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Submitted: April 24, 2007
Decided: June 19, 2007

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Re: *Seidensticker v. The Gasparilla Inn, Inc.*
Civil Action No. 2555-CC

Dear Counsel:

Before me is plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. The parties seek a declaration regarding their rights to certain stock purchased by plaintiff pursuant to a restrictive Stock Purchase Agreement. For the reasons set forth below, I grant partial summary judgment in favor of plaintiff.

I. BACKGROUND FACTS

Gasparilla Inn, Inc. (the "Company") owns a luxury resort and other valuable parcels of land in Boca Grande, Florida. In 1979, Stephen Seidensticker took a position as a bartender at the resort, quickly rising to various positions over the following years. By 1995, Seidensticker was named Chief Executive Officer, a position he held until his termination on August 13, 2002.

In 1995, Bayard Sharp, then-owner of all 2,634 outstanding shares of Gasparilla Inn stock, began restructuring his Gasparilla Inn holdings as a part of his estate planning. He transferred 395 shares to his daughter, 928 shares to a family trust, and 1,047 shares to a revocable trust of which Sharp was trustee. In 1996, Sharp transferred 132 shares of Gasparilla Inn common stock to both of his longtime employees, William Gotwals and Stephen Seidensticker. The parties memorialized the transfers in a Stock Purchase Agreement ("SPA") that severely restricted the transferee's ability to retransfer those shares. The agreement granted the Company and Sharp rights of first refusal in the event Seidensticker chose to voluntarily transfer his shares, and listed a set of "involuntary transfers" that also triggered rights of refusal.

On August 9, 2002, Sharp died and, on August 13, 2002, Seidensticker was fired. All parties agree that this event triggered the "involuntary transfer" provision of the SPA. As a result, Seidensticker, through his attorney, Gary Larsen, delivered written notice of the deemed offer to both the Company and the Estate and sought a response regarding the price. Gotwals, in a sworn affidavit, states that he contacted Seidensticker directly and informed Seidensticker that the valuation process might take over one year.[1] The parties then moved on to negotiate Seidensticker's severance package. In a confirmation letter dated October 3, 2002, Larsen reiterated his understanding of defendants' position that they were not obligated to purchase any shares from Seidensticker but would entertain an offer from him. Defendants, through their attorney William Hoskins, responded on October 25, 2002 and formally rejected Seidensticker's offer on behalf of the Inn. No correspondence occurred between the parties regarding the stock from October 25, 2002 until November 7, 2003.

On November 7, 2003, Hoskins informed Larsen that MPI had recently completed its valuation, and purported to accept on behalf of Sharp's Estate the "now complete offer," purchasing all 132 shares of stock owned by Seidensticker. Andre Bouchard, Seidensticker's Delaware counsel, responded on December 22, 2003, seeking copies of all documents reviewed and generated by MPI and expressly reserving Seidensticker's right to challenge the validity of the Estate's

[1] Seidensticker denies that this conversation occurred. Although numerous letters were exchanged during this time, no letter memorializes this conversation or any understanding between the parties that a response from the Company or the Estate was contingent upon a receipt of the valuation from Management Planning, Inc. ("MPI"). This disputed conversation, however, is immaterial.

purported purchase of his shares. The Estate mailed a large portion of the requested copies on May 7, 2004, and communication ceased for ten months.

In early March, Seidensticker offered to sell the shares for $1.2 million. Defendants rejected this offer by letter dated March 18, 2005. On July 17, 2006, Hoskins contacted Seidensticker to remind him of the November 7, 2003 letter in which the Estate purported to purchase Seidensticker's shares. Hoskins further enclosed a replacement check, asked that Seidensticker return the original stock certificate, and informed Seidensticker that the Company had cancelled his original stock certificate. Larsen responded for Seidensticker on November 17, 2006, stating that the Inn had expressly rejected the offer and that the Estate had rejected through inaction. Thus, according to Larsen, Seidensticker remained the rightful owner of the stock.

II. CONTENTIONS

The parties' contentions are simple. Plaintiff Seidensticker freely admits that the SPA severely restricts his ability to retransfer his shares. Specifically, in the case of voluntary transfers, the agreement requires Seidensticker to provide written notice to the Company and to Sharp identifying the proposed transferee, the number of shares to be transferred and the proposed price and terms of payments. Thereafter, the Company and Sharp have rights of first refusal, acceptance of which must be in writing within thirty or sixty days respectively from date of notice. If they choose not to exercise their options, the new owner takes the shares subject to the restrictive SPA. The agreement further lists several involuntary transfers that also trigger defendants' rights of first refusal, acceptance of which must be in writing within thirty or sixty days respectively from the date of notice. The agreement even sets forth a formula by which the parties will determine the repurchase price of the shares.

The agreement, however, provides some loopholes according to plaintiff. First, subsection G of Section IV provides that the restrictive first offer provisions of Section IV become inoperable if Sharp transfers all or substantially all of his shares. Thus, plaintiff argues, the restrictions on voluntary transfers lapsed upon the transfer of Sharp's shares from his trust to his daughter after his death. Second, any transfer (voluntary or involuntary) requires the Company to deliver written notice of its intent to exercise its option within thirty days. Upon the Company's rejection or failure to deliver notice, Sharp also must deliver written notice of his intent to exercise his option within thirty days of the Company's rejection. Although Seidensticker's termination triggered the involuntary transfer provisions,

neither the Inn nor the Estate complied with the plain language of the agreement outlining the time and manner of acceptance of the deemed offer. As such, Seidensticker argues that he is entitled to a declaration that he owns the shares in Gasparilla Inn and may transfer them without restriction.

Defendants counter-argue that when read as a whole the only reasonable interpretation of the SPA is that an intra-family transfer does not constitute a transfer in the manner anticipated by the release provision in Section IV of the SPA. That, however, is non-determinative according to defendants who contend that Section V, governing involuntary transfers, controls here. Pursuant to Section V, Seidensticker's termination triggered a deemed offer, which the Estate accepted in a timely manner. As the argument goes, the share price was contingent upon a specific valuation according to the terms of the agreement, and that valuation was not complete until October 2003. Thus, the offer was not complete and could not be accepted until the share price was set. The Estate accepted the offer within thirty days of receiving the valuation. As such, the Estate entered into a valid contract to repurchase Seidensticker's shares. In the alternative, defendants argue that the doctrines of waiver, oral modification, equitable estoppel, and laches bar Seidensticker's claims.

III. ANALYSIS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] "Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[3] In evaluating cross-motions for summary judgment, this Court must examine each motion separately and only grant a motion for summary judgment to one of the parties if there is no disputed issue of material fact and that party is entitled to judgment as a matter of law.[4]

Summary judgment provides the proper framework for contractual interpretation. "Contract terms themselves will be controlling when they establish

[2] Ct. Ch. R. 56(c).
[3] Ct. Ch. R. 56(h).
[4] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 166-67 (Del. Ch. 2003).

the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[5] That is, "if the instrument is clear and unambiguous on its face, … the trial court may [not] consider parol evidence 'to interpret it or search for the parties' intent[ions]….'"[6] Ambiguity does not exist simply because parties disagree as to a contract's intended construction.[7] "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[8] Stated differently, "[a]mbiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends."[9]

A. Voluntary Transfer

Section IV subsection G of the SPA unambiguously states that "[n]otwithstanding any provisions of this Agreement to the contrary, if Sharp makes a Transfer of all or a substantial portion of the Common Stock owned by him, the restrictions of Section IV of this Agreement shall not apply to any coincident or subsequent Transfer made by Seidensticker." The agreement defines a transfer as "*any transfer* or disposition of any equitable or legal interest or ownership, whether voluntary or involuntary, *including without limitation*, *any sale*, assignment, *conveyance*, *gift*, *bequest*, pledge, encumbrance, hypothecation, security interest, equitable *or other distribution* after divorce or separation, court order, operation of law, settlement, *and any other type of transfer*."[10]

Seidensticker contends that Sharp's death and the subsequent transfer of his shares triggered subsection G. Thus, the restrictive provisions of Section IV no longer burden Seidensticker's shares. Defendants contend that the parties intended that this section operate as a tag along provision meant to apply solely in the event

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[5] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[6] *Pellaton v. The Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) (quoting *Hibbert v. Hollywood Park Inc.*, 457 A.2d 339, 343 (Del. 1983)).
[7] *Eagle Indus., Inc.*, 702 A.2d at 1232.
[8] *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[9] *Id.* (citations omitted).
[10] Opening Br. of Defs.' in Supp. of Mot. for Summ. J. Ex. 2 at § I.D. [hereinafter Stock Purchase Agreement] (emphasis added).

of a merger or acquisition. Defendants further argue that the definition of transfer does not anticipate an intra-family transfer by Sharp.

When interpreting terms of a contract, "the true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."[11] Nothing in Section IV, or the entire contract for that matter, reasonably suggests that subsection G's application is limited to mergers or acquisitions or that it is exclusive of intra-family transfers. Subsection G does not include or refer to any language relating to acquisitions. Further, the definition of transfer specifically includes bequests, the gift of personal property by will, which often includes intra-family transfers and transfers by operation of law, which includes intestate transfers.

To the extent that defendants intended this provision to act as a tag along triggered only by an acquisition or to exclude intra-family transfers, the power to draft a contract reflecting such intentions lay in their hands. The plain and unambiguous language of the contract simply does not support the limitations defendants suggest. "Delaware law will not create contract rights and obligations that were not part of the original bargain, especially, where, as here, the contract could easily have been drafted to expressly provide for them."[12] Thus, the transfer of shares to Sarah Farish, Sharp's daughter, is indeed a transfer and triggers subsection G.

Although the transfer of Sharp's shares to his daughter constituted a transfer, within the definition outlined in the agreement, both parties seem to agree (and the placement of this subsection G under Section IV suggests) that subsection G does not apply to Section V, which governs involuntary transfers. Seidensticker, however, did not execute any voluntary transfer between August 9, 2002, and August 13, 2002. Thus, I must analyze his deemed offer, resulting from his firing, under the involuntary transfer provisions of Section V.

B. Involuntary Transfer

The SPA provided that in the event of termination of employment for any reason, Seidensticker "shall be deemed to have made an offer to sell all of [his] shares of Common Stock …," and shall, within five days of his termination,

[11] *Rhone-Poulenc Basic Chem. Co.*, 616 A.2d at 1196.
[12] *Union Oil Co. of CA. v. Mobil Pipeline Co.*, 2006 Del. Ch. LEXIS 213, at *39-40 (Dec. 15, 2006).

provide written notification to the Company and Sharp of the triggering event and the deemed offer.[13] The agreement further provides that "for a period of thirty (30) days commencing immediately after its receipt of the written notice … [the Company] shall deliver written notice of the exercise of its option to [Seidensticker]."[14] The Company's failure to deliver such notice is deemed a rejection of the offer, and triggers Sharp's ability to exercise his option to purchase all the shares. Sharp's failure to deliver written notice of acceptance within thirty days also is deemed a rejection of the offer.

The agreement explicitly outlined the method by which shares sold pursuant to a "deemed offer" must be valued and priced. Specifically, Section VI provided that:

> Unless and until changed as hereinafter provided, the "Agreement Price" shall be determined by Management Planning, Inc., or its successors, at the time of any Transfer in the same manner as Management Planning, Inc. determined the purchase price as of the date of this Agreement, specifically including appropriate discounts for lack of marketability and lack of control; provided that, if the offer or deemed offer is triggered by death, disability or termination (other than a termination for cause) of Seidensticker, the "Agreement Price" shall be 170% of such value. Seidensticker agrees to sell the stock standing in his name and subject to this Agreement at the Agreement Price, or at the value stipulated in any proper amendment of this Agreement.[15]

All parties agree that Seidensticker's termination resulted in an involuntary transfer, thereby triggering the Company and Sharp's rights of refusal. All parties also agree that the "Agreement Price" as defined in Section VI of the agreement controlled the price of the stock if either party accepted the offer. The parties disagree, however, as to whether the Estate made a timely acceptance of the deemed offer to sell. Specifically, Seidensticker contends that the offer was made when he provided adequate notice on August 19, 2002. As such, the Company had until September 18, 2002, to accept and, thereafter, Sharp's Estate had until about October 18, 2002 to accept. Defendants, however, contend that the offer was not complete until MPI determined the offer price, as outlined by Section VI of the

[13] Stock Purchase Agreement at § V. A-C.
[14] Stock Purchase Agreement at § IV. B.
[15] Stock Purchase Agreement at § VI.

SPA. The Sharp Estate accepted the deemed offer and paid the purchase price within thirty days of the MPI valuation. Thus, the issue turns on whether a definite price is a necessary term for an offer to be complete.

"A right of first refusal is an inchoate, textually-based contract right that ripens into an option upon the occurrence of the event specified in the underlying contract. The terms of the option are strictly construed in accordance with the contract provisions that created the right."[16] The triggering event here is clear. The contract specifically and clearly states that the Company "for a period of thirty (30) days *commencing immediately after its receipt of the written notice* **…** has the option to purchase all or any portion of the Offered Shares."[17]

The Sharp Estate does not contend that it responded in writing within sixty days of the receipt of written notice. Instead, it attempts to circumvent this provision by alleging that the option price was a necessary component of the deemed offer. All parties, including Seidensticker, knew that MPI's valuation would be a lengthy process. Thus, argue defendants, "the only plausible interpretation of the SPA is that the deemed offer was not complete, and the option did not commence, until after MPI completed its valuation of the Gasparilla Inn stock."[18]

Drafter-defendants had the power to specifically condition the time limitations upon the determination of a definite price, but failed to do so twice. Both subsections B and C specifically state that the parties' options become exercisable after the receipt of written notice, not after the receipt of the MPI valuation. A court will not write conditions into the contract that are not present, especially where the language is clear and such terms easily could have been included. Further, general principles of contract law do not support defendants' interpretation. A contract does not fail simply because the price is not specified. "In the process of negotiating an agreement, a term that is frequently left indefinite and to be settled by future agreement, or by some other specified method, is the price in money—the compensatory exchange for the subject matter of purchase."[19] Thus, "an agreement is not unenforceable for lack of definiteness of price or

[16] *Union Oil Co. of CA.*, 2006 Del. Ch. LEXIS 213, at *49.
[17] Stock Purchase Agreement at § IV. B.
[18] Opening Br. of Defs.' in Supp. of Mot. for Summ. J. at 31.
[19] Arthur L. Corbin et al., Corbin on Contracts, § 4.3 at 567 (1993).

amount if the parties specify a practicable method by which the amount can be determined by the court without any new expression by the parties themselves."[20]

Defendants not only provide a method to determine the price, they provide a company to conduct the valuations, and set a premium to be paid upon the occurrence of certain events. It naturally follows then that if a reasonable method to set a price (instead of knowledge of the actual price) provides sufficient definiteness to form an enforceable contract, such a provision, *a fortiori*, provides sufficient definiteness to complete an offer absent contractual terms to the contrary (none of which exist here). The absence of a specific price term in the offer did not prevent defendants' acceptance of the offer. Defendants drafted the contract, set its limitations, and determined the method by which the shares would be valued. Thus, they could have easily included a provision that accounted for MPI's lengthy valuation process, had they intended for such a provision to exist.

The Sharp Estate had no more than sixty days immediately following the receipt of Seidensticker's notice to provide written notice that it was exercising its option to buy Seidensticker's shares. It failed to do so. Thus, no contract to sell the options was formed.

C. Doctrines of Waiver, Estoppel and Modification

Defendants seek relief from strict time and manner requirements for exercise of the deemed option based on the following: (1) Gotwals' testimony that he explained to Seidensticker that the valuation process would take awhile; (2) Seidensticker's alleged failure to object at that time; and (3) a subsequent letter mailed by Seidensticker's attorney which suggested that the parties focus on negotiating the severance package.

Under Delaware law, "[a] party asserting an oral modification must prove the intended change with 'specificity and directness as to leave no doubt of the intention of the parties to change what was previously solemnized by a formal document."[21] Likewise, "the standards for proving waiver under Delaware law are quite exacting. Waiver is the voluntary and intentional relinquishment of a known right. It implies knowledge of all material facts and an intent to waive, together

[20] Arthur L. Corbin et al., Corbin on Contracts, § 4.4 at 581 (1993).
[21] *Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1230 (Del. Ch. 2000).

with a willingness to refrain from enforcing those contractual rights."[22] Finally, a claim for equitable estoppel requires a showing that "(1) the person asserting estoppel lacked knowledge or the means of discovering the truth of the facts in question, (2) they relied on the conduct of the party against whom estoppel is being asserted and (3) they suffered a prejudicial change in position in reliance on the conduct."[23]

Seidensticker's actions simply do not support waiver, modification, or equitable estoppel. Setting aside for a moment the fact that Gotwals' testimony is controverted and accepting it as true, Gotwals' testimony does not provide sufficient detail to warrant waiver, modification, or estoppel. Gotwals asserts that he explained that the process might take up to a year. He further assures that Seidensticker did not object because if he had, they would have had further discussions. Gotwals does not testify that the parties agreed to (or for that matter even discussed) an extension of the time limits set in Section IV. This information fails to show the specificity, knowledge, or intent required for any equitable escape form the plain terms of the contract. Thus, Seidensticker had nothing about which to object because no discussion of any change of rights or positions occurred. Further, the letter upon which defendants rely specifically states, "I suggest that we leave the stock issue until a later date, as it seems to be your client's position that they are not required to take any action on the stock agreement and that Mr. Seidensticker may continue his role as a 5% shareholder indefinitely." This appears to be an acknowledgement that neither the Inn nor the Estate was bound to purchase the stock; however, nothing more need be read into this statement. As such, neither the doctrines of waiver, estoppel, nor modification bar Seidensticker's claims.

D. Laches

Finally, the doctrine of laches is inapplicable. Seidensticker did not learn of the injury, of which he now complains, until July 17, 2006, when the Company first announced its cancellation of his shares. Before this date, Seidensticker had no reason to believe his rights had been affected in any manner. Thus, his claim is timely.

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[22] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 444 (Del. 2005) (citations omitted).

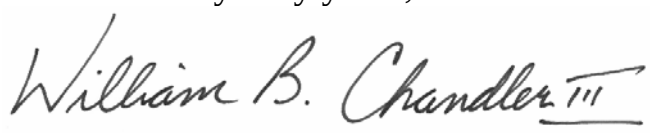
[23] *Copeland v. Kramarck*, 2006 Del. Ch. LEXIS 157, at *13 (Del. Ch. July 27, 2006) (citations omitted).

IV. CONCLUSION

The transfer of Sharps' shares to his daughter triggered Section IV subsection G and released Seidensticker from compliance with its restrictive provisions. Further, the Inn formally rejected Seidensticker's deemed offer and the Estate rejected it by inaction when it failed to respond to Seidensticker's offer within a total of sixty days. Thus, no contract for the purchase of Seidensticker's stock exists. Counsel shall confer and provide a scheduling ordering regarding the disposition of any remaining claims.

IT IS SO ORDERED.

Very truly yours,



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