Reversed and Rendered and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00900-CV

ZAPATA CORPORATION, Appellant

V.

LAMAR C. MCINTYRE, Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 98-15430

O P I N I O N

This is an appeal from a judgment in favor of Lamar C. McIntyre, appellee, in a suit for breach of an employment agreement. The trial court found as a matter of law that Zapata Corporation, appellant, breached McIntyre's employment agreement. Following a jury trial on the issue of damages, the trial court entered judgment in favor of McIntyre. We reverse and render judgment that McIntyre take nothing from Zapata.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1968, Lamar C. McIntyre went to work for Zapata Corporation. In 1994, McIntyre entered into a written employment agreement ("the Agreement") with Zapata. Under the Agreement, which became effective October 1, 1994, McIntyre was designated to serve as Zapata's treasurer, vice president, and chief financial officer. On January 15, 1996, however, McIntyre was terminated pursuant to paragraph 5(a)(i) of the Agreement. Paragraph 5(a)(i) provides that McIntyre could be terminated "without cause." Though McIntyre was officially terminated without cause, Zapata contends he was terminated because he was "unproductive." Despite his termination, McIntyre was entitled to receive his salary and certain benefits from Zapata until December 17, 1998, his thirtieth anniversary with the company. According to McIntyre, the continued salary and benefits was a guarantee he demanded and which was incorporated into the contract at his insistence. Zapata complied with the terms of the Agreement and continued to pay McIntyre's salary and include him in the pension plan, the health insurance plan, the profit-sharing plan, and the 1990 stock option plan. This dispute arose when Zapata refused to award McIntyre stock options under the 1996 Long-Term Incentive Plan ("the Plan").

A little less than a year after McIntyre's termination, Zapata's shareholders adopted the Plan. Its stated objective was to "retain key executives and other selected employees and reward them for making major contributions to the success of the Company" by giving them a proprietary interest in Zapata's growth and performance. Under the Plan, the board of directors designated a compensation committee ("the Committee") to administer the Plan. The Committee was given "full and exclusive power to interpret" the Plan and to adopt rules, regulations and guidelines to carry out the Plan. Moreover, the terms of the Plan specifically stated that "[a]ny decision of the Committee in the interpretation and administration of this Plan shall lie within its sole and absolute discretion and shall be final, conclusive and binding on all parties concerned." Those eligible for an award under the Plan were employees in positions of responsibility and "whose performance, *in the judgment of the Committee*, can have a significant effect on the success of the Company...." (emphasis added).

On July 11, 1997, the Committee awarded certain stock options to every "direct" and "active" Zapata employee. In his deposition, Joseph L. Von Rosenberg, III, who was general counsel and executive vice-president for Zapata from 1994 through 1997, testified that McIntyre was "actually included" in all Zapata benefits plans "subject to the terms and conditions of those plans." According to Rosenberg, while McIntyre was "included" in the Plan, the Committee determined he was not qualified to receive stock options under the Plan, and therefore, he was not awarded any stock options.

After Zapata awarded the stock options in 1997, the price of Zapata stock began to rise. In July of 1998, the time some of the awarded options first became exercisable, the price of Zapata stock had almost doubled.[1] Eventually, the stock reached unprecedented levels. Soon, however, the price declined to its former levels.

In April of 1998, McIntyre filed suit against Zapata alleging Zapata had breached the Agreement. Specifically, McIntyre alleged that Zapata breached the Agreement by failing to award him stock options under the 1996 Long-Term Incentive Plan. Both Zapata and McIntyre filed motions for summary judgment. The trial court denied Zapata's motion. While the trial court did not formally rule on McIntyre's motion,[2] it did rule as a matter of law that, under the terms of the Agreement, McIntyre was entitled to be included in the Plan. In other words, the trial court found, based on the unambiguous terms of the Agreement, that Zapata had breached the Agreement.[3] The issue of damages was then tried to a jury. Based on the trial court's ruling on the contract and the jury's verdict, the trial court entered

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[1] The individual stock option agreements that contained the terms of the option awards provide that the first third of the options would become exercisable after one year.

[2] We disagree with Zapata's argument that the trial court *granted* McIntyre's motion for summary judgment. The trial court determined as a matter of law that the Agreement was not ambiguous and then interpreted its meaning as a matter of law. While the trial court's ruling effectively awarded McIntyre the relief he requested in his partial motion for summary judgment, the trial court never, in fact, ruled on that motion.

[3] In its order denying Zapata's motion for summary judgment, the trial court opined that as a matter of law McIntyre was "entitled to participate in the stock option plan to at least the extent that the person who assumed [McIntyre's] duties was allowed to participate."

judgment in favor of McIntyre for $3,275,659.01 in actual damages plus prejudgment and postjudgment interest. Zapata filed this appeal, raising eight issues for our review.

II. DID THE TRIAL COURT ERR IN RULING THAT ZAPATA BREACHED THE AGREEMENT BY FAILING TO AWARD STOCK OPTIONS TO MCINTYRE UNDER THE 1996 LONG-TERM INCENTIVE PLAN?

In its first issue, Zapata alleges the trial court erred in denying its motion for summary judgment and ruling as a matter of law that the Agreement required Zapata to award stock options to McIntyre. Zapata argues that under the terms of the Agreement and the Plan it did not breach the Agreement when it declined to award stock options to McIntyre on July 11, 1997.

A. The Applicable Law

Whether a contract is ambiguous is a question of law for the court. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). A contract is not ambiguous if it can be given a certain and definite meaning or interpretation. *State Farm Fire and Cas. Co. v. Vaughn*, 968 S.W.2d 931, 933 (Tex. 1998); *Cook Composites, Inc. v. Westlake Styrene Corp.,* 15 S.W.3d 124, 131 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd). Here, neither party asserts ambiguity and we agree that the contract is not ambiguous.

Where a contract is unambiguous, the interpretation of the contract is a question of law for the court. *Dewitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999) (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). When construing a contract, the court's primary concern is to give effect to the written expression of the parties' intent. *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). The contract must be considered as a whole and each part of the contract should be given effect because we presume that the parties to a contract intend every clause to have some effect. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). As the supreme court stated, "[n]o one phrase, sentence, or section should be isolated from its setting and considered apart from the other provisions." *Forbau* v. *Aetna Life Ins.* Co., 876 S.W.2d 132, 134 (Tex. 1994) (quoting *Guardian Trust Co. v. Bauereisen*, 132 Tex. 396, 121

S.W.2d 579, 583 (1938)). Additionally, controlling effect must be given to specific provisions over general provisions. *Forbau*, 876 S.W.2d at 133-34; *Preferred Risk Mut. Ins. Co. v. Watson*, 937 S.W.2d 148, 149 (Tex. App.—Fort Worth 1997, writ denied).

As we stated, the written expression of the parties' intent is this court's primary concern in contract interpretation. *Lenape Resources*, 925 S.W.2d at 574. In determining intent, we are free to consider evidence of the circumstances surrounding the execution of the contract; however, we look to these circumstances merely to assist us in understanding the object and purpose of the contractual language the parties chose. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981); *Cook Composites*, 15 S.W.3d at 132. In essence, consideration of the circumstances in existence at the time of the execution of the contract merely establishes "background" for contractual interpretation. *See Medical Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d 820, 823 (Tex. App.—Houston [14th Dist.] 1988, writ denied). Though the circumstances surrounding the execution may be considered, the parties may not contradict or vary the terms of the agreement by oral statements of their intentions. *Sun Oil*, 626 S.W.2d at 734; *Cook Composites*, 15 S.W.3d at 132.

B. The Agreement

The employment agreement between Zapata and McIntyre was entered into, according to the terms of the Agreement, on October 1, 1994. The Agreement defined McIntyre's term of employment as October 1, 1994, through December 17, 1998, unless McIntyre voluntarily terminated his employment. Under paragraph 3(a) of the Agreement, entitled "Compensation and Benefits," Zapata agreed to pay McIntyre an annual salary during the term of his employment. In paragraphs (3)(b) and (c), the parties defined the benefits, other than salary, to which McIntyre was entitled. These paragraphs provide, in pertinent part:

> b. During the Term of Employment, the Executive [McIntyre] shall be entitled to participate and shall be included in any pension, profit-sharing, stock option,

> deferred compensation, or similar plan or program of the Company [Zapata] established by the Company, pursuant to the terms and conditions thereof.
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> c. The Executive shall participate in such stock plans as the Company may have and shall be eligible to participate in other long-term incentive compensation plans which are extended by the Company during the Term of Employment to executives of the Company exercising comparable responsibilities and receiving comparable compensation.

The Agreement also contained a reference to these benefit provisions in the event McIntyre was terminated by Zapata. Specifically, paragraph 5(a)(i) provides that if McIntyre is terminated without cause, he is still entitled to receive his annual salary for the remainder of the term of employment. This paragraph also states:

> If, for any reason other than a Non-salary event [termination for cause, death, or total and permanent disability], the Executive's Services hereunder shall be terminated by the Company during the Term of Employment, then the Company shall make arrangements to include Executive in Company's benefit plans through December 17, 1998.

C. Arguments and Analysis

In its argument, Zapata agrees that the above provisions of the Agreement grant McIntyre certain rights with respect to Zapata stock option plans. Zapata argues, however, that none of the provisions mandates that Zapata must *award* stock options to McIntyre. Zapata contends that based on a proper interpretation of the Agreement, McIntyre was merely *eligible to participate* in the 1996 stock option plan; he was not automatically entitled to an award of stock options. Zapata bases its argument on paragraph 3(b) of the Agreement and the terms of the Plan, which state that the committee appointed to administer the Plan has absolute discretion to determine who will be awarded stock options under the Plan.

McIntyre, on the other hand, argues paragraph 3 of the Agreement is inapplicable to this case. He contends the terms in paragraph 3 govern his compensation package during the period *before* termination and that paragraph 5 controls his compensation package *after*

termination. Because he had been terminated by Zapata, McIntyre argues that only paragraph 5 should be considered by this Court. He contends that based on the language in paragraph 5(a)(i), the trial court correctly determined he was entitled to an award of stock options. Applying the rules of contract construction, we hold McIntyre's interpretation is inconsistent with the specific terms of Agreement and with the Agreement as a whole.

Paragraph 3(b) of the Agreement specifically states that McIntyre "shall be entitled to participate and shall be included in any . . . stock option . . . plan or program of the Company established by the Company, *pursuant to the terms and conditions thereof*." (emphasis added). This section plainly limits McIntyre's inclusion in any stock option plan to the terms and conditions of that plan. At oral argument, McIntyre took the position that the Agreement could not be subject to the terms and conditions of the Plan because the Plan was not in existence at the time he signed the employment agreement. This argument is unreasonable. On the one hand, McIntyre urges he his entitled to stock options that were awarded pursuant to the 1996 plan; however, he then argues that he is not bound by the terms of the Plan under which he proposes to benefit. McIntyre's interpretation would require this Court to give effect to one provision in the Plan while ignoring another. This is contrary to basic rules of contract interpretation. *See Heritage Resources*, 939 S.W.2d at 121 (holding that contract must be considered as whole and each part should be given effect).

Because the Agreement, with reference to McIntyre's inclusion in any stock option plan, is subject to the terms and conditions of the Plan, the terms of the Plan are clearly applicable to a determination of whether McIntyre was entitled to an award of stock options. The Plan states that it shall be administered by a committee, appointed by the board of directors. The Committee is given full and exclusive power to interpret the Plan and to adopt rules and guidelines for carrying it out. The Committee is given the power to determine the type of award to be made to the participants of the Plan. Moreover, the Plan specifically provides that any decision of the Committee is within its sole and absolute discretion and is

final, conclusive, and binding on all parties. The only limitation on the power of the Committee is that it exercise its powers "in the best interest of the Company and in keeping with the objectives of this Plan." The stated objective of the Plan is to "retain key executives and other selected employees and reward them for making major contributions to the success of the Company."

Accordingly, we hold the Agreement is subject to the terms of the Plan, and therefore, any decision to award, or not to award, stock options to McIntyre was in the discretion of the Committee.

Paragraph 3(b) is very specific as to the timing of its applicability. The first sentence of the paragraph states that it applies *"during the Term of Employment."* As we have previously noted, the Agreement defines "term of employment" as the period from October 1, 1994, through December 17, 1998. Thus, McIntyre's contention that paragraph 3(b) applies only to his entitlement to benefits *prior to* his termination is contrary to the specific terms of the Agreement.

Paragraph 3(b) is also specific as to the conditions under which McIntyre is entitled to participate in any Zapata stock option plan. The portion of paragraph 5(a)(i) relied on by McIntyre to support his argument, however, is very general. It merely provides that McIntyre is to be "included" in Zapata's benefit plans—it does not provide that McIntyre is *guaranteed* an award of stock options. As noted above, specific terms in a contract control over general terms. *Forbau*, 876 S.W.2d at 133-34*; Watson*, 937 S.W.2d at 149. Based on this, and other rules of construction, we hold the language relied on by McIntyre in paragraph 5(a)(i) is subject to the limitation in paragraph 3(b), and therefore, the terms of the Plan.

McIntyre contends the language in paragraph 5 guarantees him an award of stock options under the Plan. He argues the limiting language of paragraph 3(b) cannot be used to exclude McIntyre from an award of stock options. McIntyre suggests the "pursuant to the terms and conditions thereof" language in paragraph 3(b) is merely administrative language

describing how McIntyre will be awarded options. In other words, McIntyre argues the only function served by paragraph 3(b) is to describe "how" he will be awarded stock options (pursuant to the terms and conditions of the Plan), not "if" he will be awarded stock options. McIntyre contends paragraph 5 governs whether he will receive stock options and paragraph 3(b) governs only the mechanics of the award. We disagree.

In essence, McIntyre claims the limiting language of paragraph 3(b) cannot be used to negate the mandatory language of paragraph 5. He contends that to do so would render paragraph 5 meaningless, a violation of the basic rules of contract construction. Again, we disagree. Based on a consideration of the Agreement as whole, we hold that paragraph 5 merely clarifies that any rights McIntyre may have to an award of stock options, as specifically defined by paragraph 3(b), will not cease if he is terminated without cause. We hold the language of paragraph 3(b) determines McIntyre's rights relative to stock options and paragraph 5 makes clear that those rights will continue if he is terminated without cause. Paragraph 5 does not guarantee McIntyre an award of stock options. This interpretation harmonizes the provisions in paragraphs 3(b) and 5 without rendering either meaningless.

Because we have determined that McIntyre's right to an award of stock options is limited by the terms and conditions of the 1996 stock option plan, we must look to the terms of the Plan to determine whether Zapata breached the employment agreement by failing to award McIntyre stock options. An award pursuant to the 1996 stock option plan is at the discretion of the Committee and the Committee chose not to award any stock options to McIntyre. This decision by the Committee is final, conclusive, and binding. The courts of this state have long held that when a decision is made not to award benefits to an employee under an employer-funded plan, which is made part of an employment contract between employer and employee, and which contains provisions that make the employer's determination final, the determination can only be attacked by alleging and proving bad faith or fraud on the part of the employer.[4] *Goudie v. HNG Oil Co.*, 711 S.W.2d 716, 718 (Tex.

[4] Zapata suggests that under the express terms of the Plan, Delaware law concerning the (continued...)

App.—El Paso 1986, writ ref'd n.r.e.); *Associated Milk Producers v. Nelson*, 624 S.W.2d 920, 926 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Texaco, Inc. v. Romine*, 536 S.W.2d 253 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).[5] McIntyre did not allege that either the Committee or Zapata acted in bad faith or fraudulently in refusing to award the stock options. Thus, the decision by the Committee is final and binding.

V. CONCLUSION

In conclusion, we hold that as a matter of law McIntyre was not guaranteed an award of stock options under the terms of the employment agreement. Based on the terms of the Agreement, which were subject to the terms and conditions of the Plan, the award committee had the discretion to refuse to award any options to McIntyre. Accordingly, the trial court erred in finding Zapata breached the Agreement and in entering judgment for McIntyre. Given our disposition of this issue, we need not address the remaining seven issues. We reverse the trial court's judgment and render judgment that McIntyre take nothing on his claim against Zapata.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed March 15, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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[4] (...continued)
conclusive effect of a committee decision must be applied. We need not make this determination, however, because there is no dispute that on this issue Texas and Delaware law are consistent.

[5] Though it did not expressly confront this issue, in *Neuhoff Bros. Packers Management Corp. v. Wilson*, 453 S.W.2d 472, 474 (Tex. 1970), the Texas Supreme Court seemed to recognize that committee decisions in these circumstances are binding unless there is proof of bad faith on the part of the committee.