[Cite as *BLA Invests., Inc. v. LeCount,* 2010-Ohio-4098.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BLA INVESTMENTS, INC.	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
WILLIAM E. LECOUNT	:	Case No. 2009CA00309
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2009CV03639
JUDGMENT:	Judgment Modified
DATE OF JUDGMENT ENTRY:	August 30, 2010

APPEARANCES:

For Plaintiff-Appellant

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Farmer, J.

{¶1} In 1992, William Anthony and appellee, William LeCount, formed appellant, BLA Investments, Inc. Each partner was a fifty percent shareholder. At the time the corporation was started, the parties entered into a "Mandatory Buy-Sell Agreement" which governed the procedures by which either shareholder could or was required to sell his shares back to the corporation. Appellee left appellant's employ on November 16, 2006.

{¶2} On September 22, 2009, appellant filed a complaint against appellee seeking specific performance under the Buy-Sell Agreement. Appellant sought a court order for appellee to tender his shares in the corporation for the agreed price of $250,000. In the alternative, the price of the shares should be determined as of the date his employment with the corporation ceased, November 16, 2006.

{¶3} On October 27, 2007, appellee moved to stay the proceedings pending binding arbitration pursuant to the arbitration clause in the agreement. By judgment entry filed November 23, 2009, the trial court granted the motion to stay and ordered the parties to proceed to binding arbitration with regard to the purchase price of the stock.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ERRED IN SENDING A NON-ARBITRABLE ISSUE TO ARBITRATION."

I

{¶6} Appellant claims the trial court erred in referring the matter to arbitration as the issue in dispute is non-arbitrable. Specifically, appellant claims the subject arbitration clause is limited to the purchase price of the stock and the trial court should have instructed the arbitrator as to the specific date to be used in determining the purchase price as the issue of *when* the purchase price should be calculated is beyond the scope of the arbitration provision. We agree.

{¶7} An arbitrator draws his authority to settle disputes and impose awards under an agreement from the agreement itself. See *Goodyear Tire & Rubber Corp. v. Local Union 200,* 42 Ohio St.2d 516, 519, certiorari denied (1975), 423 U.S. 986. "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration." *Academy of Medicine of Cincinnati v. Aetna Health, Inc.,* 108 Ohio St.3d 185, 2006-Ohio-657, ¶11.

{¶8} Both parties concede the subject arbitration clause involves a very narrow issue, the purchase price of the stock:

{¶9} "Purchase Price. The purchase price for the stock of either Shareholder, which is to be sold pursuant to this Agreement, shall be a value unanimously agreed upon by the Shareholders. Said purchase price shall take into consideration all tangible and intangible assets of the Corporation, including goodwill. Said purchase price, as determined by the Shareholders will annually be set forth in a writing designated 'Exhibit A', signed and dated by each Shareholder and will be attached to this Agreement and incorporated herein for all purposes. The Exhibit which is most recently signed and dated by both Shareholders setting forth the purchase price shall determine the purchase price to be used for the purpose of this Agreement.

{¶10} "In the event the Shareholders cannot agree on the purchase price, then this issue shall be submitted for binding arbitration to the American Arbitration Association. The award made by an arbitrator of the American Arbitration Association shall be determinative of the purchase price to be used for the purposes of this Agreement and shall be binding and conclusive as to all parties hereunder." See, Mandatory Buy-Sell Agreement at No. 4.

{¶11} Pursuant to No. 2 of the Buy-Sell Agreement, appellee was required to sell his shares back to the corporation when he ceased "to function in an active capacity as such, or retires, for any reason whatsoever." Subsection B states the following:

{¶12} "Closing. The closing for the sale of the shares of stock purchased by the Corporation pursuant to this paragraph shall take place at the principal office of the Corporation at a date designated by the Corporation, which shall be not more than one hundred twenty (120) days following the termination of employment of the Shareholder, and not less than fifteen (15) days following such termination of employment."

{¶13} It is undisputed that appellee left appellant's employ on November 16, 2006 and did not sell his shares to the corporation within the required time as a dispute existed over the purchase price.

{¶14} Attached to the Buy-Sell Agreement is Exhibit A dated December 26, 1992 which states the following:

{¶15} "The purchase price to be paid by the Corporation for the stock of either Shareholder to the Mandatory Buy-Sell Agreement of the parties is Two hundred Fifty thousand Dollars ($250,000.00) per One hundred (100) shares."

{¶16} It is uncontested that a unanimous agreement by the shareholders as to the purchase price has not been done since this date. However, there is ample

evidence in the record via numerous attorneys' letters that the issue of the purchase price was a matter of dispute prior to appellee leaving appellant's employ.

{¶17} Assuming the facts as alleged by appellee, appellant argues the date for purchase price valuation should be the date appellee left appellant's employ, November 16, 2006, as a disagreement about the purchase price existed on said date sufficient to trigger arbitration. Appellee argues the purchase price valuation date should be a "current" date and because the date itself is part of the determination of the purchase price, the date is subject to arbitration. We disagree with appellee's position.

{¶18} The clear language of the agreement states that the purchase price of the stock will be determined annually in a writing designated as "Exhibit A." Since December of 1992, there has not been an annual determination, and the issue was in dispute when appellee left appellant's employ on November 16, 2006. Therefore, the issue within the narrow scope of the arbitration clause of the Buy-Sell Agreement is the purchase price of the stock on November 16, 2006.

{¶19} Upon review, we conclude the stay for arbitration shall include the directive to determine the purchase price of the stock effective November 16, 2006.

{¶20} The sole assignment of error is granted.

{¶21} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby modified.

By Farmer, J.

Delaney, J. concur and

Hoffman, P.J. concurs separately.

s/ Sheila G. Farmer

s/ Patricia A. Delaney

JUDGES

SGF/sg 720

Hoffman, P.J., concurring

{¶22} Assuming the parties dispute the purchase price as of November 16, 2006, I concur in the majority's decision to modify the trial court's order compelling Appellant to arbitration with the directive the arbitrator determine the purchase price as of November 16, 2006.

{¶23} I write separately only because I am not convinced a legitimate legal dispute exists as to the purchase price given a literal interpretation of the language in the Mandatory Buy-Sell Agreement. The Agreement was executed on December 26, 1992. Contemporaneously, Exhibit A was executed by both parties and attached to the Agreement, setting the purchase price at $250,000.00 per 100 shares.

{¶24} The Agreement clearly provides, "The Exhibit which is most recently signed and dated by both Shareholders setting forth the purchase price shall determine the purchase price to be used for the purpose of this Agreement." As Exhibit A is "the most recently signed and dated" Exhibit reflecting both Shareholders' agreement, it would seem no arbitration is necessary at all.

{¶25} As noted by the majority, it is uncontested a unanimous agreement by the Shareholders as to the purchase price has not been done since December 26, 1992. While the majority and the trial court make reference to the numerous attorneys' letters as evidence of a dispute of the purchase price prior to Appellee leaving Appellant's employ, it would seem the fact the attorneys are in dispute does not change, let alone trump, the language of the Agreement.[1]

[1] An argument could be made the Agreement itself is ambiguous in that because Exhibit A was initially attached at the execution of the Agreement, any provision for arbitration of purchase price was superfluous; an assumption contrary to ordinary contract principles.

{¶26} Despite my concern over the need for arbitration in this matter as set forth above, Appellant's only requested relief in the Conclusion of its brief to this Court is to direct the arbitrator to determine the purchase price as of November 16, 2006. As such, I concur in the decision reached by the majority.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BLA INVESTMENTS, INC.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
WILLIAM E. LECOUNT	:	
Defendant-Appellee	:	CASE NO. 2009CA00309

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is modified. Costs to appellee.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES