[Cite as *O'Planick v. Rubbermaid, Inc.*, 2004-Ohio-4968.]

<table>
<tr><td>STATE OF OHIO

COUNTY OF WAYNE</td><td>)
)ss:
)</td><td>IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT</td></tr>
<tr><td colspan="2">RICHARD B. O'PLANICK, et al.

Appellants

v.

RUBBERMAID INCORPORATED, et al.

Appellees</td><td>C.A. No. 03CA0060

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 03CA0060</td></tr>
</table>

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellant[1], Richard O'Planick, appeals the judgment of the Wayne County Court of Common Pleas granting summary judgment in favor of appellees, Rubbermaid, Inc. and Newell-Rubbermaid, Inc. This Court affirms.

I.

{¶2} Rubbermaid, Inc. maintained a stock incentive and option plan ("Plan") beginning in 1989. The Plan was administered by the Rubbermaid

---

[1] Appellant filed a class action suit in the lower court, but will be referred to in this opinion in the singular for ease.

Compensation Committee ("Committee") and provided for various stock incentive awards, including performance awards and stock options. The Plan provided that both performance awards and stock options would immediately vest upon a change in control. The Plan went on to identify specific instances which would constitute a change in control.

{¶3} On October 21, 1998, Rubbermaid and Newell announced that they had agreed to merge. Pursuant to their agreement, Rubbermaid filed a plan of merger with the Securities Exchange Commission ("SEC"). The parties agree that the merger announcement and subsequent SEC filing constituted a change in control. As such, all of the stock options and performance awards outstanding on October 21, 1998 vested immediately.

{¶4} On January 15, 1999, stock awards and performance shares were granted to certain Rubbermaid executives. Before granting these options and awards, Rubbermaid announced that the awards would not immediately vest upon the closing of the merger. Subsequently, the merger closed in March 1999 and Rubbermaid reiterated that the awards had not vested.

{¶5} In June 2002, appellant filed a class action suit in the Wayne County Court of Common Pleas along with other Rubbermaid executives who received stock options and performance awards in January 1999. Appellant contended that the Plan allowed for more than one change in control event and that the merger closing should have vested his stock options and performance awards.

Subsequently, appellees moved for summary judgment arguing that the Plan only permitted one change in control event relating to the merger. The trial court granted summary judgment in favor of appellees on all seven counts of appellant's complaint. Appellant timely appealed, raising two assignments of error.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN GRANTING DEFENDANTS-APPELLEES' ("DEFENDANTS") MOTION FOR SUMMARY JUDGMENT ON ALL COUNTS OF PLAINTIFFS-APPELLANTS' FIRST AMENDED CLASS ACTION COMPLAINT."

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN DENYING PLAINTIFFS-APPELLANTS' ("PLAINTIFFS") MOTION FOR SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CLAIM[.]"

{¶6} As both of appellant's assignments of error aver that the trial court erred in granting summary judgment, this Court will address them together. Appellant contends that trial court erred in granting summary judgment in favor of appellees and denying his motion for summary judgment. This Court disagrees.

{¶7} We begin our analysis by noting that this Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt

in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. at 292-93. Once this burden is satisfied, the nonmoving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} In support of its motion for summary judgment, appellee utilized the depositions of the members of the Committee. In these depositions, the Committee members reiterated that they had previously interpreted the Plan to

allow for only one change in control event to occur during the course of the merger. Appellee cited the plain language of the Plan as well to support its contention that the Plan only permitted one change in control event. Therefore, appellee met its initial burden of demonstrating the absence of a genuine issue of material fact. *Dresher,* 75 Ohio St.3d at 292. Appellant's response to appellee's motion for summary judgment asserted that the plain language of the Plan permitted more than one change in control to occur. As such, appellant failed to identify any specific facts demonstrating that the interpretation of the Committee was reached in error. Therefore, appellant did not meet his burden of identifying specific facts that demonstrate a genuine issue for trial. Id. at 293.

{¶11} Pursuant to the Plan, the Committee was given full power to interpret and administer the Plan. Further, "[a]ny interpretation by the Committee of the terms and provisions of the Plan *** shall be final, binding, and conclusive[.]" In the instant action, the Committee interpreted the Plan to provide for only one change in control event in the case of a merger.

{¶12} In *Hainline v. General Motors Corp.* (C.A.6, 1971), 444 F.2d 1250, the Sixth Circuit Court of Appeals was presented with a substantially similar situation. In that case, the General Motors bonus plan provided that interpretations by the committee in charge of administering the plan were final and conclusive. Id. at 1258. However, the court held that such language does not preclude judicial review. Id. at 1255. The court went on to hold that the applicable standard of

review of the committee's interpretation was whether or not the committee was guilty of "fraud or such gross mistakes as imply bad faith or failure to exercise honest judgment." Id. at 1256, quoting *Siegel v. First Penn. Banking and Trust Co.* (E.D.Pa. 1961), 201 F.Supp. 664, 669.

{¶13} In the instant case, this Court cannot say that the Committee committed gross mistakes or fraud in its interpretation of the Plan. Our conclusion is based upon several factors. First, the Plan defined a change in control as

> "the occurrence of any of the following events:
>
> "(i) The Company is merged, consolidated or reorganized into or with another corporation or other legal person, and as a result of such merger, consolidation or reorganization less than two-thirds of the combined voting power of the then-outstanding securities of such corporation or person immediately after such transaction are held in the aggregate by the Holders of the combined voting power of the then-outstanding securities entitled to vote generally in the election of Directors ("Voting Stock") of the Company immediately prior to such transaction;
>
> "(ii) The Company sells or otherwise transfers all or substantially all of its assets to another corporation or other legal entity, and as a result of such sale or transfer less than two-thirds of the combined voting power of the then-outstanding securities of such corporation or entity immediately after such sale or transfer is held in the aggregate by the Holders of Voting Stock of the Company immediately prior to such sale or transfer;
>
> "(iii) ***;
>
> "(iv) The Company files a report or proxy statement with the Securities and Exchange Commission pursuant to the Exchange Act disclosing in response to Form 8-K or Schedule 14A (or any successor schedule, form or report or item therein) that a Change in Control of the Company has occurred or will occur in the future pursuant to any then-existing contract or transaction; or

"(v) ***."

{¶14} Appellant has urged that the above language provides for multiple change in control events to occur in the case of a merger. However, the Plan's stated purpose "is to reward performance *** by providing long term incentives and rewards[.]" As such, the construction urged by appellant would be in direct contravention of the Plan's stated purpose of long term incentives.

{¶15} Additionally, appellant has made no showing of bad faith by the Committee. To the contrary, the Committee informed appellant prior to the grant of the stock options and performance awards in question that the options and awards would not vest at the time the merger closed. Also, the record reflects that if the Committee had interpreted the Plan to provide for multiple change in control events, it would not have issued stock options and performance awards in January 1999. Further, the Committee's interpretation of the Plan is consistent with the stated purpose of the plan, i.e. providing long term incentives to Rubbermaid employees. As such, this Court cannot say that the Committee committed such gross mistakes as to imply bad faith or a failure to exercise honest judgment.

{¶16} Appellant also avers that the trial court erred in finding that appellees owed no fiduciary duty to appellant and that appellees had not committed fraud. However, even if this Court were to determine that a fiduciary duty existed, our finding above makes summary judgment appropriate. As we have found the Committee's interpretation of the plan to be a reasonable one and

there is no dispute that this interpretation was provided to appellant, appellant cannot demonstrate that appellees breached any duty. Further, appellant cannot succeed on a claim of fraud because he cannot demonstrate any misrepresentation made by the appellees.

{¶17} Next, appellant contends that the trial court erred in finding that two of the plaintiffs below were barred from suing appellees based upon releases they had signed upon their termination. Based upon our conclusions supra, these plaintiffs could not succeed on any of their claims. As such, even if the trial court erred in barring them from suit, any error was harmless.

{¶18} Finally, appellant contends that the trial court erred in denying his motion for summary judgment on his breach of contract claim. As discussed supra, the Committee in its interpretation of the Plan did not commit gross mistakes or act in bad faith. Therefore, deference is given to its interpretation of the plan. As such, appellees did not breach the contract by failing to accelerate the vesting of appellant's stock options. Therefore, appellant was not entitled to summary judgment on his breach of contract claim.

{¶19} Accordingly, appellant's first and second assignments of error are overruled.

III.

{¶20} Appellant's assignments of error are overruled, and the judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

Exceptions.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

THOMAS J. LEE, RUSSELL S. SAYRE, and JOHN B. NALBANDIAN, Attorneys at Law, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202, for appellants.

JERRY S. PACKARD, Attorney at Law, 2171 B. Eagle Pass, Wooster, Ohio 44691, for appellants.

THOMAS B. QUINN, SONDRA A. HEMERYCK and PAULA M. KETCHAM, Attorneys at Law, 6600 Sears Tower, Chicago, Il 60606, for appellees.

J. DOUGLAS DRUSHAL, Attorney at Law, 225 North Market Street, P. O. Box 599, Wooster, Ohio 44691, for appellees.