STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF CHESTONIA,

Plaintiff-Appellant,

v

TOWNSHIP OF STAR,

Defendant-Appellee.

FOR PUBLICATION
May 17, 2005
9:00 a.m.

No. 250933
Antrim Circuit Court
LC No. 03-007911-CZ

STEPHEN ORDWAY, SHERRIE ORDWAY, PERRY A. RUSNELL, JEANETTE P. RUSNELL, KEITH A. RUSNELL, MELISSA RUSNELL, DAVID D. HOLZ, CAROLYN COON, ANGELA GAPINSKI, TERRY GAPINSKI, RONALD MILITELLO, ROSE MILITELLO, GENE W. CASE, LOUISE A. CASE, TERRY OLDS, DARLINE A. OLDS, GARY ZIMPFER, JUDY L. ZIMPFER, MIKE SERAPHIME, MICHELE JEWELL, MARVIN WOOD, LEON J. WALDMAN, ELAINE WALDMAN, BRYCE SEELEY, PATRICIA MILLIGAN, WARNER B. BROWN, SHIRLEY A. BROWN, PHYLLIS K. GILL, THOMAS GILL, ROLAND L. ORDWAY, SR., THERES I. JOHNSON, ELLA L. HOPP, HERMAN D. HOPP, WILFRED GATES, ELISA GATES, ANNETTE L. VOELKER, TAMMY J. PADGETT, MARIANN JACKMAN, NORM JACKMAN, MITCH COON, PAULINE L. COON, SCOTT JOHNSON, PENNY A. COON, SCOTT E. COON, GEORGINA MADAGAME, MABEL PRICE, LOIS V. BATES, WALTER W. JONES, JR., JAMES D. WILKINSON, and JULIA KIM WILKINSON,

Plaintiffs-Appellants,

v

No. 255509

Antrim Circuit Court
LC No. 03-007967-AW

TOWNSHIP OF STAR, ARLEN TURNER, MARILYN RYPKOWSKI, KAY RINGLE, and CECILE WOODWARD,

Defendants-Appellees.

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

In this contract action, plaintiff Township of Chestonia appeals by right from the order terminating the operation of a joint fire department operated by the two parties, and from the order dividing the assets of that fire department. We reverse and remand. We do not retain jurisdiction.

I. FACTS

The parties to this case are two small neighboring communities in Antrim County. Plaintiff Chestonia Township has a population of approximately 600. Defendant Star Township has a population of approximately 750.

Since the 1940's, the two communities have operated a joint fire department. At least as early as 1974, the electorates of both townships voted to have their communities "join for the creation of a special assessment district for the purpose of providing fire protection for said joint fire district, and levy a special assessment" for the support and maintenance of the joint fire department. At that time, a five-member board was created to oversee the joint fire department, and was given the name of Alba Fire Board. From that time until the parties began legal action against one another in April 2002, the parties continued to operate the joint fire department in this manner: with the Alba Fire Board running the fire department, and the two townships maintaining the joint fire district and voting millages for the expansion, maintenance, and operation of the joint fire department.

On January 1, 1985, the parties entered into what was apparently the first written agreement between the Townships regarding the operation of the joint fire department. This agreement, entitled Fire Board Agreement, was entered into pursuant to MCL 124.2.[1] The agreement legally created a joint fire department, to be called the Alba Fire Department, and set out the terms governing the Alba Fire Board. The agreement provided that the contract between the parties would continue until both Townships deemed it unfeasible. It further provided that

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[1] The 1985 agreement itself refers to this statute as Act No. 35, Public Acts of 1951.

the agreement between the parties could be extended, terminated, or amended only by the unanimous consent of both Townships.

On September 1, 1999, the parties amended this agreement, under the name of Fire Board Agreement (Amended) ("Amended Agreement"), to permit members of the board of either township to sit on the Fire Board as a voting member. In all other respects the 1985 and 1999 agreements were identical.

Shortly after the Amended Agreement was signed, however, differences began to arise among the members of the two townships' boards. These differences included, among other things, disagreements over expenditures, concerns over lack of accountability, differences over who should be appointed fire chief, concerns regarding insurance coverage for the joint fire department and general personality conflicts. As a result of these differences, on January 30, 2002, the Star Township Board passed a resolution purporting to withdraw from the Amended Agreement.

Subsequently, on April 8, 2002, Star Township filed a complaint[2] naming Chestonia Township as defendant. Star Township sought a declaratory ruling that its January 30, 2002 action had terminated the 1999 Amended Agreement and thereby also terminated the existence of the Alba Fire Board. Star Township further requested the court to order an accounting, to make an equitable division of the joint Alba Fire Department's assets and to order the return of revenues levied and collected pursuant to millages passed by Star Township for purposes of providing fire protection.

Star Township then brought a motion for summary disposition. On October 14, 2002, the trial court heard arguments on this motion. At the conclusion of the hearing, the trial court found that there was no evidence that the January 30, 2002 action had actually terminated the agreement, because the motion passed by the Township merely expressed its desire to terminate to the agreement and not its intent to do so. Accordingly, the court granted partial summary disposition to Chestonia Township. In so ruling, the court explicitly left open the question of whether Star Township had the authority to unilaterally withdraw from the Amended Agreement.

On November 14, 2002, the Star Township Board passed a resolution explicitly setting forth its intent to withdraw immediately from the Alba Fire Board and the Alba Fire Department. On January 13, 2002, Chestonia Township filed the complaint in the instant suit, claiming breach of agreement. Chestonia Township sought specific performance of the Amended Agreement and damages for Star Township's breach. Trial was held on June 24 and 25, 2003.

At the conclusion of trial, the trial court made the following findings and rulings. First, the court noted that the question of whether Star Township had the right to unilaterally withdraw from the Amended Agreement had not been considered by the court during the first action between the parties. Accordingly, the court concluded that the doctrine of res judicata did not preclude the present action. Next, the court concluded that the Amended Agreement essentially

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[2] The April 8, 2002 complaint was not the complaint filed in the instant suit.

constituted a perpetual contract. Therefore, the court concluded the Amended Agreement was void as against public policy. The court also concluded that the language of the various millages passed by the two townships to provide for fire protection for their communities did not require the joint fire department to continue for any set length of time, and that Star Township was not required to continue paying over the revenue from the fire protection millages passed by its residents past a reasonable period of time. It found this reasonable time to end with the payment of any unpaid revenues levied through December 31, 2002, including any delinquent taxes owed from that period. Finally, the court ordered the parties to submit proposals regarding the liquidation and distribution of the Alba Fire Board assets. The court entered an order reflecting these rulings on July 17, 2003.

Following a hearing on the question of the liquidation and distribution of the Alba Fire Board's assets, on September 3, 2003 the court entered an order awarding Star Township 2/3 and Chestonia Township 1/3 of the value of the assets of the Alba Fire Department. In this order, the court further awarded to Chestonia Township any remaining funds held by the Alba Fire Board. The court also made specific distributional rulings as to certain of the Alba Fire Department assets.

II. RES JUDICATA

Plaintiff argues that the trial court erred when it held that the partial summary disposition order and the stipulation and order of dismissal in the first action between the parties was not a determination on the merits and that, therefore, the doctrine of res judicata did not apply. The trial court did not err.

A. Standard of Review

The applicability of res judicata is a question of law, which is reviewed de novo. *Adair v State,* 470 Mich 105, 119; 680 NW2d 386 (2004).

B. Analysis

In the first case between the parties, Star Township specifically placed before the court the question of whether it had the authority to withdraw from the Amended Agreement, but the trial court declined to rule on the issue. Therefore, this claim was neither litigated, nor could it have been litigated in the first action between the parties.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc,* 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata bars litigation in the subsequent action of not only those claims actually litigated in the first action, but also those claims arising out of the same transaction which the parties, by exercising reasonable diligence, could have litigated but did not. *Adair, supra* at 121.

In the first action between the parties, the trial court declined to rule on the question of whether Star Township had the authority to unilaterally terminate the Amended Agreement. Therefore, this issue was not actually litigated in the first action. Moreover, this is not a situation where a claim that could have been brought and litigated in the first action was not. In the

original case, in fact, Star Township did bring the claim here challenged by plaintiff. However, the trial court then elected not to rule on the issue. Accordingly, the doctrine of res judicata does not apply to this case. As a result, the trial court did not err in so finding.

III. UNILATERAL TERMINATION OF CONTRACT

Plaintiffs argues that the trial court erred when it found that Star Township could unilaterally terminate the Amended Agreement between the parties, and in finding the agreement void as against public policy. We agree.

A. Standard of Review

This Court reviews questions of contract interpretation de novo. *Morley v Automobile Club of Michigan,* 458 Mich 459, 465; 581 NW2d 237 (1998).

B. Analysis

On January 1, 1985, the parties entered into a Fire Board Agreement. The parties amended this agreement on September 1, 1999. The Amended Agreement, in Paragraph 1, provided: "[t]his agreement shall commence on the date here in [sic] and continue until both Townships deem it unfeasible." The Amended Agreement further provided, in Paragraph 12, that "[t]his agreement may be extended, terminated, or amended by the unanimous consent of the Townships."

Both the 1985 agreement and the 1999 agreement were entered into pursuant to MCL 124.1, *et seq*., which authorizes and prescribes, in part, intergovernmental contracts between municipal corporations. MCL 124.2 provides as follows:

> Any municipal corporation shall have power to join with any other municipal corporation, or with any number or combination thereof by contract, or otherwise as may be permitted by law, for the ownership, operation, or performance, jointly or by any 1 or more on behalf of all, of any property, facility or service which each would have the power to own, operate or perform separately.

MCL 124.1(a) defines a municipal corporation, for purposes of MCL 124.2, as including townships.

In April 2002, Star Township (defendant here) brought suit requesting, among other things, that the court find that it had the right to unilaterally terminate the Amended Agreement. The court granted summary disposition to Chestonia Township (plaintiff here) on another basis and never reached this question. When Chestonia Township filed the present case in January 2003, defendant then brought a counter-complaint again raising this question.

At the conclusion of trial, the court concluded that defendant had the authority to unilaterally terminate the Amended Agreement because the agreement constituted a perpetual agreement and that such agreements were void as against public policy. We find that the Amended Agreement is not a perpetual agreement. Neither party nor the trial court has cited any

legal authority defining what constitutes a perpetual contract, and we have found no case law providing such a definition.[3] Black's Law Dictionary, however, defines "perpetual" as meaning "[n]ever ceasing; continuous; enduring; lasting; unlimited in respect of time; continuing without intermission or interval." Black's Law Dictionary (6th ed), at 1140. It further defines the term "in perpetuity" as meaning of "[e]ndless duration; lasting; forever." *Id.*, at 791.

The Amended Agreement does not state that it is unlimited or never to cease. Rather, the Amended Agreement states, "This agreement shall commence on date here in [sic] and continue *until* both Townships deem it unfeasible." Our Supreme Court addressed a similar issue and found that a contract stating "that it would remain in 'full force and effect indefinitely, unless terminated at an earlier date'" had a definite term because use of the word *unless* provided a means for termination. *Lichnovsky v Ziebart International Corp*, 414 Mich 228, 234, 240; 324 NW2d 732 (1982). The contract here contains a similarly limiting provision: the Amended Agreement may terminate when both parties believe the agreement is not feasible.

An analysis under general principles of contract interpretation arrives at the same result. The primary goal of contract interpretation is to enforce the parties' intent. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Where the language used is clear, interpretation and enforcement are limited to that language. *Id*., 656-657. Parties are presumed to understand and intend what the language employed clearly states. *Id*., 656. Therefore, this Court enforces a contract as written if there is only one possible interpretation. *Morley*, *supra* at 465.

Here, as noted, the contract clearly provides that it is to continue until both townships deem it unfeasible, and it is terminable only "by the unanimous consent of the Townships." The only possible interpretation is that Star Township therefore lacked the authority to unilaterally terminate the Amended Agreement.

IV. REMAINING ISSUES

In light of our decision in the previous issue we need not decide whether the trial court erred in allowing the Star Township Board to divert tax revenues to be used for an independent Star Township fire department and not for the joint fire district or whether the trial court erred in failing to apply the doctrine of equitable estoppel to require the enforcement of the Amended Agreement between the parties.

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[3] The term "perpetual contract" is found in two published Michigan cases – both from the nineteenth century. In *Lewis v Weidenfeld*, 114 Mich 581, 593; 72 NW 604 (1897), our Supreme Court simply reported that a witness had testified that a contract "was perpetual, because it was based upon a perpetual contract." In *Horner v Eaton Rapids*, 122 Mich 117, 120-121; 80 NW 1012 (1899), our Supreme Court again used the term "perpetual contract," but apparently used it as a synonym for "permanent contract." Neither case made any apparent attempt to define the term.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Karen Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette