THIRD DIVISION
April 27, 2011

No. 1-10-0353

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF LEO PERLOW a/k/a R. LEO PERLOW a/k/a LEO R. PERLOW a/k/a ROLAND PERLOW a/k/a ROLAND LEO PERLOW, Deceased (Jason A. Perlow (as Successor Trustee of the Virginia M. Perlow Declaration of Trust, dated September 6, 2001, as amended, for the benefit of Virginia M. Perlow), Petitioner-Appellant, v. Joseph B. Denenberg (as Trustee of the R. Leo Perlow Trust, dated November 15, 1991), Burton Denenberg (as Successor Trustee of the R. Leo Perlow Trust, dated November 15, 1991), The R. Leo Perlow Trust, dated November 15, 1991, Chicago Mercantile Exchange, Inc., Chicago Mercantile Exchange Holdings, Inc., Computershare Investor Services LLC, James Perlow, Mark Perlow, Bruce Perlow, Lee Perlow, Vivienne Perlow, Earl Perlow, Jeremy Perlow, Burton Perlow, Jaxon Perlow, Lucy Perlow, Rory Logan Perlow, Miles Perlow Kaufman, Arlene Lieb (individually and as Trustee of the Judith Lerner Trust), Jewish United Fund, Troy Henikoff, Carlin Henikoff, Jamie Henikoff Moffitt, Sander Moffitt, Beth Lerner, Nathan Lerner, Joshua Lerner, Margo Lerner Proeh, Austin Proeh, Alex Proeh, Gavin Proeh, and Gabriel Proeh, Respondents-Appellees).	)	Appeal from the Circuit Court of Cook County No. 03 P 7662 Honorable Susan M. Coleman, Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Quinn, P.J., and Neville, J., concurred in the judgment.

ORDER

HELD: Circuit court did not err in granting summary judgment in favor of respondents

where the declaration of trust executed by Leo Perlow is unambiguous and does not entitle Virginia Perlow to his class A shares of Chicago Mercantile Exchange Holdings, Inc.

Petitioner, Jason Perlow, appeals from an order of the circuit court of Cook County granting summary judgment in favor of respondents, Joseph Denenberg, as trustee of the R. Leo Perlow Trust ("Trust"); Burton Denenberg, as executor of the estate of Joseph Denenberg; the Chicago Mercantile Exchange, Inc. ("CME"); Chicago Mercantile Exchange Holdings, Inc. ("CME Holdings"); and Computershare Investor Services, LLC ("Computershare"). Petitioner contends that the court erred by granting summary judgment because the evidence shows that Leo Perlow had intended to transfer his class A shares of CME Holdings to Virginia Perlow upon his death. For the reasons that follow, we affirm.

BACKGROUND

On November 15, 1991, Leo executed a declaration of trust ("Trust Declaration"), in which he established the Trust and transferred 833⅓ shares of common stock of R.L. Perlow Corp., and two full memberships in the CME to the Trust, which he was to hold and administer as trustee. In the Declaration of Trust, Leo directed:

> "[i]f and to the extent that the trust property at the time of my death consists of two (2) whole or fractional memberships in the Chicago Mercantile Exchange, the Trustee shall distribute the interest in one such membership to my son, JEREMY PERLOW, if he survives me for at least thirty (30) days, and the interest in the other such membership to my son, JASON PERLOW, if he survives me for at least thirty (30) days."

In November 2000, the CME, which had operated as a not-for-profit membership corporation to that point, demutualized and became a shareholder-owned corporation. On December 3, 2001, the CME reorganized into a holding company structure through a merger by which it became a wholly owned subsidiary of CME Holdings, a publicly traded company. During this process, equity ownership rights were separated from membership trading rights and the CME's rules were amended to reflect that distinction, such that "membership or membership interest" was defined as "[t]he trading right associated with a Class B Share." Following the demutualization and merger, the Trust owned 35,988 CME Holdings class A shares, two CME Holdings class B-1 shares, and two CME memberships.

Leo amended the Trust Declaration numerous times and executed an amended eighth amendment of the Trust Declaration on October 10, 2001, in which he deleted the requirement that petitioner and Jeremy survive him by at least 30 days to receive the CME memberships, and executed a tenth amendment on February 10, 2003, in which he directed:

> "[i]f and to the extent that the Trust property at the time of my death includes two (2) memberships in the Chicago Mercantile Exchange, the Trustee shall distribute all of my interest in said memberships, including the right to use said seats for trading on said exchange, to my wife, VIRGINIA. In the event my wife shall predecease me, then the Trustee shall distribute the interest in one such membership to my son, JEREMY PERLOW, and the interest in the other such membership to my son, JASON PERLOW."

On June 19, 2003, Leo passed away and Joseph Denenberg became the trustee. On June

3, 2004, Virginia filed a petition for declaratory and injunctive relief against Joseph Denenberg, the CME, CME Holdings, Computershare, and numerous other Trust beneficiaries to enforce the terms of the Trust. Virginia explained that she was the second wife and widow of Leo and the mother of petitioner and Jeremy Perlow. Leo had six children from his first marriage, James Perlow, Mark Perlow, Earl Perlow, Burton Perlow, Arlene Lieb, and Judith Lerner, who were also beneficiaries of the Trust. Virginia further explained that Computershare was a limited liability company that CME Holdings had designated to be the transfer agent of all class A shares of CME Holdings.

Virginia alleged that Denenberg had breached, and was continuing to breach, his duties as trustee by failing to transfer the Trust's class A shares of CME Holdings to her. She requested the circuit court enter a temporary restraining order and preliminary injunction precluding Denenberg from dissipating, liquidating, transferring, or removing from the Trust the class A shares pending the resolution of her claims; a temporary restraining order precluding the CME entities from taking any further action relating to the disposition, liquidation, or transfer of the class A shares pending resolution of her claims; and a declaratory judgment finding that the Trust Declaration required Denenberg to transfer all the Trust's CME interests, including the class A shares, to her and that Denenberg had wrongfully refused to do so to that point.

On June 10, 2005, Virginia filed a motion for summary judgment on her petition for declaratory relief, in which she asserted that Leo had unambiguously granted her all his interests in the CME. On January 22, 2007, the circuit court entered an order granting Virginia's motion for summary judgment, but in doing so stated that the issue before it was merely whether Leo had

intended to pass his interest in the CME membership to Virginia, and not whether that interest included the disputed class A shares.

On August 1, 2007, petitioner, as successor trustee of the Virginia M. Perlow Trust, filed a six-count amended petition for declaratory and other relief against the now deceased Joseph Denenberg, the current trustee Burton Denenberg, the CME, CME Holdings, Computershare, and numerous other Trust beneficiaries. Petitioner asserted that Joseph Denenberg had sold the Trust's class A shares of CME Holdings on the open market on or after June 4, 2004, even though Virginia, who was now deceased, had been entitled to those shares and had requested they not be sold. Petitioner also asserted that Virginia had informed the CME entities of her interest in those shares and that they had nonetheless allowed Joseph Denenberg to convert those shares to her detriment.

In count I of his amended petition, petitioner sought a declaratory judgment that the trustees had wrongfully failed to transfer the class A shares of CME Holdings to him and an order compelling Burton Denenberg to take all actions necessary to transfer the Trust's entire CME interest to him. Petitioner alleged in count II that Joseph Denenberg had converted the class A shares, and he alleged in count III that CME, CME Holdings, and Computershare had converted those shares as well. In count IV, petitioner alleged that the CME entities aided and abetted Joseph Denenberg in converting the class A shares, and in count V he alleged that he was entitled to specific performance whereby the CME entities would provide him with 35,998 class A shares. In count VI, petitioner sought the imposition of a constructive trust on the shares of R.L. Perlow Corp., that James Perlow, Mark Perlow, Earl Perlow, Burton Perlow, the Judith

Lerner Trust, and Arlene Lieb had received from the Trust.

On August 14, 2009, the CME filed an amended motion for summary judgment and supporting memorandum of law, in which it asserted that it did not convert or aid in the conversion of the disputed class A shares because it did not assume control, dominion, or ownership over those shares or aid and abet in their sale; that Virginia was not entitled to the class A shares; that it was exonerated of any liability by the exculpation clause of the Trust Declaration; that Leo had released the claims against it in the transfer agreements he signed in transferring his CME interests to the Trust; and that it was exempted from liability by the Uniform Commercial Code. On September 23, 2009, Burton Denenberg, as executor of the estate of Joseph Denenberg, filed a motion for summary judgment as to counts I and II of the amended petition, in which he asserted that Virginia had not been entitled to the class A shares and that Joseph Denenberg acted properly by liquidating those shares. Petitioner subsequently filed a response, in which he asserted that Virginia had been entitled to the class A shares pursuant to the unambiguous terms of the Trust Declaration, the circumstances surrounding the creation of the Trust showed that Leo had intended to distribute his class A shares to Virginia, the CME was deeply involved in the wrongful transfer of the class A shares, and the CME was not exonerated by the Trust Declaration.

On January 5, 2009, the circuit court granted respondents' motions for summary judgment, finding there was no evidence that Virginia was ever entitled to the class A shares. In doing so, the court stated that there was no ambiguity in the language of the tenth amendment to the Trust Declaration, which bequeathed the Trust's interest in Leo's two CME memberships,

including the right to use those seats on the exchange, to Virginia. The court explained that "[t]he ultimate issue at the core of the instant [dispute] is the definition of the term 'membership in the CME' as used by [Leo] in his trust" and determined the CME rules at the time of the amendment clearly defined "membership" to include only a trading right plus a class B share. Petitioner now appeals from that order.

ANALYSIS

A circuit court shall render summary judgment where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). Although a petitioner is not required to prove his case at the summary judgment stage, the nonmoving party must present a factual basis that would arguably entitle it to a judgment to survive a motion for summary judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). Summary judgment should only be granted when the right of the moving party is clear and free from doubt. *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). We review the circuit court's order granting summary judgment *de novo*. *Woods v. Pence*, 303 Ill. App. 3d 573, 576 (1999).

Petitioner contends that the circuit court erred in granting summary judgment in favor of respondents because the Trust Declaration directed that Virginia was to receive the Trust's class A CME Holdings shares upon Leo's death. A court's primary purpose in construing a trust is to discover the settlor's intent by examining the trust as a whole and giving the words employed therein their plain and ordinary meaning and effectuating that intent if it is not contrary to public

policy. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). In construing a trust in this manner, the court will apply the same rules of construction that are applicable in construing a will. *First National Bank of Chicago v. Canton Council of Campfire Girls, Inc.*, 85 Ill. 2d 507, 513 (1981).

Petitioner asserts that the Trust Declaration unambiguously provides that Virginia is entitled to the class A shares, and respondents assert that the Trust Declaration unambiguously provides that Virginia is not entitled to the class A shares. The record shows that on February 10, 2003, Leo amended the Trust Declaration to provide that "to the extent that the Trust property at the time of my death includes two (2) memberships in the Chicago Mercantile Exchange, the Trustee shall distribute all of my interest in said memberships, including the right to use said seats for trading on said exchange, to my wife, VIRGINIA." We thus agree with the circuit court that the language in the Trust Declaration is unambiguous in that it directs the trustee to deliver the Trust's interests in two CME memberships to Virginia and that the core issue in this dispute is the definition of the term "membership in the CME" as used therein.

Where a testator uses a technical term with an established meaning, a court will presume that he used that term according to its technical meaning and will give that term its technical meaning unless it is clear that the term was not used in that sense. *Gridley v. Gridley*, 399 Ill. 215, 223 (1948). The record shows that Leo executed the tenth amendment of the Trust Declaration after the demutualization and merger of the CME, at which time CME rules provided that a "membership or membership interest" consisted of "[t]he trading right associated with a Class B Share" and could only be purchased or sold with its associated class B share. Thus,

when Leo used the word "membership" to refer to his two CME memberships in the tenth amendment of the Trust Declaration, that word had a technical meaning as set forth in the CME rules, and we will therefore presume that he used that word according to its technical meaning at that time.

It is clear from the CME rules that at the time Leo executed the tenth amendment of the Trust Declaration that his interests in his CME memberships did not include any class A shares. As such, we agree with the circuit court that the language in the Trust Declaration is unambiguous and that Virginia was not entitled to any class A shares.

Petitioner, however, asserts that the unambiguous language in the tenth amendment of the Trust Declaration shows that Leo intended to transfer the class A shares to Virginia upon his death where he directed that the trustee shall distribute "all of my interest in said memberships, including the right to use said seats for trading on said exchange" to Virginia. While we agree with petitioner that this language unambiguously directed the trustee to distribute Leo's entire interest in the CME memberships, which included the right to use the seats for trading on the CME, it did not direct the trustee to distribute the class A shares because those shares were not a part of Leo's interest in the CME memberships.

Petitioner next asserts that the circuit court erred by relying on *McMahon v. Chicago Mercantile Exchange*, 221 Ill. App. 3d 935, 944 (1991), in which this court held that a CME member is bound by CME rules, in granting summary judgment. Although we agree with petitioner that *McMahon* is not applicable in this case because the issue here is whether Leo intended to provide Virginia his class A shares, we decide that Leo's intent to provide Virginia

with his interests in his CME memberships, which did not include any class A shares, can be ascertained without relying on that holding.

Petitioner next asserts that the circuit court erred by finding that the term "membership" had a technical meaning found in the CME rules. He maintains that the word "membership" is unlike other terms that have been given their technical meanings by this court and our supreme court in construing wills (*Gridley*, 399 Ill. at 222 ("heirs of my body"); *Haberl v. Monroe County*, 142 Ill. App. 3d 152, 156 (1986) ("inheritance tax"); *Matter of Estate of Laas*, 134 Ill. App. 3d 504, 508 (1985) ("adjusted gross estate"); *Brown v. Peters*, 39 Ill. App. 3d 962, 967 (1976) ("bequeath and devise"); *Irish v. Profitt*, 28 Ill. App. 3d 607, 613 (1975) ("beneficiaries")) because it is not defined in a statute, the common law, or by a recognized third party. However, the CME rules are the recognized source for the definition of a CME membership (see *Chicago Mercantile Exchange v. United States*, 840 F.2d 1352, 1356 (7th Cir. 1988) (property interest in an exchange seat is defined by the exchange rules)), and Leo used the word "membership" in the specific context of a CME membership in the Trust Declaration. Thus, we determine that the word "membership," as used in the context of a CME membership, has a technical meaning and is similar to other terms that have been given their technical meanings by this court and our supreme court.

Petitioner next asserts that the technical definition of the word "membership" should not govern in construing the Trust Declaration in this case because it would defeat Leo's clear intent to provide Virginia the class A shares. He maintains that it is clear from the series of revisions that Leo made to the Trust Declaration before and after the CME reorganization and merger that

he intended for the word "membership" to include the class A shares.

In construing a will, a court is to ascertain and give effect to the testator's intent, and the intent sought is not that presumed to have been in his mind, but rather that which was expressed by the language in the will. *Laas*, 134 Ill. App. 3d at 509. Although extrinsic evidence of the testator's intent is admissible to resolve an ambiguity in the will (*Larison v. Record*, 117 Ill. 2d 444, 448 (1987)), such evidence may not be used by a court to contradict or vary the testator's intent where it is otherwise clear and unambiguous (*Coussee v. Estate of Efston*, 262 Ill. App. 3d 419, 426 (1994)). A party cannot create an ambiguity and thereby open the door to extrinsic evidence merely by offering evidence that the testator did not intend to say what is otherwise clearly stated in the will. *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 776 (2002).

As stated earlier, the Trust Declaration provides that the trustee was to distribute Leo's interest in his two CME memberships, which did not include class A shares, to Virginia upon his death. Leo did not use any terminology in the Trust Declaration that would make it clear he did not mean to use the word "membership" in its technical sense (*Gridley*, 399 Ill. at 223), and thus clearly and unambiguously expressed his intent to provide Virginia his CME memberships in the Trust Declaration. As such, petitioner cannot create an ambiguity and open the door to extrinsic evidence by offering evidence of prior versions of the Trust Declaration to assert that Leo did not intend to say what is otherwise clearly stated in the final version of that document. *Romanowski*, 329 Ill. App. 3d at 776. We therefore determine that the use of the technical definition of "membership" in construing the Trust Declaration does not defeat Leo's alleged intent to provide Virginia the class A shares, but instead is consistent with Leo's clear intent to provide Virginia

with his two CME memberships.

Petitioner next points out that a CME membership included class A shares when Leo first created the Trust in 1991 and, citing *Bollman v. Pehlman*, 352 Ill. App. 3d 1203 (2004), asserts that the subsequent demutualization and merger of the CME had no effect on the definition of a CME membership as the term was used in the Trust Declaration. However, unlike in *Bollman*, 352 Ill. App. 3d at 1207, where the interest specified in the trust was transformed after the settlor had died, in this case the CME demutualization and merger occurred before Leo executed the tenth amendment of the Trust Declaration, in which he directed that his interest in his CME memberships be given to Virginia. In construing a trust, a court is to give effect to the settlor's intent at the time the relevant instrument was executed (*First National Bank of Chicago*, 85 Ill. 2d at 513), and we therefore determine that the circuit court did not err by finding that Leo intended to use the word "membership" as it was defined at the time he executed the tenth amendment to the Trust Declaration.

Petitioner further asserts that the circuit court erred by considering extrinsic evidence regarding the CME rules, but ignoring the evidence he had presented of earlier versions of the Trust Declaration to show Leo's overall plan of distribution. Petitioner maintains that the circuit court implicitly admitted that the Trust Declaration was ambiguous by considering the CME rules in defining the word "membership" and that it was then required to consider his extrinsic evidence regarding Leo's intent.

In granting summary judgment, the circuit court found that the language of the Trust Declaration was unambiguous in that it provided for the distribution of Leo's interest in his CME

memberships to Virginia. The court then looked to the CME rules for the definition of the word "membership" in the context of a CME membership in the same way it could have used a dictionary to ascertain the ordinary and popular meaning of every other word in the Trust Declaration. See *Bailey v. Illinois Liquor Control Comm'n*, 405 Ill. App. 3d 550, 555 (2010) (dictionary is a resource that can be used to ascertain the ordinary and popular meaning of words). We therefore determine that the circuit court did not implicitly admit that the Trust Declaration was ambiguous by looking to the CME rules for the definition of the word "membership" and reiterate that the language used in the Trust Declaration is unambiguous and that petitioner could not introduce extrinsic evidence to show that Leo did not intend to say what is otherwise clearly stated therein. *Romanowski*, 329 Ill. App. 3d at 776.

We thus conclude that the circuit court did not err in granting summary judgment in favor of respondents where Virginia was not entitled to the class A shares pursuant to the unambiguous provisions of the Trust Declaration. As such, we need not consider whether respondents were entitled to summary judgment on any of the additional grounds set forth in their motions.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.