RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000606-MR

INVENSYS, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULZ GIBSON, JUDGE
ACTION NO. 04-CI-006830

HENRY VOGT MACHINE COMPANY;
TUBE ICE, LLC; VOGT ICE, LLC;
ICELEASE PARTNERS, LTD.;
TURBO MARINE REFRIGERATION, LTD.;
TURBO RFRIGERATION, LLC; HENRY
VOGT MACHINE CO., D/B/A VOGT
FORGE & DIE; VOGT HOLDING CORPORATION;
AND UNISTAR, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES, BUCKINGHAM,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Invensys, Inc. appeals from a summary judgment granted by the Jefferson Circuit Court in favor of Henry Vogt Machine Co., wherein the court found that no material issues of fact existed with regard to Vogt's claim that Invensys was not entitled to indemnification under a prior contract to which it was not a party. After careful review, we affirm.

In 1996, Henry Vogt Machine Co. (hereinafter "Vogt") sold the assets of its Valve & Fitting Division to an entity known as 1880 Acquisition Corporation (hereinafter "1880"). Vogt and 1880 signed an Asset Purchase Agreement (hereinafter "APA"), which provided that Vogt would indemnify the "Buyer," 1880, for product liability claims arising from valves manufactured by Vogt before the date of the closing. This provision was included primarily to deal with lawsuits wherein plaintiffs alleged they were injured by asbestos contained in Vogt products. The APA allowed the "Buyer" to transfer its rights under the contract, since that entity was merely a shell corporation for one of Vogt's long-standing competitors, Edward Valves, Inc. The APA stated that any other assignments of rights, however, required the express written consent of Vogt.

After the execution of the APA, 1880 changed its name to Vogt Valve Company and two years later was merged into Edward Valves, Inc. The

[1] Senior Judge David C. Buckingham, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Certificate of Merger between Vogt Valve Company and Edward Valves, Inc. demonstrated that the surviving company was Edward Valves, Inc., with the assets, rights and obligations of Vogt Valve Company passing to Edward Valves, Inc.

At the time the APA was executed, a company called BTR Dunlop, Inc. was the indirect parent of 1880's parent, Edward Valves, Inc. In turn, BTR Dunlop, Inc. was a wholly owned direct subsidiary of BTR Dunlop Holdings (Delaware) Inc., which was a wholly owned subsidiary of BTR International Limited, which was a wholly owned direct subsidiary of BTR plc, a British company. In February 1999 BTR plc entered into a stock transaction with another British company, Siebe plc, merging the two companies to form BTR Siebe plc. Within a few months, the new company changed its name to Invensys plc.

Edward Vogt Valve Company operated as a stock-held subsidiary of BTR Dunlop, Inc. until March 2002. At that time, Invensys plc entered into a Purchase and Sale Agreement with Flowserve Corporation, from which it appears that Flowserve Corporation purchased all the stock in Edward Vogt Valve Company, which had converted into Edward Vogt Valve, LLC. In May 2002, Edward Vogt Valve LLC was merged into Flowserve US, Inc. In the Flowserve transaction, Invensys plc agreed to retain liability for its asbestos claims brought against Flowserve. Invensys plc agreed to defend, indemnify, and reimburse Flowserve with respect to the retained liabilities.

In the Flowserve transaction, Invensys, Inc. claims there was an error. Since Invensys plc retained the asbestos liabilities for the Vogt asbestos-containing

products, Invensys plc needed to retain the companion rights to indemnity for those products from Vogt. Invensys, Inc. argues now that this error was corrected when Flowserve Corporation reassigned the rights to indemnity from Vogt back to Invensys plc as of February 21, 2003. In April 2004, Invensys plc assigned the rights to indemnity from Vogt to Invensys, Inc., its U.S. subsidiary, and the Appellant herein.

Invensys, Inc. filed its complaint on August 12, 2004, in the Jefferson Circuit Court. The complaint alleged that Invensys, Inc. is the assignee of 1880's rights under the APA, and that Invensys, Inc. currently is a defendant in asbestos lawsuits for which Vogt is obligated to indemnify it under the APA. Invensys, Inc. demanded indemnity from Vogt and alleged that it was entitled to an accounting and constructive trust as to all of Vogt's assets, including those Invensys, Inc. claimed had been fraudulently conveyed to the other Defendants in violation of the contract. After brief discovery revealed that Invensys, Inc. claimed to have acquired rights under the APA through a series of corporate transactions, mergers, acquisitions and assignments, Vogt filed its motion for summary judgment.

Several months after Vogt moved for summary judgment, Invensys, Inc. amended its complaint to allege that it was also entitled to common law indemnity from Vogt. The Jefferson Circuit Court ruled in favor of Vogt on its motion for summary judgment on December 28, 2006. In its order, the court stated that it considered only express indemnity, meaning that it considered the contractual indemnity Invensys, Inc. claimed it was entitled to in the original

complaint. The court found that that the entire agreement, when read as a whole, demonstrated the contract's assignability did not rise to the level of a negotiable instrument, as Invensys, Inc. had essentially argued. Thus, Invensys, Inc. was not entitled to indemnification from Vogt under the terms of the APA.

Invensys, Inc. moved for reconsideration on the merits and asserted that the order of the court was not properly final and appealable since it dispensed of the other Defendants' claims based on only Vogt's motion for summary judgment. They also argued that Vogt's motion had not addressed the common law indemnity claim and thus that the court had improperly dismissed the common law claims which were not properly before it. With its motion for reconsideration, Invensys, Inc. tendered an exhibit, which was a new assignment it claimed would repair all the holes in the assignment of rights. This assignment was dated January 4, 2007, and purported to transfer indemnity rights from Flowserve US, Inc. to Invensys, Inc.

On February 21, 2007, the Jefferson Circuit Court denied the motion for reconsideration on the merits and stated that Invensys, Inc. had no basis for its common law indemnity claim and no rights against the other Appellees in light of the summary judgment resolving the contractual indemnity issue in favor of Vogt, thereby disposing of all claims. This appeal followed.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres*

v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. We are mindful that "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Invensys, Inc. first argues that the December order of the trial court violated CR 54.02. Invensys, Inc. claims that the trial court failed to make findings that its order disposed of all claims against all parties or that it disposed of separate claims against a party which are amenable to final judgment. Invensys, Inc. also argues that the court did not properly adhere to the requirements of CR 54.02(1) and KRS 22A.020(1), by failing to use the required language: "there is no just reason for delay." Vogt argues that this argument is futile, given that the February order issued in response to Invensys, Inc.'s motion for reconsideration disposed of all claims.

CR 54.02 states:

> (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties.

We agree with Vogt that this argument is futile, given the subsequent February order, which clearly disposed of all claims against all parties. In the February order, the court explained that by disposing of the contractual indemnity claim, the court had previously disposed of the common law indemnity claim and the fraudulent conveyance claim, given that such claims were dependent upon the contractual indemnity claim. The court explained that Invensys, Inc. would have to prevail on the contractual indemnity claim against Vogt in order to get to the common law indemnity and/or fraudulent conveyance claims. Likewise, Invensys, Inc. would have to prevail on its contractual indemnity claims against Vogt in order to obtain a claim against the other seven Defendants, given that they were not parties to the original contract. The court found that as it had already decided in the December order that there were no genuine issues of material fact and Vogt was entitled to judgment as a matter of law with regard to the contractual indemnity claims, the remaining claims against Vogt and the other Defendants were without merit. As such, it was appropriate for the court to make its original December order final and appealable. We agree. Thus, while the court perhaps did not explain fully its reasoning in the December order, any misconceptions were clearly explained in the February order, and the alleged error in the December order was harmless.

Invensys, Inc. next argues that the trial court violated its rights to due process by *sua sponte* addressing important issues of law. Invensys, Inc. cites

Storer Communications of Jefferson Cty. v. Oldham Cty. Bd. Of Educ., 850 S.W.2d 340, 342 (Ky.App. 1993) for the proposition that there is

> no authority that allows a trial court to circumvent the civil rules and enter summary judgment *sua sponte* where the legal issues have not been submitted for determination.... It is fundamental that a trial court has no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard.

Invensys, Inc. argues that the issues decided by the trial court were not properly before it. In *Storer*, the court overruled several motions and, "without notice to any of the parties, without a motion for dismissal by any party, without briefs or arguments on the issues" entered an order granting one party judgment on the merits. *Id.* at 341. We do not find what the trial court did here to be anywhere near the realm of dismissing the case on its own accord and granting judgment on the merits to one party without any proper motions for such a judgment. Instead, the court ruled on Vogt's motion for summary judgment, which was properly before it and had been fully briefed by the parties.

Specifically, Invensys, Inc. alleges that the court *sua sponte* held in the December order that Edward Vogt Valve ceased to exist when it was sold to Flowserve Corporation in March 2002. Vogt responds that Invensys, Inc. misconstrues the holding of the trial court, in that the trial court found the merger of Edward Vogt Valve into Flowserve US, Inc. to be the critical event not the sale to Flowserve US, Inc. The trial court found that merger, with Flowserve being the surviving entity, to be what terminated the existence of Edward Vogt Valve. Vogt

further argues that in no way can the trial court's decision be *sua sponte* because Vogt had previously made the same argument in its summary judgment briefing.

We agree with Vogt that the trial court properly looked at the series of mergers and acquisitions to determine whether Invensys, Inc. was entitled to indemnification under the contract. Given the provisions of the APA stating that only the buyer was allowed to assign its rights under the contract, the court properly addressed the issue of when the buyer ceased to exist for purposes of the APA. Such a decision is not *sua sponte* and was properly addressed by the court.

Invensys further claims that the court *sua sponte* held that section nineteen of the APA cancelled out sections thirteen and twenty and that the court improperly looked to the agreement to determine whether Invensys, Inc. was a beneficiary as designated in section nineteen. Invensys, Inc. argues that it never asserted indemnification rights based on a beneficiary status and instead that it consistently invoked sections thirteen and twenty of the APA directly. Invensys, Inc. argues that the unwarranted focus of the trial court on Invensys' purported beneficiary status led the court to improperly consider section nineteen of the APA, which it argues that neither itself nor Vogt ever invoked in its arguments or briefing. Vogt responds that the trial court did not use section nineteen to cancel out the other applicable sections, but instead that the court agreed with Vogt's interpretation of sections thirteen and twenty and then looked at the APA as a whole to determine if any other part of the contract would weigh against that

interpretation. Vogt argues that this was not *sua sponte* conduct when Vogt's entire motion for summary judgment was based on the construction of the APA.

We also agree that the trial court properly looked to the contract as a whole to give effect to every provision and word whenever possible. Accordingly, the trial court's determinations that the Buyer ceased to exist with the Flowserve transaction and that the provisions of the contract, when read as a whole, did not provide indemnity to Invensys, Inc. were not issued *sua sponte*.

Invensys, Inc. further contends that the trial court *sua sponte* terminated Vogt's obligations for retained liabilities in its December order. The central issue before the court on that motion was whether Vogt must indemnify Invensys, Inc. for liabilities arising from the valves. The court deciding this issue in favor of Vogt does not render the issue *sua sponte*. The Court found Invensys, Inc. to be a third party to the contract and accordingly held that it was not entitled to indemnification from Vogt. Invensys, Inc. now argues that this improperly extinguished Vogt's retained liabilities under the APA. We find that the decision that the "Buyer" ceased to exist as of the Flowserve transaction and the subsequent finding that Vogt's retained liabilities were extinguished were necessary elements of the court's ultimate decision in the summary judgment, and accordingly, were not addressed *sua sponte*.

Next, Invensys, Inc. argues that the court *sua sponte* ruled in its February order that a party must have contractual indemnity to proceed on claims for common law indemnity and that the court erroneously dismissed the remaining

Defendants from the action. Again, Invensys, Inc. misconstrues the court's findings. The February 2007 order states, "[t]he Court is of the opinion that the common law indemnity and fraudulent conveyance claims are dependent upon the contractual indemnity claim, in that Plaintiff would have to prevail on the contractual indemnity claim against Vogt in order to be able to get to the common-law indemnity and/or fraudulent conveyance claims." The court did not issue a general statement that all common law indemnity claims must first be predicated by contractual indemnity. Instead, the court found that the facts of this case did not fall into a common law indemnity situation.

In *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775 (Ky. 2000), the Kentucky Supreme Court held that common law indemnity "survived the advent of comparative negligence and apportioned liability," and recognized that common law indemnity arises in two classes of cases:

> 1) [w]here the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury.

Id. at 777. Clearly, the second category does not apply to the facts of this case. Looking at the first theory, there is no master/servant relationship between Invensys, Inc. and Vogt and thus common law indemnity would only be triggered by a theory of constructive liability. Invensys, Inc. does not provide any proof that

any such constructive liability or master/servant relationship existed between itself and Vogt, and accordingly the court properly determined that common law indemnity was not appropriate in this context.

Furthermore, the trial court's December 2006 order indicates that the parties here were sophisticated parties who, at the time the APA was created in 1996, were both aware of the risks of asbestos litigation and this awareness should have been incorporated into the agreement. Kentucky courts generally allow corporations to allocate risks among themselves via contractual indemnity, rather than applying common law indemnity.

We additionally find that the court did not improperly dismiss Invensys, Inc.'s fraudulent conveyance claims. Because the court found that Invensys, Inc. was not entitled to contractual immunity, the issue of whether Vogt fraudulently conveyed its assets in violation of the APA was rendered moot. Invensys, Inc. argues that the trial court erred in determining that a contractual indemnity claim was a prerequisite to a claim for fraudulent conveyance. However, the trial court simply found that to be the case under these specific facts and did not make a sweeping general legal assertion. We agree with the trial court's analysis and find no error.

Invensys, Inc. next argues on appeal that it has obtained indemnity rights under the APA as a matter of law and that the trial court misread and misapplied critical and unambiguous provisions of the agreement. The crux of this argument is that section 13.A.(1) of the APA is a self contained provision because

of the language "except as otherwise limited by Section 13..." Vogt shall defend, indemnify and reimburse all losses "suffered or incurred by Buyer, any successors or assigns thereto..." Under Invensys, Inc.'s interpretation, the APA contemplates that the protected parties include 1880 and *any* successors or assigns and that such parties shall be entitled to protection from Vogt for retained liabilities.

Vogt argues that section 13.A creates an indemnification obligation on Vogt in favor of the "Buyer," which extends to the "Buyer's" successors and assigns. However, it maintains that a separate section of the APA, section twenty, explicitly addresses the issue of assignments. Section twenty states that to be effective, any assignment of rights under the APA requires the express written consent of the opposite party, which Invensys, Inc. never sought. Vogt argues that section twenty carves out an exception to allow 1880, a shell corporation, to transfer its rights and obligations without express written consent, which was necessary because the contracting parties knew of 1880's pending extinction at the hand of its parent, Edward Valves, Inc.

"In the absence of an ambiguity a written instrument will be enforced strictly according to its terms, and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence." *Frear v. P.T.A. Industries Inc.*, 103 S.W.3d 99, 106 (Ky. 2003). In interpreting a contract, the court should give effect to the actual written terms of the agreement, giving effect to all parts and every word in it, if possible. *See City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986); *Cantrell Supply Inc. v. Liberty Mut.*

Ins. Co., 94 S.W.3d 381, 384-5 (Ky.App. 2002). Section twenty of the APA is entitled "Parties in Interest; Assignment" and states:

> All covenants and agreements contained in this Agreement by or on behalf of any of the parties to this Agreement shall bind and inure to the benefit of their respective heirs, executors, successors, and assigns, whether so expressed or not. No party to this Agreement may assign its rights or delegate its obligations under this Agreement to any other person or entity without the express prior written consent of the other party, except that *Buyer* may assign its rights and delegate its obligations to a subsidiary, affiliated or unaffiliated corporation of *Buyer*, provided that such assignment and delegation shall not relieve Buyer of its obligations under this Agreement.

(Emphasis added). The plain terms of the contract indicate that the "Buyer" may assign its rights, but that anyone who steps into the shoes of 1880 (even including Edward Valves, Inc.) is not the "Buyer" and must have Vogt's express prior written consent to any transfer of rights or obligations under the APA. If we were to rely solely on section 13.A, as Invensys, Inc. would have us do, it would render section twenty useless and the contracting parties obviously included it for a reason. Kentucky courts are not permitted to add to or disregard portions of contracts which have been previously agreed upon by the contracting parties. *See L.K.Comstock & Co., Inc. v. Becon Const. Co.*, 932 F.Supp. 948 (E.D.Ky. 1994)(finding that courts are obligated to read the parts of the contract as a whole and must seek interpretations which promote harmony between such provisions).

In its December order, the trial court found section nineteen of the APA to limit Invensys, Inc.'s rights under the agreement. Section nineteen is

entitled "Third Party Rights" and states, "[i]t is the intention of the parties that nothing in this Agreement shall be deemed to create any right with respect to any person or entity not a party to this Agreement." We find that the trial court's reliance on this provision demonstrates that they considered the other applicable sections and the contract as a whole to determine that Invensys, Inc. was not entitled to indemnity as it was not the "Buyer," nor had its predecessors sought out the appropriate permission from Vogt to assign the rights under the contract. Accordingly, as the trial court so treated it, it was a third party to the contract and thus did not have any rights under the APA.

Invensys, Inc. next argues the trial court improperly relied on section nineteen over section 13.A, arguing that section nineteen is a general provision, while section 13.A is specific. Invensys, Inc. contends that a specific contractual provision should prevail over a general one. *See* Restatement of Contracts 203(c) (1979); *see also L.K. Comstock & Co., Inc. v. Becon Const. Co* ., 932 F.Supp. 948, 967 (E.D.Ky.1994) *and American Bridge Co. of New York v. Glenmore Distilleries Co.*, 107 S.W. 279 (Ky. 1908). Invensys, Inc. claims that section 13.A is more specific than either section nineteen or section twenty. We disagree. Section thirteen explains the indemnification provisions and section twenty explains the assignment provisions, and if anything, is more specific than section thirteen, in that it limits the indemnification Vogt will provide unless it gives permission to the assignments. Therefore, we find no error.

Invensys, Inc. next contends that under Kentucky and Delaware law, mergers of all types are permitted and the successor entities receive all rights of the predecessor entities. Both parties agree that Delaware law applies, as both 1880 and Edward Valves, Inc. were Delaware corporations. Invensys, Inc. argues that "the rights, privileges, powers and franchises of the constituent corporations pass upon merger." *See* 8 Del. C 259; *see also Heit v. Tenneco Inc.*, 319 F.Supp. 884, 887 (D. Del. 1979) (providing that when a merger becomes effective all assets of the merged corporation, including any causes of action which might exist on its behalf, pass by operation of law to the surviving company). However, we find the case sited by Vogt to be more directly on point. In *Mesa Partners v. Phillips Petroleum Co.*, 488 A.2d 107, 116 (Del. Ch. 1984), the court held "notwithstanding the Delaware merger statute, contractual obligations do not pass if the parties by their objective contractual language contemplated that such obligations would not pass." Given the provisions in section twenty of the APA, clearly the parties by their "objective contract language" did not contemplate that such obligations would pass beyond the initial merger of 1880 Acquisition Corp and Edward Valves. 1880's rights were assigned to Edward Valves, Inc. in the 1998 merger, but following the merger the "Buyer" identified in the APA ceased to exist. Edward Valves, Inc. was the surviving entity. At that point, under the terms of section twenty of the APA, any subsequent assignment of the right to indemnity or other rights under the agreement required Vogt's express prior written consent.

Invensys, Inc. alternatively argues that under Kentucky law, it is presumed that contract rights are freely assignable. Invensys, Inc. relies on *Managed Healthcare Assoc., Inc. v. Kethan*, 209 F.3d 923, 928 (6th Cir. 2000), which states "under Kentucky law it has long been recognized that a contract is generally assignable, unless forbidden by public policy or the contract itself..." (internal quotations omitted). The terms of the contract specifically prohibited assignment beyond the initial merger between 1880 and Edward Valves, Inc without express permission by Vogt. Accordingly, under either Kentucky or Delaware law, the contract was not feely assignable due to the explicit contractual language.

Finally, Invensys, Inc. argues that the trial court's decision will negatively affect commerce in Kentucky. This argument is devoid of merit. We do not see how upholding a contract between two sophisticated parties, which was the result of a bargained for exchange, will negatively affect Kentucky commerce.

Invensys, Inc.'s, remaining arguments are without merit or are rendered moot by our agreement with the trial court's determination that the explicit language of the contract prohibited assignment without Vogt's explicit permission, following the initial merger of 1880 with Edward Valves. Accordingly, for the foregoing reasons, the judgment of the Jefferson Circuit Court is hereby affirmed.

ALL CONCUR.

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