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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1420**

Leland Bertsch, et al.,
Appellants,

vs.

Charles Phillip Ehlen,
Respondent.

**Filed May 8, 2017
Reversed and remanded
Halbrooks, Judge**

Stearns County District Court
File No. 73-CV-14-4391

John L. Greer, Kelly A. Larson, Hughes Mathews Greer, P.A., St. Cloud, Minnesota (for appellants)

Christopher R. Grote, Jessica L. Meyer, Lindquist & Vennum PLLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellants challenge the district court’s dismissal of their breach-of-contract claim and denial of their posttrial motions for amended findings and conclusions and a new trial, arguing that the district court erred by (1) interpreting “permitted assigns” as an

unambiguous requirement that the non-assigning party to the purchase agreement must consent to an assignment, (2) sua sponte raising a new issue after the close of evidence at trial, (3) improperly shifting the burden of proving the validity of the assignment, and (4) concluding that the interpretation of “permitted assigns” was litigated at trial. Because we conclude that the term “permitted assigns” is ambiguous and that, when read in context, did not require the consent of the non-assigning party, we reverse and remand.

FACTS

In 1996, appellants Leland Bertsch and Thomas Dowhan, respondent Charles Philip Ehlen, and P.H. acquired property in Hawaii as tenants in common. Appellants and Ehlen each owned an undivided 28.57% interest in the property, and P.H. owned an undivided 14.29% interest in the property. P.H. died in 2011.

After attempts to sell P.H.’s interest in the property were unsuccessful, his estate commenced a partition action on the property in Hawaii and named appellants and Ehlen as defendants. Ehlen did not participate in the partition action, but appellants actively participated. P.H.’s estate engaged in ongoing negotiations to sell P.H.’s interest in the property.

While the partition action was pending, P.E., Ehlen’s son and a longtime business associate of appellants, entered into discussions with Ehlen about purchasing Ehlen’s interest in the property so that “he could assist in breaking the owners’ stalemate [in the partition action] and facilitate future development of the Property.” Ehlen and P.E. entered

into a purchase agreement for the sale of Ehlen's 28.57% interest in the property in July 2013.¹

The proposed closing date was January 6, 2014, which was 180 days after execution of the purchase agreement. The purchase agreement stated that Ehlen "hereby sells and agrees to convey to [P.E.], and assigns," his interest in the property. The purchase agreement also mentioned "permitted assigns" in two separate clauses:

6. No Third Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any person other than the parties hereto and their respective successors and permitted assigns.

7. Succession and Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

After further consideration and before the closing date, P.E. decided that he did not want an ownership interest in the property because it was too complicated and "a messy deal." Consequently, P.E. transferred to appellants his interest as buyer in the purchase agreement through an assignment agreement on December 13, 2013. Ehlen learned of the assignment on December 20, 2013, and did not consent to it.

In anticipation of closing and pursuant to the purchase agreement, appellants placed \$1,048,000 in escrow. Ehlen did not transfer his interest in the property to appellants.

Appellants filed suit against Ehlen for breach of contract, alleging that they had a right through a valid assignment to enforce the purchase agreement. They demanded

¹ Ehlen and P.E. entered into a "nearly identical" purchase agreement in May 2013, but this earlier agreement expired because they did not close within the required 60-day period specified in that agreement.

specific performance or damages. Following cross motions for summary judgment, the district court concluded that genuine issues of material fact existed concerning the validity of the assignment, appellants' readiness to close, appellants' entitlement to specific performance, and the purchase price if it awarded specific performance to appellants.

Following a bench trial, the district court dismissed appellants' claim with prejudice. The district court concluded that appellants were ready to close but, because it determined that the assignment was invalid, the district court denied specific performance and determined that appellants acquired no rights to enforce the purchase agreement. The district court interpreted the term "permitted assigns" in the purchase agreement to mean that Ehlen's consent was necessary for any assignment to be valid. Absent Ehlen's consent, the assignment was invalid. It also found that (1) on the date of closing, appellants were "ready, willing and able to proceed with the closing as scheduled," (2) Ehlen "did not make a good faith effort to complete the transaction," and (3) the collateral issues Ehlen raised "were pretexts."

Appellants moved the district court for amended findings of fact and conclusions of law or, in the alternative, for a new trial. The district court denied appellant's posttrial motions after a hearing. In its posttrial order, the district court concluded that the term "permitted assigns" was a valid and enforceable limitation on assignment because "permitted" sufficiently demonstrated the parties' intent to require consent of the non-assigning party to the purchase agreement. The district court also stated that appellants failed to prove an element of their claim—that they had a valid assignment—and because the issue was litigated at trial, appellants suffered no prejudice. This appeal follows.

DECISION

Appellants argue that the district court erred by finding that the term “permitted assigns” unambiguously requires consent from the non-assigning party to the underlying purchase agreement and that its interpretation is contrary to caselaw. “Contract interpretation is a question of law which we review de novo.” *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). “The determination of whether a contract is unambiguous depends on the meaning assigned to the words and phrases in accordance with the apparent purpose of the contract as a whole.” *Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010). “The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations.” *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). We are required “to construe a contract as a whole so as to harmonize all provisions, if possible, and to avoid a construction that would render one or more provisions meaningless.” *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001).

Here, the purchase agreement states that it “shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.” The agreement does not define the term “permitted assigns” or use it in any other context. The district court concluded that the term “permitted assigns” is unambiguous and interpreted it as a limited restriction on assignment that requires the non-assigning party to the purchase agreement to consent to an assignment.

Appellants argue that the term “permitted assigns” is ambiguous because it could mean either permitted by law or permitted by the assignor. “To permit” is defined as “[t]o

consent to formally; to allow (something) to happen [especially] by an official ruling, decision, or law” or to “allow or admit of <if the law so permits>.” *Black’s Law Dictionary* 1322 (10th ed. 2014) (emphasis added). We agree with appellants that the term “permitted assigns” is ambiguous in the context of this purchase agreement because it could either require consent from the non-assigning party or serve to limit potential assignees to those permitted by law.

“[W]here [contract] language is ambiguous, resort may be had to extrinsic evidence, and construction then becomes a question of fact for the jury, unless such evidence is conclusive.” *Bari v. Control Data Corp.*, 439 N.W.2d 44, 47 (Minn. App. 1989), *review denied* (Minn. July 12, 1989). We need not determine whether conclusive evidence demonstrates which reasonable interpretation the parties intended, because we conclude that the term “permitted assigns” by itself does not manifest the parties’ intent to restrict assignability. *See Lipka v. Minn. Sch. Emps. Ass’n, Local 1980*, 550 N.W.2d 618, 622 (Minn. 1996) (“[J]udicial restraint bids us to refrain from deciding any issue not essential to the disposition of the particular controversy before us.”).

The general rule in Minnesota is that contract rights are assignable unless prohibited by statute, by contract, or if “the contract involves a matter of personal trust or confidence.” *Travertine Corp.*, 683 N.W.2d at 270. An enforceable anti-assignment provision in a contract “defeat[s] an otherwise valid assignment.” *Stand Up Multipositional Advantage MRI, P.A. v. Am. Family Ins. Co.*, 889 N.W.2d 543, 548 (Minn. 2017). The purpose of an anti-assignment clause “is to protect the contracting party from dealing with parties he has not chosen to do business with.” *Travertine Corp.*, 683 N.W.2d at 271. While we do not

“require that the parties use specific terms to preclude assignment,” they must “include *something* expressing their intent that the contract not be assignable.” *Id.* at 272 (citing *Wilkie v. Becker*, 268 Minn. 262, 267, 128 N.W.2d 704, 707 (1964)). And if “a contract prohibits assignment in very specific and unmistakable terms, any purported assignment is void.” *Id.* at 273.

Here, the district court concluded, and Ehlen maintains, that the word “permitted” unmistakably manifests the parties’ intent to restrict assignment of the purchase agreement unless the non-assigning party to the purchase agreement consents. The district court held that “permitted” unambiguously indicates that permission is required and concluded that the parties must have intended the phrase to require the non-assigning party’s consent because the parties to the assignment would have already consented to the assignment. Appellants argue that this language is insufficient to constitute a restriction on assignment because the language does not sufficiently manifest such intent, and it “lack[s] the same specificity, clarity, context, and scope” as the *Travertine* anti-assignment clause. We agree.

In *Travertine*, the supreme court addressed whether an anti-assignment clause in a contract was valid and enforceable. *Id.* at 274. In its entirety, the anti-assignment clause in *Travertine* provided: “This Agreement shall be binding on the parties and their respective personal representatives, successors and assigns; provided, however, that the rights and obligations of Berkey/Lennon shall not be assignable except that Berkey may assign to Lennon or Lennon assign to Berkey such rights and obligations.” *Id.* at 269-70. The supreme court determined that “‘shall’ reflects mandatory imposition” and therefore

concluded that this language was enforceable because it was clear that the parties intended to restrict the power to assign rights under the management agreement. *Id.* at 272.

In *Stand Up*, the supreme court examined an anti-assignment clause in an insurance policy. 889 N.W.2d at 544, 548. That anti-assignment clause stated that “[i]nterest in this policy may not be assigned without [American Family’s] written consent.” *Id.* at 548 (first alteration in original). The supreme court concluded that this language “unambiguously demonstrates the intention of the parties that the benefits not be assigned.” *Id.*; see *Life Rehab Servs., Inc. v. Allied Prop. & Cas. Ins. Co.*, 616 F. Supp. 2d 924, 926, 928, 936 (D. Minn. 2007) (concluding that “may not . . . is no less mandatory” than “shall” in insurance policies).

Although the parties to an agreement need not include “specific terms” or “magic words” to create an anti-assignment provision, the moving party must demonstrate that the agreement contains some language “manifesting the intention of the parties that it shall not be assigned.” *Travertine*, 683 N.W.2d at 272. This generally includes language of mandatory imposition. *E.g.*, *Life Rehab Servs.*, 616 F. Supp. 2d at 936; *Stand Up*, 889 N.W.2d at 548; *Travertine*, 683 N.W.2d at 272. This purchase agreement contains no such language.

We also note that other jurisdictions have similarly concluded that the term “permitted assigns” by itself does not clearly manifest the parties’ intention to restrict assignment. *Cf. Citibank (S.D.), N.A. v. F.D.I.C.*, 857 F. Supp. 976, 981 (D.D.C. 1994) (concluding that “permitted assigns” limited assignment only because the contract contained a separate assignment and delegation clause that stated that “[n]o party may

assign this Agreement to or delegate any of its functions hereunder to any other party without the prior written consent of the other parties”); *Garden State Bldgs., L.P. v. First Fid. Bank, N.A.*, 702 A.2d 1315, 1321-22 (N.J. Super. Ct. App. Div. 1997) (concluding that “permitted assigns” required consent of the non-assigning party only because the clause immediately after stated that “[n]o party hereto shall assign this Letter Agreement . . . without the prior written consent of the other party hereto and any such assignment without such consent shall be void”); *Brown v. Osorio*, 26 Haw. 118, 119 (1921) (concluding that “permitted assigns” could not be construed as a restriction on assignment because a restriction must be clearly expressed). Although these cases do not bind us, we find them helpful in our analysis. See *Hinckley Square Assocs. v. Cervene*, 871 N.W.2d 426, 430 (Minn. App. 2015) (“Federal caselaw does not bind Minnesota courts”); *In re Welfare of Child of E.A.C.*, 812 N.W.2d 165, 174 (Minn. App. 2012) (“Though opinions from courts of other states are not binding on Minnesota courts, they may have persuasive value.”), *review denied* (Minn. Mar. 27, 2012).

We conclude that use of the term “permitted assigns” without additional restrictive language does not clearly manifest the parties’ intent to restrict assignment in the purchase agreement as *Travertine* requires. See 683 N.W.2d at 272. In the context of the entire purchase agreement, it is not clear that the parties intended to restrict assignment by requiring permission from the non-assigning party to the purchase agreement.

Appellants raise several other issues, including whether the district court improperly shifted the burden of proving the validity of the assignment and whether the district court’s interpretation of “permitted assigns” was litigated at trial. We do not reach these issues

because they are not dispositive. *See Lipka*, 550 N.W.2d at 622. But we do note the irregular manner in which the interpretation of the term “permitted assigns” was raised.

In their complaint, appellants alleged that P.E. assigned his rights under the purchase agreement by valid assignment. Ehlen denied this allegation in his amended answer, stating that he “lacks knowledge or information sufficient to form a belief about” the validity of assignment. At summary judgment, Ehlen only challenged the validity of the assignment by arguing that P.E. did not have donative intent. According to Ehlen, the only fact question at trial affecting the validity of the assignment was whether P.E. had the requisite donative intent. At no point did Ehlen argue that appellants lacked the right to enforce the purchase agreement because he did not consent to the assignment.

During trial, Ehlen testified that he did not grant permission to anyone for the assignment. Then, after the close of evidence and without prompting from either party, the district court stated, “I take it, [defense counsel], there is an issue on whether this Purchase Agreement was assignable in the first place without permission of Mr. Ehlen?” Ehlen’s defense counsel answered in the affirmative. At the posttrial motions hearing, the district court confirmed that it raised this issue sua sponte at the end of trial.

“[O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.” *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S. Ct. 2559, 2564 (2008) (quotation omitted); *see also State v. Hines*, 270 Minn. 30, 40, 133 N.W.2d 371, 378 (1964) (“Under the Anglo-American trial system, the parties and their counsel have the primary responsibility for finding, selecting and presenting evidence.”). And “we normally decide

only questions presented by the parties.” *Greenlaw*, 554 U.S. at 244, 128 S. Ct. at 2564 (quotation omitted). “Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation” *Arizona v. California*, 530 U.S. 392, 412-13, 120 S. Ct. 2304, 2318 (2000). Moreover, like a party, a district court should not raise a new issue *after trial*. See *Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971) (stating that a claim was made “too late” when made for the first time in a motion for a new trial); *Allen v. Cent. Motors*, 204 Minn. 295, 299, 283, N.W. 490, 492 (1939) (stating that an issue was raised “too late” when first raised in a motion for amended findings). Here, the district court should not have *sua sponte* raised the issue of consent in the purchase agreement at the end of trial when appellants had no meaningful opportunity to address it.

We conclude that the district court erred in finding that the term “permitted assigns” created an enforceable restriction on assignment and reverse its judgment and determination that the assignment was invalid. Because the district court found that appellants are entitled to specific performance if the assignment is valid, we remand to the district court for entry of judgment for appellants and calculation of the purchase price pursuant to the district court’s alternative conclusions of law, stated in paragraphs 7 and 8 of its order.

Reversed and remanded.