

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

D. JAMES PHILLIPPI,	:	
	:	
Plaintiff,	:	Case No. 2:07-cv-916
	:	
v.	:	Judge Holschuh
	:	
JIM PHILLIPPI, INC., et al.,	:	Magistrate Judge Kemp
	:	
Defendants.	:	
	:	

JIM PHILLIPPI, INC., et al.,	:	
	:	
Plaintiffs,	:	Case No. 2:07-cv-1001
	:	
v.	:	Judge Holschuh
	:	
D. JAMES PHILLIPPI, et al.,	:	Magistrate Judge Kemp
	:	
Defendants.	:	
	:	

MEMORANDUM OPINION & ORDER

Plaintiff D. James Phillippi (“Phillippi”), a shareholder in two close corporations, Jim Phillippi, Inc. and J & J Ford, Inc. (“Defendant Corporations”), sues the Defendant Corporations and shareholders Anthony Scurti, Adam Scurti, and John Smurda.¹ In his amended complaint, Phillippi asserts eight claims against Defendants, including a breach of contract claim arising

¹ In the consolidated action, the Corporate Defendants return the favor, suing Phillippi and his wife. The Defendants’ summary judgment motion is the same in both actions.

from a 1988 option agreement and an accounting claim.² Defendants move for partial summary judgment on the option agreement-based breach of contract claim and the accounting claim. (Doc. # 24 in 07-cv-916 and # 18 in 07-cv-1001). Phillippi responds that the summary judgment motion is moot. For the reasons below, the Court **DENIES** Defendants’ partial summary judgment motion with respect to Phillippi’s option agreement-based breach of contract claim, and **ORDERS** Phillippi to show cause within ten days of this opinion as to why, with respect to his accounting claim, Defendants’ partial summary judgment motion should not be granted as unopposed.

I. Background and Procedural History

These cases involve a dispute among shareholders of two Ohio close corporations—Jim Phillippi, Inc. and J & J Ford, Inc. Phillippi is a twenty percent shareholder in Defendant Corporations. Defendants Scurti, Scurti, and Smurda (“Defendant Shareholders”) likewise are shareholders in Defendant Corporations. Until January 2007, Phillippi was also a director, general manager, and president of Defendant Jim Phillippi, Inc. He was removed from these positions by the other shareholders for allegedly engaging in fraudulent schemes to embezzle funds from Defendant Corporations.

In September 2007, Phillippi initiated this suit. His original complaint asserted two breach of contract claims against Defendants, only the first of which is relevant here. The first breach of contract claim arose from an option agreement that Phillippi and the Defendant Shareholders undisputedly entered into in February 1988. The option agreement permitted

² Defendants assert counterclaims against Phillippi; however, for the purposes of this motion, those counterclaims are irrelevant.

Phillippi to exercise, within eight years, an option to purchase the outstanding shares of Jim Phillippi, Inc. Phillippi alleged that Defendant Shareholders breached this agreement when, after Phillippi exercised his option, Defendants refused to value and sell to him their shares in the corporation. Phillippi also asserted three claims for an accounting and discovery of corporate documents. Phillippi's first accounting and discovery claim related to the option agreement, and sought to obtain from Defendants "an accounting of all shares, assets, profits, and records of Defendant [Jim Phillippi, Inc.], and for a proper valuation of [Phillippi's] shares in Defendant [Jim Phillippi, Inc.]" (Compl. ¶ 44.) Phillippi also sought discovery of "records, statements and underlying documentation" related to the option agreement. (Compl. ¶ 45.) The two other accounting and discovery claims related to an alleged equipment lease between Phillippi and Defendant Corporations and Defendants' use of commercial real property in which Phillippi allegedly had an interest.

In February 2008, Defendants moved for partial summary judgment on four of Phillippi's claims. Defendants first argue that Phillippi's option agreement-based breach of contract claim should be dismissed because the agreement was formally rescinded by the shareholders of Defendant Jim Phillippi, Inc. According to Defendant Anthony Scurti's affidavit attached to Defendants' summary judgment motion, the quorum of shareholders present at the April 18, 1995 shareholders and directors meeting unanimously rescinded the option agreement. (Anthony Scurti Aff. ¶ 6.) The minutes of that meeting, attached as Exhibit B to Scurti's affidavit, provide that "a motion was made by Anthony Scurti to rescind the original motion dated February 21, 1988, offering D. James Phillippi & John Smurda the option to purchase the outstanding stock of Jim Phillippi, Inc. within a period of eight years (8) the motion was

unanimously adopted.” (Scurti Aff. Ex. B.) Furthermore, according to Scurti’s affidavit and the minutes attached, Phillippi himself was present at the meeting and voted to rescind the option agreement. (Scurti Aff. ¶ 6, Ex. B.) Given that the option agreement is no longer in force, Defendants argue, it cannot now serve as the basis for a breach of contract claim.³

Defendants also move for summary judgment on Phillippi’s three accounting and discovery claims. According to Defendants, an accounting is an extraordinary equitable remedy that is inappropriate when “an action at law provides the discovery a party needs to establish that party’s claims.” (Mot. for Summ. J. 7.) Defendants argue that the Federal Rules of Civil Procedure permit liberal discovery with respect to Phillippi’s breach of contract claims, rendering the accounting claims unnecessary. Furthermore, Defendants argue that because Phillippi’s “breach of contract claims provide adequate remedies at law, it is improper to resort to an equitable accounting action.” (Mot. for Summ. J. 10.) Therefore, Defendants argue the three accounting and discovery claims should be dismissed.

In response, Phillippi argues that Defendants’ summary judgment motion is moot. The summary judgment motion is moot with respect to his option agreement-based breach of contract claim, Phillippi argues, because the option agreement was never rescinded as alleged by Defendants. In his opposition to Defendants’ summary judgment motion, Phillippi incorporates by reference his affidavit, in which he swears that:

[t]here was no meeting of the board of directors and shareholders in or about April 18, 1995 and the document attached to Mr. Scurti’s affidavit is a complete fabrication and is fraudulent. I was not present at any meeting of the board or [*sic*] directors and shareholders on April 18, 1995. There was never any waiver or

³ In the alternative, Defendants argue, Phillippi should be estopped from enforcing the option agreement because he supported and voted in favor of rescinding the agreement.

recission [*sic*] by me through vote or otherwise of the option to purchase all outstanding shares of the corporation. In fact, I exercised my option to purchase all outstanding shares of the corporation, in a timely manner, which exercise was dishonored despite the corporations obligations to the contrary.

(D. James Phillippi Aff. ¶¶ 3-6.) The summary judgment motion is moot with respect to his accounting and discovery claims, Phillippi argues, because the offending discovery claims have been omitted from his amended complaint.⁴ According to Phillippi, the amended complaint “deletes all references to their action in discovery and sets forth in detail the specific tort and contract claims against the Corporate Parties.” (Pl.’s Resp. to Mot. for Summ. J. 2.) Defendants’ partial summary judgment motion is properly before this Court.

II. Summary Judgment Standard

Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed “to secure the just, speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1).

The standard for summary judgment is found in Rule 56(c) of the Federal Rules of Civil Procedure:

[Summary judgment] should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(c). Summary judgment will be granted “only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try.” Poller v. Columbia Broadcasting

⁴ Phillippi’s motion for leave to file an amended complaint was filed on January 7, 2009, and granted on April 3, 2009. Phillippi filed his amended complaint on April 3, 2009.

Sys., 368 U.S. 464, 467 (1962) (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)); see also Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1347 (6th Cir. 1994).

III. Analysis

A. The Option Agreement

Defendants argue that Phillippi's affidavit does not, with respect to Phillippi's option agreement-based breach of contract claim, render the summary judgment motion moot. The affidavit may create a genuine issue of material fact, Defendants argue, as to whether the option agreement was ever rescinded, causing the summary judgment motion to fail in part, but it does not render the motion moot. The Court agrees with Defendants that the motion for summary judgment on the option agreement-based breach of contract claim is not moot. But because Phillippi's affidavit creates a genuine issue of material fact as to whether the option agreement was ever rescinded, summary judgment on the breach of contract claim is precluded.

According to Defendant Scurti's affidavit, the option agreement was rescinded unanimously by the quorum of Jim Phillippi, Inc.'s shareholders present at the April 18, 1995 meeting of the board of directors and shareholders. (Scurti Aff. ¶ 6, Ex. B.) Defendant Scurti swears that Phillippi himself was present at the meeting and voted to rescind the option agreement. (Scurti Aff. ¶ 6, Ex. B.) Phillippi responds, in his own affidavit incorporated by reference into his opposition to Defendants' summary judgment motion, that the April 18, 1995 meeting never occurred, and was completely fabricated by Defendant Scurti. (Phillippi Aff. ¶¶ 3-6.) According to Phillippi, the option agreement was never rescinded. (Phillippi Aff. ¶ 5.) A genuine issue of material fact exists, therefore, as to whether the option agreement was in force when Phillippi exercised his option to purchase Jim Phillippi, Inc.'s outstanding shares. See

FED. R. CIV. P. 56(c). The existence of a contract is an essential element of Phillippi's breach of contract claim. Moreover, it is for the jury to decide who is telling the truth regarding the alleged rescission of the option agreement. Therefore, the Court denies Defendants' motion for summary judgment on the option agreement-based breach of contract claim.

B. Accounting Claim

Phillippi argues that Defendants' summary judgment motion is moot with respect to his discovery and accounting claims because those claims have been omitted from his amended complaint. We agree with Phillippi with respect to his discovery claims; those claims have been removed from the amended complaint.⁵ As Defendants point out, however, count two of Phillippi's amended complaint still asserts an accounting claim. (Am. Compl. ¶¶ 58-59.) And Defendants unquestionably moved for summary judgment on both Phillippi's accounting and discovery claims. (Mot. for Summ. J. 7.) Therefore, the summary judgment motion is not moot with respect to the accounting claim that remains in count two of Phillippi's amended complaint.

Apparently under the impression that his amended complaint renders the summary judgment motion moot with respect to his accounting claim, Phillippi failed to respond to Defendants' substantive arguments for dismissing the accounting claim. Therefore, the Court orders Phillippi to show cause within ten days of this opinion as to why the Court should not grant Defendants' summary judgment motion with respect to his accounting claim as unopposed.

IV. Conclusion

For the reasons above, the Court **DENIES** Defendants' partial summary judgment motion

⁵ Because Phillippi omits the discovery claims from his amended complaint, the Court need not address Defendants' arguments in the summary judgment motion for dismissing the discovery claims. (See Mot. for Summ. J. 10-13.)

with respect to Phillippi's option agreement-based breach of contract claim (Doc. # 24 in 07-cv-916 and # 18 in 07-cv-1001), and **ORDERS** Phillippi to show cause within ten days of this opinion as to why, with respect to his accounting claim in count two of the amended complaint, Defendants' partial summary judgment motion should not be granted as unopposed.

IT IS SO ORDERED.

Date: May 27, 2009

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court