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Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: March 6, 2014 Decided: November 25, 2014)

Docket No. 13-1893-cv

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CHESAPEAKE ENERGY CORPORATION,

Plaintiff-Appellee,

v.

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,

Defendant-Appellant,

AD HOC NOTEHOLDER GROUP,

Intervenor.

----- X

Before: LEVAL, CARNEY *Circuit Judges*, and FAILLA, *District Judge*.*

Defendant Bank of New York Mellon Trust Company, N.A. appeals from the judgment of the United States District Court for the Southern District of New York (Engelmayer, *J.*) declaring that the March 15, 2013 notice of redemption issued by Plaintiff Chesapeake Energy Corporation was timely and effective to redeem certain senior notes on May 15, 2013 at the Special Price of 100% of the principal amount, plus accrued and unpaid interest to the date of redemption. The Court of Appeals (Leval, *J.*) concludes that, under the unambiguous terms of the indenture, the notice was not timely to redeem the Notes at the Special Price, as such a redemption needed to be concluded no later than March 15, 2013, with 30 to 60 days prior notice. The judgment of the district court is therefore REVERSED and the case REMANDED with instructions to consider whether the notice operates as a notice of redemption under another provision of the indenture.

* The Honorable Katherine Polk Failla of the United States District Court for the Southern District of New York, sitting by designation.

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1 Judge Failla dissents by separate opinion.

2 ROY T. ENGLERT, JR. (Mark T. Stancil & Erin C.
3 Blondel, *on the brief*), Robbins, Russell, Englert,
4 Orseck, Untereiner & Sauber LLP, Washington, DC,
5 for *Defendant-Appellant*

6 RICHARD F. ZIEGLER (Stephen L. Ascher, Ali M.
7 Arain, Anne Cortina Perry & Michael W. Ross, *on the*
8 *brief*), Jenner & Block LLP, New York, New York, for
9 *Plaintiff-Appellee*

10 LEVAL, *Circuit Judge*:

11 Defendant Bank of New York Mellon Trust Company, N.A. (“BNY Mellon”) appeals from
12 the judgment of the United States District Court for the Southern District of New York
13 (Engelmayer, *J.*) declaring that the Notice of Special Early Redemption issued by plaintiff
14 Chesapeake Energy Corporation (“Chesapeake”) on March 15, 2013 was timely and effective to
15 redeem certain senior notes (the “Notes”) at the “Special Price” of 100% of the principal amount,
16 plus interest accrued to the date of redemption. Joint App’x (“JA”) at 730, *Chesapeake Energy*
17 *Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*, No. 13-1893 (Aug. 23, 2013). BNY Mellon brings
18 this appeal in its capacity as indenture trustee for the benefit of the noteholders.

19 After an expedited bench trial, the district court adopted Chesapeake’s argument, construing
20 the Ninth Supplemental Indenture (the “Supplemental Indenture”), which governed the Notes, as
21 unambiguously authorizing Chesapeake to redeem the Notes at the Special Price by giving notice of
22 redemption during the Special Early Redemption Period—between November 15, 2012 and March
23 15, 2013—and redeeming the Notes 30 to 60 days thereafter. BNY Mellon contends that the
24 Supplemental Indenture authorized Chesapeake to redeem the Notes at the Special Price only if the
25 redemption would be accomplished within the Special Early Redemption Period, i.e., no later than
26 March 15, 2013, with notice of 30 to 60 days given during the Special Early Redemption Period.

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1 We agree with BNY Mellon. Accordingly, we reverse the judgment and remand for consideration
2 of Chesapeake's second claim for declaratory relief.

3 BACKGROUND

4 a. Factual Background

5 In February 2012, Chesapeake issued \$1.3 billion in senior notes due on March 15, 2019
6 bearing an interest rate of 6.775%. The Notes were issued under two indentures—a pre-existing
7 Base Indenture, dated August 2, 2010, which applied to several series of notes, and the
8 Supplemental Indenture, dated February 16, 2012, which specifically governed this series. JA at
9 309, 726.

10 This dispute centers on the meaning of § 1.7 of the Supplemental Indenture, which governs
11 Chesapeake's option to make a Special Early Redemption of the Notes. This section provides:

12 (a) The Company [Chesapeake] shall have no obligation to redeem, purchase or
13 repay the Notes pursuant to any mandatory redemption, sinking fund or analogous
14 provisions or at the option of a Holder thereof.

15 (b) At any time from and including November 15, 2012 to and including March 15,
16 2013 (the "Special Early Redemption Period"), the Company, at its option, *may*
17 *redeem the Notes in whole or from time to time in part for a price equal to 100% of*
18 *the principal amount of the Notes to be redeemed*, plus accrued and unpaid interest
19 on the Notes to be redeemed to the date of redemption; provided, however, that,
20 immediately following any redemption of the Notes in part (and not in whole)
21 pursuant to this Section 1.7(b), at least \$250 million aggregate principal amount of
22 the Notes remains outstanding. The Company shall be permitted to exercise its
23 option to redeem the Notes pursuant to this Section 1.7 *so long as it gives the notice*
24 *of redemption pursuant to Section 3.04 of the Base Indenture during the Special*
25 *Early Redemption Period*. Any redemption pursuant to this Section 1.7(b) shall be
26 conducted, to the extent applicable, pursuant to the provisions of Sections 3.02
27 through 3.07 of the Base Indenture.

28 (c) At any time after March 15, 2013 to the Maturity Date, the Company, at its
29 option, may redeem the Notes in whole or from time to time in part for an amount
30 equal to the Make-Whole Price plus accrued and unpaid interest to the date of
31 redemption in accordance with the Form of Note.

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1 JA at 730 (emphasis added).

2 Section 1.7(b) cross-references § 3.04 of the Base Indenture, which provides:

3 (a) At least 30 days but not more than 60 days before a redemption date,
4 [Chesapeake] shall mail a notice of redemption by first-class mail to each Holder of
5 Securities to be redeemed at such Holder's registered address.

6 JA at 338.

7 These provisions allowed Chesapeake two elective options for early redemption. Pursuant to
8 § 1.7(b), Chesapeake could elect early redemption of Notes at the Special Price during the Special
9 Early Redemption Period. Pursuant to § 1.7(c), Chesapeake could elect early redemption of Notes
10 after the Special Early Redemption Period at a substantially higher "Make-Whole Price."

11 On February 20, 2013, twenty-three days prior to the end of the Special Early Redemption
12 Period, Chesapeake announced that it planned to redeem the Notes at the Special Price pursuant to
13 § 1.7(b). Later that day, however, a hedge fund, which had purchased a large amount of the Notes,
14 protested that the time allowed for notice of redemption at the Special Price had expired because
15 redemption at the Special Price was permitted solely within the Special Early Redemption Period
16 and no less than 30 days following the giving of notice, which was no longer possible.

17 On February 22, 2013, BNY Mellon notified Chesapeake that it would not participate in the
18 proposed redemption. On February 28, 2013, BNY Mellon told Chesapeake that if Chesapeake
19 issued a notice of redemption, BNY Mellon might deem the notice as having triggered redemption
20 at the Make-Whole Price pursuant to § 1.7(c). Chesapeake nonetheless issued a Notice of Special
21 Early Redemption on March 15, 2013, calling for redemption at the Special Price on May 15, 2013.

22 **b. The Trial and the District Court's Decision**

23 On March 8, 2013, Chesapeake filed this action against BNY Mellon seeking declaratory
24 judgment that its Notice of Special Early Redemption at the Special Price would be timely and

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1 effective if mailed by March 15, 2013. In the event the court ruled that the notice was not timely to
2 effectuate early redemption at the Special Price, the complaint also sought a declaratory ruling that
3 the notice would not trigger redemption at the Make-Whole Price.

4 The court held an expedited bench trial on April 23-25, 2013 with closing arguments on
5 April 30, 2013. On May 8, 2013, only eight days later, and with the date noticed for redemption
6 only one week away, the court issued a detailed 92-page decision, and entered judgment thereon,
7 ruling that § 1.7(b) of the Supplemental Indenture was unambiguous in setting March 15, 2013 as
8 the deadline for notice of redemption at the Special Price, and in allowing actual redemption to
9 occur 30 to 60 days thereafter. *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co., N.A.*,
10 957 F. Supp. 2d 316, 339-40 (S.D.N.Y. 2013). The court further ruled that, even if the indenture
11 provisions were deemed ambiguous, “the extrinsic evidence convincingly establishes a meeting of
12 the minds among the negotiating parties” that “these parties intended and agreed that March 15,
13 2013 would serve as the deadline for Chesapeake to give notice of redemption.” *Id.* at 359.¹

14 BNY Mellon appeals, arguing that § 1.7(b) authorized redemption at the Special Price only
15 if accomplished no later than March 15, 2013, with notice given 30 to 60 days before, also during
16 the Special Early Redemption Period.

17 DISCUSSION

18 We conclude that the terms of § 1.7 unambiguously terminated Chesapeake’s right to
19 redeem the Notes at the Special Price on March 15, 2013. Notice of such redemption needed to be
20 given no later than February 13, 2013; the notice given by Chesapeake on March 15, 2013 of
21 redemption to occur on May 15, 2013 was, therefore, untimely.

¹ The court also held that Chesapeake’s notice was not defective, that Chesapeake’s second claim for declaratory relief was moot in light of the court’s holding, and that Chesapeake’s claim was not barred by laches, equitable estoppel, or waiver. *Id.* at 372-74.

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1 When interpreting a contract, our “primary objective . . . is to give effect to the intent of the
 2 parties as revealed by the language of their agreement.” *Compagnie Financiere de CIC et de*
 3 *L’Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 232 F.3d 153, 157 (2d Cir.
 4 2000). “[T]he words and phrases [in a contract] should be given their plain meaning, and the
 5 contract should be construed so as to give full meaning and effect to all of its provisions.” *Olin*
 6 *Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 99 (2d Cir. 2012) (internal quotation marks omitted).

7 Under New York law, a contract is ambiguous if its terms “could suggest more than one
 8 meaning when viewed objectively by a reasonably intelligent person who has examined the context
 9 of the entire integrated agreement and who is cognizant of the customs, practices, usages and
 10 terminology as generally understood in the particular trade or business.” *Law Debenture Trust Co.*
 11 *of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) (internal quotation marks
 12 omitted). “No ambiguity exists where the contract language has a definite and precise meaning,
 13 unattended by danger of misconception in the purport of the [contract] itself, and concerning which
 14 there is no reasonable basis for a difference of opinion.” *Id.* at 467 (internal quotation marks
 15 omitted). “[W]hen the terms of a written contract are clear and unambiguous, the intent of the
 16 parties must be found within the four corners of the contract” *Howard v. Howard*, 740
 17 N.Y.S.2d 71, 71 (2d Dep’t 2002) (citations omitted).

18 The district court adopted Chesapeake’s argument. It read § 1.7(b)’s Special Early
 19 Redemption Period as fixing the period during which Chesapeake could begin the redemption
 20 process by providing notice, and not requiring actual redemption within that period. Accordingly, it
 21 read the term “may redeem,” in the first sentence of § 1.7(b) to mean “may commence the
 22 redemption process [by giving notice].” *Chesapeake Energy Corp.*, 957 F. Supp. 2d at 336. In the

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1 court's view, this interpretation was required in order to avoid what the court perceived to be an
2 "irreconcilable conflict" in the indenture's terms. *Id.* at 337.

3 Because the first sentence of § 1.7(b) provides that Chesapeake "may redeem" the Notes at
4 the Special Price "[a]t any time from and including November 15, 2012 to and including March 15,
5 2013," the court interpreted that sentence as guaranteeing Chesapeake four full months in which it
6 could effectuate the redemption. However, the second sentence of § 1.7(b) (incorporating by
7 reference § 3.04 of the Base Indenture) required Chesapeake to give 30 to 60 days notice, which
8 notice was required to be given during the same four-month period. The notice obligation provided
9 by the second sentence thus prevented Chesapeake from redeeming during the first 30 days of the
10 specified Special Early Redemption Period. The effect of the second sentence was, thus, to allow
11 three months during which Chesapeake could effectuate the redemption. In the court's view this
12 created an irreconcilable conflict. *Id.* The court explained,

13 Under BNY Mellon's reading of § 1.7(b), there is no four-month period for doing
14 *anything*, including for giving notice or for a redemption. Rather, there is, implicitly,
15 a three-month period for a notice of at-par redemption (November 15, 2012 through
16 February 13, 2013) and a separate, implicit three-month period for redemption itself
17 on such terms (December 15, 2012 through March 15, 2013)

18 *Id.* at 338.

19 While the court's observation (that Chesapeake did not have four months in which it could
20 redeem) was correct, we respectfully disagree that this created an irreconcilable conflict.
21 Chesapeake's interpretation is flawed in several respects.

22 The Supplemental Indenture does not purport to give Chesapeake four months in which to
23 accomplish redemption at the Special Price, or four months in which to give notice of the
24 redemption. Nor does the indenture purport to give Chesapeake the opportunity to redeem *at any*

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1 *time* between November 15, 2012 and March 15, 2013. The indenture was simply drafted using a
 2 “so long as” clause, in the nature of a proviso, which limited the scope of a prior provision.

3 It is true that the first sentence of § 1.7(b) of the Supplemental Indenture, if it were written
 4 in isolation, would give Chesapeake the right to redeem Notes at the Special Price “at any time
 5 from and including November 15, 2012 to and including March 15, 2013,” defined as the “Special
 6 Early Redemption Period.” But that first sentence does not appear in isolation. The immediately
 7 following sentence makes clear that Chesapeake’s right of redemption set forth in the first sentence
 8 is subjected to a limiting qualification. The second sentence states, “[Chesapeake] shall be
 9 permitted to exercise its option to redeem the Notes pursuant to this Section 1.7 *so long as it gives*
 10 *the notice* of redemption pursuant to Section 3.04 of the Base Indenture *during the Special Early*
 11 *Redemption Period.*” JA at 730 (emphasis added).

12 Reading the first and second sentences together makes clear that Chesapeake may exercise
 13 this right of early redemption only during the Special Early Redemption Period and only after
 14 giving the required notice of 30 to 60 days “*during the Special Early Redemption Period.*” JA at
 15 730 (emphasis added).

16 When a proposition is followed by a clause beginning with “so long as,” the “so long as”
 17 clause typically serves as a proviso, introducing a condition that narrows the broader initial
 18 proposition. *See, e.g., Burrage v. United States*, 571 U.S. ___, 134 S.Ct. 881, 888 (2014) (“[I]f
 19 poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death
 20 even if those diseases played a part in his demise, so long as, without the incremental effect of the
 21 poison, he would have lived.”); *The Chicago Manual of Style* § 4.3 (16th ed. 2010) (“Whenever a
 22 book or article, poem or lecture, database or drama comes into the world, it is automatically
 23 covered by copyright so long as it is ‘fixed’ in some ‘tangible’ form and embodies original

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1 expression.”). Section 1.7(b)’s “so long as” clause is not in conflict with the first sentence; it is a
2 proviso, which limits the scope of Chesapeake’s right.

3 The use of such a proviso in a contract can indeed narrow the scope of a contract term, but it
4 does so in a manner dictated by the contractual text. As employed in the Supplemental Indenture,
5 this common linguistic device was used to set forth the different components of a set of rights and
6 obligations in separate sentences. The contractual text required reading these different sentences in
7 tandem. When read in tandem, these sentences communicated a clearly defined right, contingent on
8 the performance of clearly specified obligations.

9 If instead of describing the Special Early Redemption process in two consecutive sentences,
10 the indenture had stated in a single sentence, “At any time during the Special Early Redemption
11 Period from November 15, 2012 to March 15, 2013, Chesapeake may redeem the Notes at the
12 Special Price, so long as it gives notice pursuant to Section 3.04 of the Base Indenture during the
13 Special Early Redemption Period,” what Chesapeake calls an “irreconcilable conflict” would be
14 equally present, and yet no one could fail to understand that both notice and redemption must occur
15 during the Special Early Redemption Period. By spreading those provisions through two successive
16 sentences, the indenture perhaps required more patience on the part of the reader, but it had the
17 same unmistakable meaning.

18 A further flaw in Chesapeake’s interpretation is that it introduces conflict and contradiction
19 into the contractual text. This interpretation construes the words “may redeem” in the first sentence
20 of § 1.7(b) to mean “may commence the redemption process [by giving notice].” *Chesapeake*
21 *Energy Corp.*, 957 F. Supp. 2d at 336. It attributes to the word “redeem” an unnatural meaning,
22 substantially different from its normal meaning. Additionally, it causes the word to carry different

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1 meanings in different iterations within the same contractual provision, indeed within the same
2 sentence.

3 “Redeem” (in the verb form) or “redemption” (in its noun form) refers to “[t]he
4 reacquisition of a security by the issuer.” *Black’s Law Dictionary* 1390 (9th ed. 2009) (defining
5 “redemption” as “[t]he reacquisition of a security by the issuer”); *Barron’s Dictionary of Finance*
6 *and Investment Terms* 587 (8th ed. 2010) (defining “redemption” as “repayment of a debt security
7 or preferred stock issue, at or before maturity”); *Webster’s New International Dictionary* 2085 (2d
8 ed. 1934) (defining “redeem” as “[t]o regain possession of by payment of a stipulated price; to
9 repurchase”). Chesapeake’s interpretation gives the term a very different meaning—not “[t]he
10 reacquisition of a security by the issuer,” but the giving of notice by the issuer that it would
11 reacquire the security.

12 Furthermore, Chesapeake’s interpretation causes the term to mean different things in
13 different instances of its appearance. “Redeem” (or “redemption”) appears numerous times in § 1.7,
14 and six times within the affected first sentence of § 1.7(b). For the first and second appearances of
15 the term in that sentence—“Special Early *Redemption* Period” and “[Chesapeake], at its option may
16 *redeem* the Notes”—Chesapeake’s interpretation changes its meaning so that instead of referring to
17 the act of redemption, it refers to the giving of notice of a future redemption. For this sentence to
18 make sense, however, “redeem” needs to retain its normal meaning in other appearances within the
19 sentence. Unpaid interest to “the date of *redemption*” cannot reasonably refer to the date of the
20 notice. It necessarily refers to the date on which Chesapeake pays the debt represented by the Notes
21 (or otherwise reacquires them), as interest would continue to accrue so long as any part of the debt
22 remains outstanding. Likewise, it is clear that in requiring that \$250 million aggregate principal
23 remain outstanding “immediately following any *redemption*,” the sentence refers to actual

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1 redemption, not the date the redemption is noticed. The word “redemption” in the phrase “notice of
 2 redemption,” which appears in the second sentence, necessarily refers to the reacquisition of the
 3 Notes and not the giving of notice. Finally, there would be no making sense of the provision
 4 requiring that notice be mailed to noteholders “[a]t least 30 days but not more than 60 days before a
 5 *redemption* date,” JA at 338, unless “redemption” carries its customary meaning. Under
 6 Chesapeake’s interpretation of the Supplemental Indenture, the indenture trustee, charged with the
 7 fiduciary duty to protect the rights of the noteholders, would be left to guess when the contractual
 8 term meant what it said, and when a different, artificial meaning was to be substituted.²

9 The terms of the Supplemental Indenture had a definite and precise meaning. The contract
 10 made perfect sense with the term “redeem” carrying its normal meaning in each usage. The
 11 governing indenture unambiguously provided that, in order to exercise the right to early redemption

² Judge Failla argues that our reading of the indenture is defective because it renders untrue the statement implicit in the first sentence of § 1.7(b) that Chesapeake *may redeem the Notes* between November 15 and December 14 at the Special Price. Under our reading, she contends, the term “Special Early Redemption Period” of November 15, 2012 to March 15, 2013 “would cease to have independent meaning.” We respectfully disagree with both propositions. As Judge Failla earlier acknowledges, the term Special Early Redemption Period continues to have meaning under our reading. It is the period during which Chesapeake must do all actions necessary under the contract to effectuate redemption at the Special Price: the giving of notice and the redemption. And while it is correct that, if the first sentence of § 1.7(b) were to be read in isolation, its statement that Chesapeake “may redeem the Notes” at any time from November 15, 2012 to March 15, 2013, would prove untrue as to the first 30 days of the period, the first sentence is not to be read in isolation. It is immediately qualified by the next sentence, which explains that Chesapeake may “exercise its option to redeem the Notes . . . so long as it gives the notice of redemption . . . during the Special Early Redemption Period.” As is commonplace, the proviso limits the scope of the statement to which it serves as a proviso.

Judge Failla further asserts that our reading is structurally incoherent and elevates form over substance. We do not see how that is the case. Our reading simply reads the word “redeem” to mean what it says. When the word is read to retain its meaning in each of its appearances, the provisions of § 1.7(b), although set forth in a complicated structure, have a clear, coherent, and understandable meaning.

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1 at the Special Price, Chesapeake was obliged, as the indenture trustee has correctly insisted, to
2 effectuate the redemption within the specified Special Early Redemption Period upon notice of 30
3 to 60 days also given within that period. Chesapeake's option to make Special Early Redemption at
4 the Special Price could therefore be exercised only by effectuating redemption no later than March
5 15, 2013, upon notice given no later than February 13, 2013. The notice Chesapeake gave on March
6 15, 2013, calling for redemption on May 15, 2013, was untimely and ineffective to redeem at the
7 Special Price.³

8 CONCLUSION

9 For the reasons stated above, we **REVERSE** the district court's judgment and **REMAND**
10 for consideration of Chesapeake's second claim for declaratory judgment that the redemption notice
11 given by Chesapeake on March 15, 2013 should not be deemed to have noticed redemption at the
12 Make-Whole Price.

³ Because we find that the Supplemental Indenture is unambiguous, we have no need to rule on the district court's findings relating to extrinsic evidence. *See Howard*, 740 N.Y.S.2d at 71.