newport Utilities Board***, the court stated:

> In construing a contract, the entire contract should be considered in determining the meaning of any or all of its parts. ***Crouch v. Shepard***, 44 Tenn. (4 Cold.) 383, 387 (1867). It is the universal rule that a contract must be viewed from beginning to end and all its terms must pass in review, for one clause may modify, limit, or illuminate another. ***Associated Press v. WGNS Inc.***, 48 Tenn. App. 407, 348 S.W.2d 507 (1961).

***Id.***, 690 S.W.2d 231, 237.

Where there is no ambiguity in a contract, this Court must apply the words used, giving those words their ordinary meaning. Neither party is to be favored in their construction. ***Heyer-Jordan & Assoc.***, 801 S.W.2d at 821 (citing ***Brown v. Tennessee Auto. Ins. Co.***, 192 Tenn. 60, 237 S.W.2d 553 (1951)). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, ***Cookeville P.C.***, 884 S.W.2d at 462 (citing ***Oman Constr. Co. v. Tennessee Valley Authority***, 486 F. Supp. 375, 382 (M.D. Tenn. 1979)), nor can this Court create an ambiguity where none exists in the contract. ***Cookeville P.C.***, 884 S.W.2d at 462 (citing ***Edwards v. Travelers Indem. Co.***, 201 Tenn. 435, 300 S.W.2d 615, 617-18 (Tenn. 1957)). Parole evidence is not admissible to remove a patent ambiguity, but is admissible to remove a latent ambiguity. ***Ward v. Berry & Assoc. Inc.,*** 614 S.W.2d 372 (Tenn. App. 1981).

In ***Ward***, the Court explained the distinction between a patent ambiguity and a latent ambiguity:

> A patent ambiguity is one produced by the uncertainty, contradictoriness or deficiency of the language of an instrument, so that no discovery of facts or proof of declarations can restore the doubtful sense without adding ideas which the words do not sustain. A latent ambiguity is one where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of

> extraneous facts without altering or adding to the written language or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases used. ***Teague v. Sowder***, 121 Tenn. 132, 114 S.W. 484 (1908).

614 S.W.2d at 374.

In the instant suit, the contract provides that it is the sole agreement between the parties. Both parties contended in oral argument, *inter alia,* that the contract is unambiguous. If there is any ambiguity in the letter contract at issue, it certainly appears to be a patent ambiguity. The Court in ***Ward*** was confronted with an analogous situation, and the opinion is quite instructive in explaining the extent to which extraneous evidence can be considered. The Court said:

> [T]o the extent that the letter speaks unequivocally and certainly, it must be accepted as conclusive without oral contradiction. To the extent, if any, that the meaning of the words is uncertain, then it is permissible to show by communications between the parties or other circumstances what the *mutual* intent of the parties was, not inconsistent with the words in question. To the extent that the words show unequivocally that there was no agreement as to a given matter, then evidence to supply the omission is not admissible . . . .
>
> However, the mutual intent of the parties is not shown by mere evidence of how one part "felt," or "intended" or "understood" or "believed" about the terms of an agreement; nor is such evidence competent to show the mutual intent of the parties unless communicated to the opposite party and assented to by him.

614 S.W.2d at 374-375.

Despite arguments of LMI's counsel to the contrary, we find nothing in the contract that limits Browder's commission to 8% of the initial funding goal of $850,000.00. There is no question that the contract letter references a prior commitment between LMI and Sunbelt Financial Securities, Inc. to raise $850,000.00. It also states that Browder agreed to raise the "capital specified in your materials," presumably the business plan and offering circular put together by Sunbelt and also referenced in the parties' contract. These references to prior agreements between LMI and Sunbelt are not dispositive, however, of the agreement between LMI and Browder. There is nothing in the contract that limits the amount of investment upon which Browder's 8% commission shall be paid. The contract states:

> Should a party or parties we introduce provide funding for your project within three years of the date of introduction by us, we shall be paid a fee of 8% of the gross consideration furnished by

> our lender/investor. Our
> fee is based upon the total consideration furnished.

There is simply no way to read the contract as stating "we shall be paid a fee of 8% of the gross consideration, up to the gross consideration of $850,000.00." The contract continues:

> The aforementioned fee shall be paid in full within three days of the initial provision of funds to Logistics Management, Inc. The fee is payable in full at that time without regard to the fact that a portion of the funding commitment might be deferred.

We believe this paragraph contemplates the possibility of "short funding"; that is, if Browder found an investor who was willing to pay $100.00 January 1 and $200.00 February 1, Browder would be entitled to commission on the full $300.00 on January 1. The next sentence of that paragraph states:

> If during the first three years after initial funding, the amount of the financial commitment is increased, the additional fee due to us shall be paid to us within three days of that increased commitment.

Applying the natural and ordinary meaning to the words of the contract leads us to the conclusion that Browder included this clause to ensure that he would be compensated in the event his investors increased their financial commitment **after** the initial funding. Considering the extraneous evidence to the extent permissible under ***Ward***, we find nothing to change the intent expressed by the language of the contract.

Accordingly, the order of the trial court granting summary judgment to defendant is reversed. The case is remanded for such further proceedings as may be necessary, and costs of the appeal are assessed to appellee.

**W. FRANK CRAWFORD,**
**PRESIDING JUDGE, W.S.**

**ALAN E. HIGHERS, JUDGE**

**DAVID R. FARMER, JUDGE**