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February 9, 2005 (2004-SC-0333-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001287-MR

DANIEL K. COYLE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 00-CI-007628

STEVEN C. SCHWARTZ — APPELLEE

AND NO. 2002-CA-001574-MR

STEVEN CRAIG SCHWARTZ — CROSS-APPELLANT

v.

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 00-CI-007628

DANIEL K. COYLE; AND
AMERICAN SCALE CORPORATION — CROSS-APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: JOHNSON AND McANULTY, JUDGES; AND JOHN D. MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Daniel K. Coyle has appealed from an opinion and order of the Jefferson Circuit Court entered on May 15, 2002, which held that the trial court's previous orders entered on December 12, 2001, and March 4, 2002, were final and appealable. Steven C. Schwartz has cross-appealed from that same order. On December 12, 2001, the trial court entered an order granting Coyle's motion for summary judgment in part, finding that the stock-transfer agreement and cross-purchase agreement between Coyle and Schwartz were valid and enforceable. In that same order, the trial court granted Schwartz's motion for partial summary judgment, finding that the stock-valuation provision in the cross-purchase agreement was unenforceable as a penalty. On March 4, 2002, the trial court denied Coyle's motion to alter, amend, or vacate that portion of the trial court's December 12, 2001, order which held that the stock-valuation provision was unenforceable. Having concluded that the share-transfer agreement and cross-purchase agreement were valid and enforceable, we affirm that portion of the trial

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

court's order granting Coyle's motion for summary judgment on those issues. Having concluded that the stock-valuation provision was also valid and enforceable, we reverse that portion of the trial court's order granting Schwartz's motion for partial summary judgment on that issue.

American Scale Corporation, a closely-held Kentucky corporation with its principal place of business in Louisville, Kentucky, was incorporated in February 1985.[2] Coyle (president of American Scale) and Schwartz (vice-president of American Scale) were and are American Scale's sole shareholders. At the time of incorporation, Coyle and Schwartz each received 200 shares of stock in exchange for their capital contributions of $10,000.00.

In early March 1986 Schwartz was involved in an automobile accident in which his passenger was seriously injured. Schwartz's passenger filed suit against American Scale, since it was the party that had provided insurance coverage on Schwartz's vehicle. Following the accident, Coyle became concerned that Schwartz's activities would expose American Scale to further liability.[3] As a result, Coyle informed Schwartz that he no longer desired to be in a 50-50

[2] American Scale is a business involved in the sale and repair of industrial and commercial scales.

[3] According to Coyle's brief, he was particularly displeased with Schwartz's actions in transporting an underage female, who was purportedly Schwartz's girlfriend, in a vehicle insured by American Scale.

shareholder relationship with him. Coyle told Schwartz that unless Schwartz agreed to transfer 1% of his shares to Coyle, thereby permitting Coyle to assume majority control of American Scale, Coyle would either seek a dissolution of American Scale, or withdraw and begin operating a business in competition with American Scale.

On March 21, 1986, Coyle and Schwartz executed a share-transfer agreement wherein Schwartz transferred 1% of his American Scale shares to Coyle. The agreement specifically stated that Coyle would thereafter own a 51% interest in American Scale, leaving Schwartz as owner of the remaining 49% of American Scale's shares.

Approximately two years later, on August 25, 1988, Coyle and Schwartz executed a written "Stockholders' Cross-Purchase Agreement." The cross-purchase agreement provided a mechanism for the repurchase of a shareholders' stock in the event of death, disability, or voluntary withdrawal of that shareholder. Specifically, the agreement stated that if Coyle or Schwartz died, or otherwise attempted to dispose of their shares, the other shareholder would have the right to purchase those shares (share-transfer restriction). In addition, the cross-purchase agreement gave the majority shareholder an option to purchase all of the minority shareholder's stock at any time upon 60-days written notice (majority-purchase option).

With respect to both the share-transfer restriction and the majority-purchase option, the agreement provided a stock-valuation method for determining a per share price in the event either of the provisions were triggered. The stock-valuation provision of the cross-purchase agreement read in pertinent part as follows:

> Unless altered as herein provided, for the purpose of determining the purchase price to be paid for the stock of a Stockholder, the fair market value of each share of stock shall be, as of [August 25, 1988], $250.00.
>
> The Stockholders shall redetermine the value of the stock within 60 days following the end of each fiscal year. . . . If the Stockholders fail to make the required annual redetermination of value for a particular year, the last previously recorded value shall control.

Over the course of the next 12 years, neither Coyle nor Schwartz ever initiated proceedings to revaluate the price of American Scale's shares as provided in the cross-purchase agreement. Hence, the initial price of $250.00 per share was never revalued pursuant to the cross-purchase agreement.

In a letter dated November 20, 2000, Coyle informed Schwartz that he was exercising the majority-purchase option. The letter stated, inter alia, that "the purchase price to be paid for [Schwartz's] stock [was] $250.00 per share." On November 27, 2000, after refusing to tender his shares to Coyle

for the price specified in Coyle's letter, Schwartz filed a complaint in the Jefferson Circuit Court, naming Coyle and American Scale as defendants. Schwartz sought an order compelling Coyle and American Scale to allow Schwartz to inspect various books and records of the corporation. On November 29, 2000, Schwartz filed an amended complaint seeking, among other things, a declaration of rights[4] regarding the validity of the cross-purchase agreement as a whole or any part thereof.

On January 24, 2001, Coyle filed an answer to Schwartz's amended complaint, and added a counterclaim for a declaration of rights and specific performance. In his counterclaim, Coyle asked for an order compelling Schwartz to transfer all of his shares to Coyle at a price of $250.00 per share.[5] Over the course of the next several months, Coyle filed a motion for summary judgment and Schwartz filed a motion for partial summary judgment. In Coyle's motion for summary

[4] See Kentucky Revised Statutes (KRS) 418.040.

[5] On February 5, 2001, the trial court entered an order permitting Schwartz to file a second amended complaint, which added a shareholder's derivative claim. Schwartz alleged that Coyle had engaged in a variety of improper activities that harmed American Scale, such as paying himself excessive compensation and borrowing money from the corporation without repaying it. On June 21, 2001, the trial court entered an order permitting Schwartz to file a third amended complaint, wherein he added a breach of fiduciary duty claim and an intentional infliction of emotional distress claim against Coyle, and a retaliatory discharge claim against Coyle and American Scale. In an order entered on December 12, 2001, the trial court ruled that Schwartz's claims of wrongdoing on the part of Coyle which occurred prior to November 27, 1995, were time-barred pursuant to KRS 413.120(2). Schwartz has not appealed from that ruling. While some of Schwartz's remaining claims are still pending before the trial court, they are not relevant to the issues in this appeal.

judgment, he sought, inter alia, a determination that the parties' March 21, 1986, share-transfer agreement and August 25, 1988, cross-purchase agreement were valid and enforceable. Coyle also sought an order compelling Schwartz to transfer his shares to Coyle at a price of $250.00 per share pursuant to the cross-purchase agreement. In Schwartz's motion for partial summary judgment, he sought a determination that the stock-valuation provision, which listed a stock price of $250.00 per share, was unenforceable as a penalty.

On December 12, 2001, after a significant amount of discovery had taken place, the trial court entered an order addressing the pending cross-motions for summary judgment. The trial court ruled that the parties' March 21, 1986, share-transfer agreement was supported by valuable consideration, and was therefore enforceable. Hence, the trial court found that Coyle was the majority shareholder of American Scale (owner of 51% of the stock) and that Schwartz was the minority shareholder (owner of 49% of the stock).

Further, the trial court ruled that the parties' August 25, 1988, cross-purchase agreement was valid, and that Coyle, as majority shareholder, had the right under the majority-purchase option to buy all of Schwartz's stock upon proper written notice. However, the trial court found that forcing Schwartz to sell all of his stock at the price of

$250.00 per share would constitute a penalty. Thus, the trial court ruled that the stock-valuation provision listing a price of $250.00 per share was unenforceable, and ordered that a current valuation of the stock must be undertaken before Schwartz could be compelled to transfer his shares. Therefore, Coyle's motion for summary judgment was granted in part and denied in part, and Schwartz's motion for partial summary judgment as to the validity of the stock-valuation provision was granted.

On December 21, 2001, Coyle filed a motion to alter, amend, or vacate that portion of the trial court's order which held that Coyle could not compel Schwartz to transfer his stock at the price of $250.00 per share. On March 4, 2002, the trial court entered an order denying Coyle's motion to alter, amend, or vacate. On March 7, 2002, Coyle filed a motion to certify the trial court's December 12, 2001, and March 4, 2002, orders as final and appealable under CR[6] 54.02. A hearing on this motion was held on April 25, 2002, after which the trial court entered an order granting Coyle's motion to certify on May 15, 2002. Coyle's appeal and Schwartz's cross-appeal followed.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any

[6] Kentucky Rules of Civil Procedure.

circumstances."[7] The trial court is required to view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[8] As this Court has previously stated, "[t]he 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations omitted].[9]

We first address Schwartz's claim on his cross-appeal that the trial court erred by finding that the parties' March 21, 1986, share-transfer agreement was supported by valuable consideration and enforceable, whereby Coyle became a majority shareholder in American Scale. Specifically, Schwartz argues:

> In his [b]rief, Coyle claims that "in consideration of Coyle's agreement to both forebear from seeking a dissolution of American Scale and thereafter continue his involvement in the operation of the corporation," Schwartz and Coyle entered into the [share-transfer agreement]. According to the express terms of the [share-transfer agreement], however, Coyle made no such promise and did not agree to

[7] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)).

[8] Steelvest, supra, (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)).

[9] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

> forebear from anything. Without such a promise . . . there was no consideration for the [share-transfer agreement] and therefore it was invalid [citations to record omitted].

According to Schwartz, since the share-transfer agreement did not expressly recite Coyle's promise to forebear from seeking a dissolution of the corporation, Coyle was at liberty to initiate a dissolution at anytime. Thus, Schwartz argues that Coyle suffered no detriment under the share-transfer agreement, and that Schwartz is therefore not bound by the terms of the agreement. In a related argument, Schwartz also argues that the parol evidence rule prohibited the trial court from considering extrinsic evidence apart from the written agreement in determining whether the share-transfer agreement was supported by valuable consideration. We disagree and reject both of Schwartz's arguments.

Section 218 of the Restatement (Second) of Contracts,[10] provides in pertinent part as follows:

> (2) Evidence is admissible to prove whether or not there is consideration for a promise, even though the parties have reduced their agreement to a writing which appears to be a completely integrated agreement.

Comment d to Section 218 states:

> Omission of consideration. Where a written agreement requires consideration and none is stated in the writing, a finding that the

[10] Restatement (Second) of Contracts § 218 (1981).

> writing is a completely integrated agreement would mean that it is not binding for want of consideration. Since only a binding integrated agreement brings the parol evidence rule into operation, evidence is admissible to show that there was consideration and what it was.

Further, in Apple v. McCullough,[11] the former Court of Appeals stated that "'it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was.'"

Hence, even though the parties' March 21, 1986, share-transfer agreement did not specifically recite Coyle's promise to forebear from seeking a dissolution of American Scale, this omission does not preclude the parties from being bound by the agreement if, via extrinsic evidence, it is shown that valuable consideration supports the agreement.

In the case sub judice, the trial court specifically found that Coyle agreed not to sell his stock and/or seek a dissolution of the corporation in exchange for Schwartz's agreement to transfer 1% of his stock to Coyle. Schwartz has not challenged this factual finding on appeal. It is well-established that a promise to refrain from doing that which an individual has a right to do can constitute valuable

[11] 239 Ky. 74, 38 S.W.2d 955, 956 (1931)(quoting 22 C.J. 1157, § 1555).

consideration.[12] Schwartz has conceded that Coyle had the right to seek a dissolution of the corporation absent an agreement to the contrary. Therefore, the parties' March 21, 1986, share-transfer agreement was supported by valuable consideration. Accordingly, the trial court did not err by finding that the parties' share-transfer agreement was supported by valuable consideration and enforceable, and that subsequent to the execution of the share-transfer agreement, Coyle became the majority shareholder in American Scale.

As a final basis for his argument that the share-transfer agreement was not supported by consideration, Schwartz claims that Coyle's promise to forebear from seeking a dissolution of the corporation in exchange for Schwartz's agreement to transfer 1% of his shares, was nothing but a mere "threat," and should not be deemed valuable consideration on public policy grounds. We disagree.

The ownership of a controlling interest in a corporation is a valuable asset. "The stockholders holding a majority of the capital stock of a corporation have the right to determine the policy to be pursued and to manage and direct the corporation's affairs, and the minority must submit to their judgment so long as the majority act in good faith and within

[12] See Luigart v. Federal Parquatry Mfg. Co., 194 Ky. 213, 238 S.W. 758, 760-61 (1922).

the limitation of the law" [footnotes omitted].[13] Hence, a shareholder who does not own a controlling interest in the corporation, and who may be concerned over the corporation's recent affairs, has a legitimate reason to acquire a controlling interest in the business.

In the instant case, the trial court found that Coyle had a legitimate, good-faith reason for seeking a controlling interest in American Scale, i.e., Coyle had lost confidence in Schwartz's judgment.[14] Schwartz has not challenged this finding by the trial court on appeal. Accordingly, we conclude that Coyle's promise to forebear from seeking a dissolution of American Scale in exchange for Schwartz's agreement to transfer 1% of his shares to Coyle, constituted valuable consideration and does not violate public policy. Accordingly, we affirm the trial court's granting of summary judgment in favor of Coyle on the issue of the validity of the share-transfer agreement.

Having concluded that the share-transfer agreement was valid and enforceable, we now turn to Schwartz's claim in his cross-appeal that the August 25, 1988, cross-purchase agreement is invalid. The cross-purchase agreement executed by Coyle and Schwartz contained a majority-purchase option, entitling the majority shareholder to purchase all of the minority

[13] 18A Am.Jur.2d Corporations § 762 (Supp. 2003).

[14] A finding of a good-faith reason may not have been necessary. See 18A Am.Jur.2d Corporations § 763 (1985).

shareholder's stock upon 60-days written notice. As we stated above, after the execution of the share-transfer agreement, Coyle became the majority shareholder in American Scale. Hence, Coyle had the option to purchase all of Schwartz's shares upon 60-days written notice.

Schwartz claims that there was no consideration supporting the majority-purchase option provision and that the trial court erred by finding that particular provision to be enforceable. We disagree. There is no requirement that each provision of a contract be supported by separate, independent consideration.[15] "It is sufficient if the overall agreement has a consideration."[16] In the case at bar, the cross-purchase agreement as a whole was supported by valuable consideration.

Prior to the execution of the cross-purchase agreement, Coyle and Schwartz were free to dispose of their shares in any manner they desired. However, the cross-purchase agreement placed a significant limitation on each party's ability to dispose of their respective shares. The share-transfer restriction provided that if either Coyle or Schwartz died or otherwise attempted to dispose of their shares, the other would have the right to purchase those shares.

[15] Stiles v. Reda, 312 Ky. 562, 564, 228 S.W.2d 455, 456 (1950).

[16] Hamrick v. City of Ashland, Ky., 321 S.W.2d 401, 403 (1959).

Thus, in addition to receiving a benefit under the share-transfer restriction, i.e., Coyle and Schwartz were virtually assured that an outsider to the corporation would be unable to seize control, both Coyle and Schwartz also suffered a detriment in the sense that they could not freely dispose of their respective shares. The presence of benefits and concomitant detriments in the parties' agreement constituted the essence of the consideration.[17] Thus, since the cross-purchase agreement was supported by valuable consideration, the trial court did not err by finding that the majority-purchase option provision was enforceable. Accordingly, we affirm the trial court's granting of summary judgment in favor of Coyle on the issue of the validity of the majority-purchase option.

The cross-purchase agreement also contained a stock-valuation provision. In his appeal, Coyle argues that the trial court erred by finding that the stock-valuation provision was unenforceable as a penalty. Specifically, Coyle claims that Man O' War Restaurants, Inc. v. Martin,[18] the case relied upon by the trial court in ruling that the stock-valuation provision was

[17] See Phillips v. Phillips, 294 Ky. 323, 335, 171 S.W.2d 458, 464 (1943)(defining consideration as "'[a] benefit to the party promising, or a loss or detriment to the party to whom the promise is made. "Benefit," as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. And "detriment" means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise'")(quoting Luigart, 238 S.W. at 760).

[18] Ky., 932 S.W.2d 366 (1996).

unenforceable, is distinguishable from the facts of the case at bar and does not compel a finding that the stock-valuation provision was unenforceable as a penalty. We agree.

In Man O' War, the provision at issue required a shareholder/employee to return his stock to the corporation if his employment with the corporation was terminated. In the event of termination, the provision stated that the shareholder/employee would receive the price he originally paid for his shares in exchange for the return of his stock. Our Supreme Court held that this provision was unenforceable, stating that a provision which called for the return of stock at the price paid without regard to the stock's actual value was an unenforceable penalty.[19] However, the facts of the case sub judice are distinguishable and Man O' War is not controlling.

Unlike the provision in question in Man O' War, Coyle and Schwartz were not bound by a fixed price under the terms of their cross-purchase agreement. Rather, the agreement that Coyle and Schwartz entered into provided that the "mutual agreement" method would control the valuation of American Scale's stock if the majority shareholder exercised the majority-purchase option. The parties agreed to revaluate the stock each year. If no revaluation took place in a given year, the parties agreed that the last recorded value would control.

[19] Id. at 368.

This "mutual agreement" method was expressly recognized as a permissible valuation method by our Supreme Court in Man O' War.[20] While Coyle and Schwartz never revaluated the stock, this fact alone does not render the provision unenforceable.

In Concord Auto Auction, Inc. v. Rustin,[21] the United States District Court for the District of Massachusetts was presented with an analogous situation. In Rustin, the administrator of a deceased shareholder's estate refused to transfer the decedent's shares back to the corporation as called for in the repurchase agreement following the shareholder's death. Although the repurchase agreement had called for an annual revaluation of the stock, no revaluation had taken place prior to the decedent shareholder's death. The administrator argued, inter alia, that the "mutual agreement" valuation provision should not be enforced since the actual value of the stock was much higher than the value that had originally been listed in the repurchase agreement. In rejecting the administrator's argument, the Court stated:

> [T]he Court rules that the purchase prices were carefully set, fair when established, evidenced by an Agreement binding all parties equally to the same terms without

[20] Id. at 368-69 (stating that "[p]arties are allowed to agree upon a financial valuation under the 'mutual agreement' method which allows the parties to agree to an initial fixed value for the stock, but requires that the parties at defined intervals (after six months, one year) revisit their prior agreement to adjust the valuation to reflect changes in the actual market value").

[21] 627 F.Supp. 1526 (D.Mass. 1986).

> any indication that any one sibling would reap a windfall. The courts may not rewrite a shareholder's agreement under the guise of relieving one of the parties from the hardship of an improvident bargain. The Court cannot protect the parties from a bad bargain and it will not protect them from bad luck. Cox, the party whose estate is aggrieved, had while alive every opportunity to call the annual meeting and persuade his sisters to revalue their stock. Sad though the situation be, sadness is not the touchstone of contract interpretation [citations omitted].[22]

We find this reasoning of the federal district court to be persuasive. Schwartz, as owner of 49% of American Scale's outstanding shares, had the right under the corporation's bylaws to call for a special meeting to revaluate the listed price of American Scale's shares. Schwartz has admitted in his deposition testimony that he never made such a request. Hence, by sitting on his rights for over 12 years, Schwartz took the risk that Coyle would exercise the majority-purchase option at a time when the actual value of American Scale's shares was in excess of the $250.00 price originally listed in the stock-valuation provision. Schwartz is not entitled to have the courts rewrite the parties' agreement simply because he believes he is receiving the short end of the bargain.[23] Accordingly, we

[22] Id. at 1531-32.

[23] See also 18A Am.Jur.2d Corporations § 703 (discussing contract provisions requiring periodic revaluations and stating that "[t]he original price would control where the agreement clearly provides that the last figure agreed upon would be conclusive or that, failing a redetermination of the stock's value,

reverse the trial court's finding that the stock-valuation provision listing a price of $250.00 per share was unenforceable.[24]

The terms of the stock-valuation provision listed an original price of $250.00 per share. The provision further stated that the fair market value shall be $250.00 "[u]nless altered as herein provided" via the "mutual agreement" revaluation method. Since the parties failed to revaluate the price of American Scale's shares, $250.00 is the "last recorded value" with respect to the price of the corporation's shares.

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the earlier figures shall govern"); Matter of Dillon's Estate, 575 P.2d 127 (Okla.App. 1977)(enforcing a mutual agreement provision and the original price of $1.00 per share where the stock valuation provision stated that the last price agreed upon would be "conclusive as to the value" of the stock, and no revaluation had taken place); and In re Borchard's Estate, 74 Misc.2d 376, 346 N.Y.S.2d 620 (N.Y.Sur.Ct. 1973)(enforcing a periodic revaluation provision and the original price of $450.00 per share where the last price agreed upon was to govern if no revaluation had taken place).

[24] It is important to note that on July 15, 2002, two months after the trial court entered the order from which this appeal and cross-appeal were taken, KRS 271B.6-270 was amended. Under the statute as amended, an agreement requiring a shareholder to sell his shares to the corporation or another person for an agreed upon price or a price based on a valuation formula, including a requirement to transfer the shares for an amount equal to the price paid for the shares, is enforceable. KRS 271B.6-270(4) states in pertinent part:

> A restriction on the transfer or registration of transfer of shares may without limitation:
>
> . . .
>
> (c) Obligate a shareholder to transfer the restricted shares to the corporation or other persons for an agreed price or a price based on a valuation formula, including an obligation to transfer the shares for an amount equal to the original consideration paid for the shares[.]

Therefore, the majority-purchase option and the stock-valuation provision entitle Coyle to purchase all of Schwartz's stock at a price of $250.00 per share.

Finally, we address Schwartz's claim in his cross-appeal that the trial court erred by finding that Schwartz and Coyle did not abandon the stock-valuation provision of the cross-purchase agreement. Specifically, Schwartz argues:

> [I]t is clear that both Schwartz and Coyle abandoned their rights under the [c]ross-[p]urchase [a]greement by virtue of their failure to take any action to re-value their shares for more [than] a decade. By completely ignoring the [c]ross-[p]urchase [a]greement's requirement that both shareholders "shall redetermine the value of the stock within 60 days following the end of each fiscal year" and record the same, as well as their intention to re-value their shares in American Scale, Schwartz and Coyle unequivocally acted in a manner inconsistent with the existence of the [c]ross-[p]urchase [a]greement.

We disagree and hold that the trial court did not err by finding that Coyle and Schwartz did not abandon their rights under the stock-valuation provision.

In Texaco, Inc. v. Debusk,[25] the former Court of Appeals discussed what must be shown to constitute abandonment:

> "A contract may be rescinded or discharged by acts or conduct of the parties inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant

[25] Ky., 444 S.W.2d 261, 263 (1969)(quoting 17 Am.Jur.2d Contracts § 494).

> circumstances and conduct of the parties. There is authority to the effect that even a contract under seal may be released, surrendered, or discharged by matters in pais."
>
> "While as a general rule a contract will be treated as abandoned or rescinded where the acts and conduct of one party inconsistent with its existence are acquiesced in by the other party, to be sufficient the acts and conduct must be positive and unequivocal" [emphasis added].

In the instant case, while Coyle and Schwartz never revaluated American Scale's stock in the years following the execution of the cross-purchase agreement, this fact, standing alone, does not constitute "positive and unequivocal" acts which could lead to a finding of abandonment. The stock-valuation provision itself provided a default price for the stock in the event the parties failed to revaluate the shares. Therefore, Coyle and Schwartz contemplated that they might not always conduct a revaluation. Accordingly, the failure of Coyle and Schwartz to conduct an annual revaluation of American Scale's shares did not constitute an abandonment of the stock-valuation provision.

Based on the foregoing, the orders of the Jefferson Circuit Court are affirmed in part and reversed in part.

McANULTY, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MILLER, SENIOR JUDGE, DISSENTING: I dissent from so much of the majority opinion as reverses the circuit court on the valuation of the interest to be purchased. I am of the opinion that the stock-valuation provision in this case is a forfeiture of the type disapproved in Man O' War Restaurants, Inc. v. Martin, Ky., 932 S.W.2d 366 (1996). Equity detests forfeiture provisions and frequently will find them unenforceable. Man O' War Restaurants, Inc., at 368 (*citing* Sebastian v. Floyd, Ky., 585 S.W.2d 381 (1979); C.I.T. Corp. v. Thompson, 293 Ky. 637, 169 S.W.2d 820 (1943)). I believe fundamental principles of equity and fair-dealing compel that the stock-valuation provision be invalidated in this case. Id. I would affirm the circuit court on all issues.

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