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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TODD O'REILLY, both in his individual capacity)	
and derivatively on behalf of AL PIEMONTE)	
FORD SALES, INC.,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 14 CH 4227
)	
ALEX A. PIEMONTE, JR., ROSANNA D.)	
PIEMONTE, and AL PIEMONTE FORD SALES,)	The Honorable
INC.,)	Neil H. Cohen,
)	Judge Presiding.
Defendants)	
)	
(ROSANNA D. PIEMONTE, as executor of THE)	
ESTATE OF ALEX A. PIEMONTE, JR.,)	
Defendants-Appellants).)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment declaring that the plaintiff had the right, under the parties' Stock Redemption Agreement, to purchase the deceased shareholder's shares at book value reversed where there existed a genuine issue of material fact regarding whether the Stock Redemption Agreement was later amended by the parties.

¶ 2 Defendant Estate of Alex A. Piemonte, Jr. (“Estate”), through its executor Rosanna D. Piemonte (“Rosanna”), appeals from the trial court’s grant of partial summary judgment in favor of the plaintiff, Todd O’Reilly, finding that, upon the death of Alex A. Piemonte, Jr. (“Piemonte”), O’Reilly held the first option to purchase Piemonte’s shares in Al Piemonte Ford Sales, Inc. (“APFS”). The Estate also appeals from the trial court’s ruling that the purchase price of said shares was their book value.

¶ 3 On appeal, the Estate makes a number of arguments against these two findings: (1) the written agreements between the parties do not contain an enforceable option for O’Reilly to purchase Piemonte’s shares at book value; (2) the relevant provisions of the parties’ written agreements are ambiguous, such that they create a genuine issue of material fact precluding summary judgment; and (3) a written amendment to the parties’ agreements modified any option to purchase O’Reilly might have had. For the reasons that follow, we reverse and remand for further proceedings.

¶ 4 **BACKGROUND**

¶ 5 In December 2014, O’Reilly filed his Second Amended Verified Complaint (“Complaint”) in which he alleged, in relevant part, the following. In 1993, he was hired as vice president and general manager of APFS. Three years later, on August 1, 1996, O’Reilly, Piemonte, and APFS entered into three written agreements, which memorialized the parties’ understandings surrounding O’Reilly’s joining of the APFS management team.

¶ 6 The first agreement, O’Reilly’s “Employment Agreement,” was entered into by O’Reilly and APFS, and it set out the terms of O’Reilly’s employment, including compensation, bonuses, insurance, and other benefits.

¶ 7 The second agreement, the “Stock Purchase Agreement” (“Purchase Agreement”), was entered into by O’Reilly and Piemonte. The Purchase Agreement granted a continuing option to O’Reilly to purchase up to 49% of the issued and outstanding stock in APFS for book value. The Purchase Agreement also provided that “[i]n the event that either shareholder receives a bona fide offer to purchase his shares in the Corporation, the other shareholder shall have the right of first refusal to purchase the shares for a period of sixty (60) days under the same terms and conditions.”

¶ 8 In the third agreement, entitled “Al Piemonte Ford Sales, Inc. Stock Redemption Agreement” (“Redemption Agreement”), O’Reilly, Piemonte, and APFS agreed that if a shareholder intended to sell, transfer, or otherwise dispose of any of his shares, APFS had 60 days in which to purchase the shares on the same terms. If APFS chose not to purchase the shares, then the right to purchase on the same terms passed to the other shareholder. In addition, the Redemption Agreement contained the following other relevant provisions:

“6. PURCHASE PRICE:

Except as provided in paragraph 8 below, the purchase price for each share purchased under this Agreement shall be the book value (hereinafter “book value”) as of the last day of the month prior to which the event triggering the purchase occurs. ***

8. PURCHASE OBLIGATIONS UPON DEATH:

C. Purchase of Shares on Death:

(1) At the death of the first to die of the shareholders, the surviving shareholder shall have the first option to purchase all of the shares of the deceased

shareholder. To the extent that the surviving shareholder decides not to purchase the shares of the deceased shareholder, the Corporation [APFS] shall have the second option to purchase the shares. The price and payment of the shares shall be as set forth below.

(2) Death of O'Reilly: Upon the death of O'Reilly, Piemonte, at his option, may purchase and O'Reilly's estate shall sell all of O'Reilly's shares in the Corporation now owned or hereafter acquired by him. The purchase price for the shares shall be the greater of one and one-half (1-1/2) times book value or the amount of insurance on the life of O'Reilly whichever is greater. If Piemonte does not elect to purchase the shares of O'Reilly, the Corporation shall purchase and O'Reilly's estate shall sell all of O'Reilly's shares in the Corporation now owned or hereafter acquired by him. The purchase price by the Corporation for the shares shall be the greater of one and one-half (1-1/2) times book value or the amount of insurance on the life O'Reilly whichever is greater."

¶ 9 According to the Complaint, over the years following O'Reilly's joining of APFS, Piemonte married Rosanna. Also during that time, Piemonte's health began to decline and Rosanna and her son, Marco, began to exert more management control of APFS. O'Reilly alleged that among various management misdeeds on the part of Piemonte, Rosanna, and Marco, they also attempted to push O'Reilly out of APFS and prevent him from purchasing Piemonte's shares in APFS upon Piemonte's death.

¶ 10 Although the Complaint contained a number of counts, the only one relevant to the current appeal is Count VI, which sought a declaratory judgment with respect to the Redemption Agreement. More specifically, O'Reilly, in Count VI, sought a declaration that under the

Redemption Agreement, he had the first option to purchase all of Piemonte's shares in APFS upon Piemonte's death.

¶ 11 A few weeks after the filing of the Complaint, Piemonte died. O'Reilly then filed a motion for partial summary judgment, seeking a declaration that pursuant to the Redemption Agreement, he had the present right to purchase all of APFS shares held by Piemonte at his death.

¶ 12 In response, the Estate made a number of arguments, one of which was that the sale of Piemonte's shares on his death was controlled by a 2004 written amendment to the Redemption Agreement. That amendment was entitled "First Amendment to Employment Agreement and Stock Purchase Agreement" ("2004 Amendment") and sought to afford another APFS employee, John Guiffre, the right to purchase five percent of the stock in APFS, by reducing O'Reilly's continuing option to purchase from 49% to 44%. In addition, paragraph 5 of the 2004 Amendment read as follows:

"5. **Right of First Refusal.** In the event that Guiffre receives a bona fide written offer from a third party to purchase any shares of AP Ford stock owned by him and purchased under this First Amendment that he desires to accept, then Guiffre shall first offer the stock to O'Reilly under the same terms and conditions of the written offer. In the event that Guiffre desires to sell or transfer the stock without a bona fide written offer from a third party, then he shall first offer to sell his stock to O'Reilly at book value. In the event that Piemonte desires to sell the shares of AP Ford common stock owned directly or beneficially by him, then Piemonte shall first offer the stock to O'Reilly under the same terms and conditions of any bona fide written offer to sell. *In the event that Piemonte desires to sell or transfer the stock without a written offer from a third party, or*

at Piemonte's death, then Piemonte or his estate or the trust then owning or in control of the stock shall first offer the stock to O'Reilly to purchase at fair market value."

(Emphasis added.)

According to the Estate, the italicized language above gave O'Reilly a right of first refusal, but only if the Estate desired to sell Piemonte's shares. The Estate also argued that the Redemption Agreement, when read in conjunction with the Purchase Agreement, was ambiguous, thereby creating a genuine issue of material fact as to the parties' intent.

¶ 13 The trial court granted O'Reilly's motion for partial summary judgment. The trial court first concluded that the Purchase Agreement could not be used to create an ambiguity in the Redemption Agreement, because the Redemption Agreement contained an integration clause, preventing reference to any prior or contemporaneous agreements between the parties. Second, the trial court found that the 2004 Amendment did not modify the Redemption Agreement, because the 2004 Amendment stated only that it was modifying the Employment Agreement and the Purchase Agreement. Finally, upon examining the language of the Redemption Agreement, the trial court concluded that it clearly provided that the surviving shareholder, in this case O'Reilly, had the first right to purchase all of the shares of the deceased shareholder.

¶ 14 Nine days after the trial court issued its decision on O'Reilly's motion for partial summary judgment, O'Reilly filed a "Motion to Compel Calculation" ("Motion to Compel") In that motion, O'Reilly stated that following the trial court's determination that he had the right to purchase Piemonte's shares, he requested that APFS's accountants calculate the book value of Piemonte's shares—per the Redemption Agreement—and that they had failed to do so. A few days later, O'Reilly filed a "Petition for Further Relief Pursuant to 735 ILCS 5/2-701(C)" ("Petition for Further Relief"). The common law record contains only the first page of this

document, but the report of proceedings indicates that O'Reilly sought a determination by the trial court that the purchase price of Piemonte's shares was to be book value. On August 4, 2016, the trial court obliged and found that the purchase price for Piemonte's shares was to be book value, per the terms of the Redemption Agreement.

¶ 15 Several months later, on November 8, 2016, the trial court entered a Supreme Court Rule 304(a) finding as to its rulings on Count VI, and the Estate filed a timely notice of appeal on November 21, 2016.

¶ 16 ANALYSIS

¶ 17 On appeal, the Estate makes a number of arguments: (1) the Redemption Agreement does not contain an enforceable option to purchase Piemonte's shares at death, because the Redemption Agreement is missing an essential term, namely, the price at which O'Reilly could purchase Piemonte's shares at death; (2) the Purchase Agreement and Redemption Agreement, when read together, demonstrate an ambiguity in whether the parties intended O'Reilly to be able to purchase Piemonte's shares on death, because the Redemption Agreement does not contain a specific "Death of Piemonte" section like it does a "Death of O'Reilly" section, and because the Purchase Agreement gives O'Reilly an option to purchase only up to 49% of the outstanding stock; and (3) even if O'Reilly possesses a right to purchase Piemonte's shares on death, the 2004 Amendment set the purchase price of those shares at their fair market value. Because we conclude that there exists a genuine issue of material fact with respect to whether the parties intended the 2004 Amendment to modify the Redemption Agreement, we need not address the Estate's other contentions.

¶ 18 Summary judgment is appropriate where "the pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to the nonmoving party, reveal no genuine issue of

material fact and the movant is entitled to judgment as a matter of law.” *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 14. It is not appropriate, however, where the facts are in dispute or where the facts are not in dispute but reasonable persons could draw differing inferences from the undisputed facts. *Sandlin v. Harrah’s Illinois Corp.*, 2016 IL App (3d) 150018, ¶ 10. Ultimately, “[t]he purpose of summary judgment is not to try a question of fact but to determine if one exists.” *Id.* We review a trial court’s determinations on summary judgment and in interpreting a contract *de novo*. *Id.*

¶ 19 There is no dispute amongst the parties that the Employment Agreement, Purchase Agreement, and Redemption Agreement were all executed on August 1, 1996, nor do the parties dispute that the 2004 Amendment was later executed in 2004. They do disagree, however, on whether the 2004 Amendment modifies the Redemption Agreement, specifically, the terms under which O’Reilly may purchase Piemonte’s shares on Piemonte’s death. Although the trial court sided with O’Reilly and found that the 2004 Amendment did not modify the Redemption Agreement, we conclude that there exists a genuine issue of material fact on this issue that precludes the entry of summary judgment.

¶ 20 “A modification of a contract is a change in one or more respects that introduces new elements into the details of the contract and cancels others, but leaves the general purpose and effect undisturbed.” *Nebel, Inc. v. Mid-City National Bank of Chicago*, 329 Ill. App. 3d 957, 964 (2002). Modifications of a contract must meet all of the requirements of any other contract: offer, acceptance, and consideration. *Id.* Typically, parol evidence of prior or contemporaneous agreements between the parties is not admissible to contradict the terms of an otherwise unambiguous contract. *Ashe v. Sunshine Broadcasting Corp.*, 90 Ill. App. 3d 97, 100 (1980). Parol evidence is admissible, however, to demonstrate the existence of a subsequent agreement

between the parties, even if that subsequent agreement modifies the previous contract or creates a new and independent contract. *Id.* Generally speaking, when it is necessary to resort to extrinsic evidence, the question of whether a contract has been modified by a subsequent agreement is a question to be determined by the trier of fact. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 11 (2006); *Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶ 22. If, however, the court, upon examination of the extrinsic evidence, determines that there is only one reasonable conclusion, it may decide the issue as a matter of law. *Midway Park Saver*, 2012 IL App (1st) 110849, ¶ 22.

¶ 21 Here, the 2004 Amendment is not clear on whether it was intended to modify the Redemption Agreement. O'Reilly points out that the 2004 Amendment was entitled "First Amendment to *Employment Agreement* and *Stock Purchase Agreement*" (emphasis added) and that the 2004 Amendment refers only to the Employment Agreement and the Stock Purchase Agreement in its provisions and never specifically refers to the Redemption Agreement. See *Prime Group, Inc. v. Northern Trust Co.*, 215 Ill. App. 3d 1065, 1071 (1991) (the title of an agreement, although not controlling, is probative).

¶ 22 On the other hand, as the Estate argues, the 2004 Amendment explicitly addresses the disposition of Piemonte's shares upon his death—a topic previously addressed only by the Redemption Agreement. Whereas the Redemption Agreement did not provide pricing specifically for O'Reilly's purchase of Piemonte's shares on his death and, thus, the shares would arguably have been subject to book value pricing per the catchall provision of paragraph 6, the 2004 Amendment specifically stated that O'Reilly's purchase of Piemonte's shares on his death would be at fair market value. Similarly, the Redemption Agreement provided that in the situation where Piemonte voluntarily intended to sell any of his shares, he was required to first

offer them to APFS. If APFS were to forego purchasing them, then O'Reilly would have the option to purchase them. The 2004 Amendment, in contrast, stated that in such a situation, *O'Reilly* would have the first right to purchase the shares. Although these latter provisions are not at issue in this case, their conflicting nature further indicates that the 2004 Amendment, despite only explicitly referencing the Employment Agreement and the Purchase Agreement, addressed some of the same terms as the Redemption Agreement. See *Harrison v. Polar Star Lodge No. 652*, 116 Ill. 279, 287 (1886) (“Where the parties to a contract come to a fresh agreement, of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first.”); *Courtois v. Millard*, 174 Ill. App. 3d 716, 720 (1988) (“The inconsistencies between the two contracts evinces the conclusion that the two parties intended for the second contract to control their agreement and to supersede the first contract.”); *American National Bank & Trust Co. of Chicago v. Bentley*, 159 Ill. App. 3d 27, 29 (1987) (“Merger occurs when a contract supersedes and incorporates all or part of an earlier agreement. When a subsequent contract relates to the same subject matter and has the same terms as a previous contract, the actions of the parties are based on the provision of the later executed document.”).

¶ 23 Adding to the uncertainty regarding the purpose of the 2004 Amendment is the deposition testimony of O'Reilly and the attorney who represented him during the negotiation of the Employment Agreement, Purchase Agreement, Redemption Agreement, and 2004 Amendment, Bruce Farrell. Farrell gave the following relevant testimony regarding paragraph 5 of the 2004 Amendment:

“Q. I'd like to focus on the second half of the paragraph, the sentence that starts “In the event that Piemonte desires,” so after the first two sentences that relate to Mr. Guiffre. Do you see that?”

A. Um-hum. I do. Thank you.

Q. Did you believe Mr. O'Reilly was obtaining something of value through those sentences?

A. Yes.

Q. And what was that, from your perspective?

A. A clarification of his right to regain the stock if Mr. Guiffre wanted to sell it or to obtain the stock from Mr. Piemonte if Mr. Piemonte wanted to transfer it and sell it or at his death."

O'Reilly testified in relevant part:

"Q. Okay. And then we also talked about it in the—the—Exhibit 8—Exhibit 6 [the 2004 Amendment]. Can you get Exhibit 6? Where on the second page it talks about what happens if someone desires to sell their shares. And that you wanted to make sure that you got the first option to buy them, not the corporation, correct?

A. Yes, sir."

¶ 24 Given that the 2004 Amendment clearly addresses and conflicts with terms of the Redemption Agreement, including O'Reilly's purchase of Piemonte's shares on Piemonte's death, and given the deposition testimony of Farrell and O'Reilly that the 2004 Amendment was intended, at least in part, to clarify the terms governing the sale of shares between shareholders, we cannot help but conclude that there exists a genuine issue of material fact regarding whether the 2004 Amendment was intended to modify the Redemption Agreement. Because there exists a genuine issue of material fact regarding the applicability of the 2004 Amendment to the Redemption Agreement, and because the 2004 Amendment purports to address O'Reilly's rights to purchase Piemonte's shares on Piemonte's death and at what price, no determination can be

made on whether O'Reilly possesses a right to purchase Piemonte's shares on his death or on the price of the shares if O'Reilly does possess such a right, unless and until a trier of fact decides whether the 2004 Amendment supersedes the Redemption Agreement in these respects. Thus, there is no need for us to address, at the present time, the correctness of the trial court's interpretation of the Redemption Agreement or the potential interpretation of the 2004 Amendment.

¶ 25 Accordingly, because there exists a genuine issue of material fact regarding whether the 2004 Amendment was intended to modify some or all of the terms of the Redemption Agreement, we reverse the trial court's May 10, 2016, order finding that O'Reilly was entitled under the Redemption Agreement to purchase Piemonte's shares upon Piemonte's death, and its August 4, 2016, order finding that under the Redemption Agreement such purchase would be at the book value of the shares, and remand for further proceedings.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the Circuit Court of Cook County is reversed and the matter remanded for further proceedings.

¶ 28 Reversed and remanded.