

STATE OF MICHIGAN
COURT OF APPEALS

JOHN L. DRUMMY, JR., As Successor Trustee of
the WILLIAM P. CLARK TRUST DATED
AUGUST 25, 1987,

UNPUBLISHED
February 11, 2003

Plaintiff-Appellant,

v

WALL CO., INC.,

No. 235307
Oakland Circuit Court
LC No. 00-025670-CK

Defendant-Appellee.

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Factual and Procedural History

The facts in this case are undisputed. Defendant was a closely held family business involved in the manufacture and application of hard surfacing materials. The outstanding shares of defendant's stock were owned by four people: William P. Clark, Sr. ("Clark Sr."), who was defendant's Chairman of the Board and Chief Executive Officer, and his children, William P. Clark, Jr. ("Clark Jr."), Christine C. Drummy ("Christine"), and Marilyn C. MacMillan ("Marilyn"). On August 25, 1987, Clark Sr. set up a trust called the William P. Clark Trust ("the trust"). Upon the death of Clark Sr., his shares in the defendant corporation would be transferred to the trust.

On December 23, 1997, defendant's four stockholders entered into the Wall Co. Incorporated Restated Stockholder Agreement (the "RS Agreement"). The RS Agreement provided in part that upon the death of Clark Sr., the stock owned by Christine, and Marilyn, and the trust was to be purchased by defendant in accordance with the method for determining the price of the stock contained in paragraph seven of the RS Agreement. The RS Agreement was put in place to move Wall Co., Inc., stock from the trust to the defendant corporation in an orderly manner, so that ultimately, Clark Jr. would be the sole shareholder of the defendant corporation and, as trust beneficiaries, Christine and Marilyn would benefit from money paid by the defendant corporation to the trust. Paragraph seven of the RS Agreement, provided, in pertinent part:

The purchase price for each share of Stock shall be equal to the Corporation Fair Market Value divided by the total number of shares of Stock then outstanding and then reduced by all appropriate minority, lack of marketability, or other discounts available with regard to the Stock being valued. The legal representative of Clark, or Clark, Jr., as the case may be (the “Selling Stockholder”), and the Corporation shall promptly appoint a mutually acceptable qualified independent appraiser experienced in valuing closely-held businesses in Michigan similar in nature to the Corporation (an “Appraiser”) to provide the Corporation Fair Market Value and determine the appropriate discounts. If the Selling Stockholder and the Corporation are unable to agree upon an Appraiser within twenty (20) days after the Notice Date, the Selling Stockholder and the Corporation shall each select an appraiser. If either party does not select an appraiser within such period, then the Corporation Fair Market Value shall be determined solely by the appraiser selected by the other party. If the event that two appraisers are selected, the two appraisers shall select a third appraiser, or, if they are unable to agree within five (5) days of their appointment, the American Arbitration Association shall select a third appraiser. The Appraiser appointed pursuant to the foregoing procedure shall be required to determine the Corporation Fair Market Value and appropriate discounts and shall be required to deliver such determination in writing within sixty (60) days after appointment, and such determination shall be final and binding upon the parties. . . .

Clark Sr. died on April 27, 1998, and was survived by his three children. Charles M. Bayer, Clark Sr.’s brother-in-law and a member of defendant’s board of directors, became the trustee to the trust. At the time of Clark Sr.’s death, there were one thousand outstanding shares of defendant’s stock: Clark Sr. owned 476, Clark Jr. owned 424, Christine owned fifty, and Marilyn owned fifty.

In June or July 1998, an agent for defendant called the accounting firm Coopers & Lybrand, LLP (“Coopers & Lybrand”) (now PricewaterhouseCoopers, LLP [“PwC”]), to see if it could appraise defendant’s stock. Steven J. Shanker, a partner for Coopers & Lybrand, had previously done work for defendant valuing its stock. Bayer and defendant agreed to hire Shanker perform the appraisal for \$18,000, plus expenses. Shanker performed the work and appraised defendant’s stock as of December 31, 1997, at \$8,000 a share. Defendant paid PwC for Shanker’s services and Bayer reimbursed defendant for half of PwC’s fee. Bayer never objected to the appointment of Shanker as the appraiser for defendant’s stock and never objected to the \$8,000 a share value established by Shanker. Pursuant to the RS Agreement, Christine and Marilyn sold their shares of stock to defendant for \$8,000 a share. On March 1, 2000, Christine and Marilyn, the beneficiaries of the trust, removed Bayer as trustee and replaced him with plaintiff as successor trustee.

On August 29, 2000, plaintiff filed a complaint against defendant, alleging, *inter alia*, that defendant breached the RS Agreement by failing to appoint a qualified independent appraiser. Plaintiff alleged that Shanker was not a qualified independent appraiser because he had handled defendant’s accounting work in the past.¹ Defendant filed a motion for summary

¹ Count II (breach of contract—failure to distribute income) and Count III (accounting) of
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disposition of Count I of plaintiff's complaint pursuant to MCR 2.116(C)(10), arguing that plaintiff was bound by the actions of his predecessor trustee, Bayer, who waived the trust's option to select a different appraiser and ratified the parties' mutual appointment of Shanker. Plaintiff also moved for summary disposition, arguing that defendant violated the RS Agreement by failing to hire an independent qualified appraiser to value the stock. On June 13, 2001, the trial court entered an order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition.

II. Analysis

Plaintiff first argues that he is not bound by the actions of his predecessor trustee, Bayer, who agreed to have PwC appraise the stock. Plaintiff does not dispute that a successor trustee steps into the shoes of his predecessor trustees and is bound by their actions. *Wood v Potter*, 291 Mich 203, 211; 289 NW 131 (1939). However, plaintiff argues that he is not bound by the actions of Bayer because Bayer had a conflict of interests when the appraiser was chosen. Plaintiff argues that Bayer had an inherent conflict of interests because he was the trustee to the trust and was a member of defendant's board of directors when the appraiser was chosen. Defendant does not dispute the fact that Bayer had a conflict of interests.

Plaintiff fails to cite any law to support its argument that a successor trustee is not bound by the acts of his predecessor if the predecessor had a conflict of interests.² This Court will not search for law to sustain a party's position where the party fails to cite any authority supporting its claim. *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 635 NW2d 339 (2001). We decline to address this argument because it has not been properly presented for appeal. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).³

Plaintiff also argues that the fact that Bayer agreed to Shanker as the appraiser does not act as a waiver with respect to plaintiff's right as the successor trustee to object to Shanker as the appraiser. Plaintiff points to paragraph twenty-one of the RS Agreement, which provides:

Waiver. Failure of either party to insist in any one or more instances upon performance of any of the terms or conditions of this Agreement shall not be construed as a waiver of future performance of any such term, covenant or condition, but the obligations of either party with respect thereto shall continue in full force and effect.

This provision of the RS Agreement does not apply to the situation at hand because it refers to waiver of *future* performance of the terms of the RS Agreement. At issue in this case, however,

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plaintiff's complaint were dismissed by stipulation of the parties. Defendant filed a counterclaim against plaintiff, alleging that plaintiff breached the RS Agreement, but defendant's counterclaim was also dismissed by stipulation of the parties.

² The only law cited by plaintiff is two federal district court cases explaining when a "minority discount" may be applied in determining the value of stock.

³ Plaintiff does *not* argue that Bayer lacked the authority to appoint an appraiser.

is the *past* performance of the predecessor trustee in choosing the appraiser. Therefore, plaintiff is bound by the actions of his predecessor trustee. *Wood, supra*.

Plaintiff also argues that defendant violated the RS Agreement by failing to appoint an independent appraiser. We disagree. First, the RS Agreement contains no definition of what constitutes an “independent” appraiser. The fact that Shanker, working for PwC, had done work for defendant in the past does not necessarily mean that he was not an “independent” appraiser under the RS Agreement. Moreover, whether Shanker was an independent appraiser is irrelevant because the appraisal is final and binding on the parties. By agreeing to appoint Shanker as the appraiser, Bayer and defendant opted not to each select their own appraiser. The RS Agreement provides that when the appraiser delivered the appraisal, “such determination shall be final and binding upon the parties.” Bayer never challenged Shanker as the appraiser and Shanker appraised the stocks at \$8,000 a share. Under the RS Agreement, this appraisal is final and binding on the parties.

Plaintiff argues that the “final and binding” clause in the RS Agreement does not apply to this case because the parties did not comply with the RS Agreement in appointing the appraiser. Paragraph seven of the RS Agreement provides, “The Appraiser *appointed pursuant to the foregoing procedure . . .*” must make the appraisal and deliver it to the parties within sixty days, “and such determination shall be final and binding upon the parties.” (Emphasis added.) The language of the RS Agreement should be given its plain ordinary meaning and technical and constrained construction should be avoided. *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). We conclude that the “final and binding” clause of the RS Agreement applies because the appraiser was appointed pursuant to the procedure set forth in paragraph seven of the RS Agreement. In conformity with the procedure set forth in the RS Agreement, defendant and Bayer agreed upon a mutually acceptable appraiser. As discussed, there is no indication that the appointed appraiser was not “independent” within the meaning of the RS Agreement. Even if Shanker was not “independent,” Bayer agreed to Shanker as the appraiser and plaintiff is bound by the decisions of Bayer as the predecessor trustee. Therefore, because Shanker was appointed through the procedures set forth in the RS Agreement, his appraisal is final and binding on the parties.

Finally, plaintiff argues that the appraisal completed by Shanker was flawed because it inappropriately attached a minority discount to shares to be sold pursuant to the RS Agreement despite the fact that the RS Agreement contemplated a sale of a majority of the shares of stock. Plaintiff argues that because the interest being sold pursuant to the RS Agreement was greater than fifty percent, Shanker should not have applied a minority discount in appraising the stock. Paragraph seven of the RS Agreement provides that the purchase price for the stock shall be determined “and then reduced by all *appropriate* minority, lack of marketability, or other discounts available with regard to the Stock being valued.” (Emphasis added.) Shanker reduced the purchase price of the stock by what he believed was an appropriate minority discount. Even if Shanker inappropriately reduced the purchase price of the stock with a minority discount, the RS Agreement plainly provides that the appraiser’s determination of the fair market value of the stocks was “final and binding” on the parties. Plaintiff may not challenge the methodology used by the appraiser in the face of this clear contractual language. To allow plaintiff to challenge the appraiser’s methods for the reason that “the procedure in Paragraph 7 of the [RS] Agreement for

determining the Fair Market Value of the shares was not followed”⁴ would render the “final and binding” language of the contract meaningless.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette

⁴ Plaintiff’s Brief on Appeal, p 11.