

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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NEVILLE, RODIE AND SHAW, INC.

Plaintiff,

- against -

Case No. 3:23-cv-00266-VAB

E.A. PRESCOTT LEGARD, AS EXECUTOR OF THE
ESTATE OF EDWIN F. LEGARD, JR.,

Defendant.

----- X

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS AND IN
SUPPORT OF DEFENDANT'S CROSS-MOTION FOR
JUDGMENT ON THE PLEADINGS**

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**ORAL ARGUMENT
REQUESTED**

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PRELIMINARY STATEMENT

E.A. Prescott Legard, (“Defendant,” or “Executor”) as executor of the estate of Edwin F. Legard, Jr. (“Decedent”), respectfully submits this memorandum of law in opposition to Plaintiff’s Motion for Judgment on the Pleadings and in support of its Cross-Motion for Judgment on the Pleadings in accordance with Rule 12(c) of the Federal Rules of Civil Procedure.

Neville, Rodie and Shaw, Inc. (“Plaintiff,” “NRS,” or the “Corporation”) filed this action seeking specific performance of Sections 2 and 2A of the Shareholders’ Agreement, restated as of December 22, 2003 (the “Agreement”) among the shareholders of common stock of the Corporation. Plaintiff erroneously claims that these provisions afford the Corporation a right to purchase the Decedent’s shares of common stock. In reality, the Agreement imposes an obligation on the Corporation to purchase the shares of the Decedent. However, under the Agreement, the Legal Representative of the Decedent retains the right to refuse to sell the Decedent’s shares to the Corporation and may choose instead to sell them to third-parties at any amount it deems appropriate.

Under general contract interpretation principles, the Agreement is indeed only susceptible to one meaning, namely that the Corporation has an obligation to attempt to purchase the Decedent’s shares, but the Decedent is under no obligation to sell them. If Decedent refuses the Corporation’s offer, it retains ownership of these shares and may sell them to third parties. Consequently, this Court should deny Plaintiff’s Motion for Judgment on the Pleadings, since Plaintiff cannot create an obligation to purchase shares that is not provided for in the Agreement.

Furthermore, this Court should grant Defendant's Motion for Judgment on the Pleadings and hold that the Defendant is under no obligation to sell the Decedent's shares of common stock to the Corporation for Book Value; that Defendant continues to own the Decedent's shares of common stock; and that Defendant may sell the shares of common stock to third parties for any amount it deems appropriate.

FACTUAL BACKGROUND

In June 2002, the Decedent purchased ten shares of NRS common stock for \$85,500.00, the Book Value of said shares, represented by Certificate #49. Ex. A, Statement of Undisputed Facts ¶ 2. In March 2009, Decedent received ten additional shares of NRS common stock, represented by Certificate #58 (together with Certificate #49, the "Certificates"). Ex. A, Statement of Undisputed Facts ¶ 3. In December 2003, the Decedent, along with the other owners of the common stock of NRS, entered into the Agreement. Ex. B, Agreement.

Section 2 of the Agreement provides, in pertinent part, that "the provisions of this Agreement shall govern . . . the ownership by his estate of shares of stock in the event of his death." Ex. B, Agreement, Section 2. Section 2(A) of the Agreement, entitled "Purchase of Shareholder's Shares Upon Death of Shareholder," imposes an "**obligation to purchase all of the decedent's shares** as soon thereafter as is practicable" on the Corporation. (emphasis added) Ex. B, Agreement, Section 2(A). Section 2(A) also provides that "[t]he purchase price shall be the Book Value of the shares as of the end of the fiscal year completed prior to the date of the shareholder's death after the audit for such year has been finalized." Ex. B, Agreement, Section 2(A). The Book Value, as defined in the Agreement, is "per share . . . the book value determined in accordance with generally accepted accounting principles from the books of the Corporation by its

independent certified public accountants regularly retained by the Corporation....” Ex. B, Agreement, Section 2. The Agreement also indicates that the “[n]o Shareholder (or legal representative) . . . shall be permitted to continue to own or to assign, sell or pledge his shares of Common Stock **unless . . . the Corporation or other Shareholders fail to purchase such shares** of Common Stock pursuant to this Agreement.” (emphasis added) Ex. B, Agreement, Section 2. The Agreement finally provides that “[i]f the deceased shareholder’s shares are not purchased by the Corporation (or other Shareholders) within one year from the date of death, the legal representative and/or beneficiaries or heirs shall have the right to sell such shares, but the Corporation’s obligation shall expire without liability of any kind to the Corporation.” Ex. B, Agreement, Section 2(A).

The Decedent died on September 23, 2022. Ex. A, Statement of Undisputed Facts, ¶ 1. Following the Decedent’s death, the Connecticut Probate Court issued a decree appointing Defendant as the Executor of the Decedent’s Estate. Compl., ¶ 5; Answer, ¶ 5. Shortly thereafter, in accordance with the Agreement, the Corporation offered to pay the Book Value of the shares at the end of the fiscal year ending in 2021 corresponding to \$304,081.20. Compl., ¶ 22; Answer, ¶ 52. Defendant refused to sell the shares to the Corporation for Book Value as permitted by the Agreement. Answer, ¶ 30. On February 28, 2023, Plaintiff commenced this action seeking specific performance of the Agreement alleging that the Defendant failed to tender and sell the Decedent’s Shares back to the Corporation for Book Value in violation of the Agreement. *See generally* Compl.

On June 14, 2023, Plaintiff filed a Motion for Judgment on the Pleadings, requesting this Court to enter an order awarding specific performance of the Agreement in Plaintiff’s favor and

requiring Defendant to tender the Certificates and to sell the Decedent's shares to the Corporation at Book Value of \$304,081.20.

LEGAL ARGUMENT

I Standard of Review on Motions for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides that “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c); *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 301 (2d Cir. 2021). “Pleadings” include both the “complaint” and the “answer to [the] complaint.” Fed. R. Civ. P. 7(a); *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 301 (2d Cir. 2021).

When deciding on a motion for judgment on the pleadings pursuant to Rule 12(c) the Court will apply the same standard as a motion to dismiss under Rule 12(6). *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). Judgment on the pleadings is appropriate if there are no remaining material issues of fact to be resolved and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c); see *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 n. 2 (1977); *Burns Int'l Sec. Servs., Inc. v. Int'l Union, United Plant Guard Workers of Am. (UPGWA) & Its Loc. 537*, 47 F.3d 14, 16 (2d Cir. 1995).

In determining a motion for judgment, “[a] court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-movant; it should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* Notwithstanding, under Rule 12(c), the Court may consider materials outside of the pleadings. *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d, 49, 53 (2d Cir. 1985). Therefore, the Court may consider any written

documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.” *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

II The Proper Interpretation of the Agreement is a Matter of Law

Plaintiff alleges in its Motion for Judgment on the Pleadings that the proper interpretation of the Agreement effectively restricts the Defendant from selling his shares to third parties and imposes an additional duty to sell his Shares to the Corporation. This is an improper interpretation of the unambiguous terms of the Agreement.

“The fundamental objective of contract interpretation is to give effect to the expressed intentions of the parties.” *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997). “Under New York law, the initial interpretation of a contract is a matter of law for the court to decide.” *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London, England*, 136 F.3d 82, 86 (2d Cir. 1998); *28th Highline Assocs., L.L.C. v. Roache*, 826 F. App'x 70, 72–73 (2d Cir. 2020) (quotations omitted).¹ *See also Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 464 (2d Cir. 2010).

Here, Plaintiff has moved the Court to enter judgment on the pleadings against Defendant on the basis that the unambiguous terms of the Agreement demonstrate that the Defendant may not retain the Decedent’s shares where the Corporation has sought to purchase them at Book Value. While Defendant agrees with the Plaintiff that the Agreement is unambiguous and that the only dispute for this Court to resolve is the proper interpretation of the Agreement which is legal in

¹ Section 9 of the Agreement states that the agreement shall be governed under New York law. Ex B, Agreement, Section 9.

nature, the terms of the Agreement demonstrate that Plaintiff has an obligation to buy the Decedent's shares for Book Value, but also demonstrate that Defendant is under no obligation to sell them to the Corporation. Therefore, the Agreement is only susceptible to one meaning, namely that the Corporation has an obligation to attempt to purchase the Decedent's shares, but the Decedent is under no obligation to sell them. If Decedent refuses the Corporation's offer, then it may retain ownership of these shares or sell them to a third party. Plaintiff's interpretation of the Agreement imposes additional restrictions or duties on the parties that were not intended in the Agreement. Therefore, the Plaintiff's Motion for Judgment on the Pleadings should be denied.

III The Proper Interpretation of the Contract Allows Defendant to Refuse to Sell its Common Shares to the Corporation

The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing. *See Slatt v. Slatt*, 64 N.Y.2d 966, 488 N.Y.S.2d 645, 477 N.E.2d 1099 (1985); *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018, 584 N.Y.S.2d 424, 425, 594 N.E.2d 918, 919 (1992); *Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66, 869 N.Y.S.2d 511, 516 (2008), *aff'd*, 13 N.Y.3d 398, 920 N.E.2d 359 (2009). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may not be admitted. *See W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 443, 566 N.E.2d 639, 642 (1990); *Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66, 869 N.Y.S.2d 511, 516 (2008), *aff'd*, 13 N.Y.3d 398, 920 N.E.2d 359 (2009).

The Court must assess the plain meaning of the contract terms in light of the "entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,"

with the wording to be considered “in the light of the obligation as a whole and the intention of the parties as manifested thereby.” *Kass v. Kass*, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356–57, 696 N.E.2d 174, 181 (1998), quoting *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524, 159 N.E. 418, 419 (1927); *Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66, 869 N.Y.S.2d 511, 516 (2008), *aff’d*, 13 N.Y.3d 398, 920 N.E.2d 359 (2009).

A contract is unambiguous if “the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself and concerning which there is no reasonable basis for a difference of opinion.” *Donohue v. Cuomo*, 38 N.Y.3d 1, 13, 184 N.E.3d 860, 867 (2022). Basically, the contract is unambiguous if “on its face [it] is reasonably susceptible of only one meaning.” *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166, 170–171 (2002); *Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66, 869 N.Y.S.2d 511, 516 (2008), *aff’d*, 13 N.Y.3d 398, 920 N.E.2d 359 (2009). If contractual language is unambiguous, the parties’ differing interpretations of the contract do not make it ambiguous. *See Id.* at 67 (citing *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 460 (N.Y. 1957); *Moore v. Kopel*, 237A.D.2d 124, 125 (N.Y. App. Div. 1997).).

Furthermore, a court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties. *Teichman by Teichman v. Community Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 630 (1996); *Morlee Sales Corp. v. Mfrs. Trust Co.*, 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 518, 172 N.E.2d 280, 282 (1961); *Riverside S. Plan. Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66, 869 N.Y.S.2d 511, 516 (2008), *aff’d*, 13 N.Y.3d 398, 920 N.E.2d 359 (2009). “[W]here a contract

was negotiated between sophisticated, counseled businesspeople negotiating at arm's length, courts should be especially reluctant to interpret an agreement as impliedly stating something which the parties" specifically did not include. *Donohue v. Cuomo*, 38 N.Y.3d 1, 12, 184 N.E.3d 860, 866 (2022).

Section 2 of the Agreement specifies that "the provisions of this Agreement shall govern . . . the ownership by his estate of shares of stock in the event of his death." Section 2A adds that "[u]pon the death of any Shareholder, the Corporation shall have **the obligation to purchase** all of the decedent's shares as soon thereafter as is practicable. The purchase price shall be the Book Value of the shares as of the end of the fiscal year completed prior to the date of the shareholder's death. . . ." (emphasis added).

Here, the Agreement expressly affirms that the Corporation has an obligation to purchase the Decedent's shares, but it does not require the Legal Representative of the Decedent to sell them. In practical terms, this means if the Corporation attempts to purchase the shares by offering to pay the contractually established Purchase Price but fails to conclude the transaction for external reasons – such as a refusal to sell by the Decedent's Legal Representative of the Decedent – then it is free of liability. Section 2A of the Agreement confirms this interpretation:

If a deceased shareholder's shares are not purchased by the Corporation (or other shareholders) within one year from the date of death, the **legal representatives and/or beneficiaries or heirs shall have the right to sell such shares, but the Corporation's obligation to purchase such shares shall continue in effect until such shares are sold**, at which time its obligation shall expire without liability of any kind to the Corporation. (emphasis added)

In fact, the Agreement foresees the possibility that the Corporation will fail to purchase the shares and allows the Decedent's Legal Representative to continue to own, assign, sell or pledge them:

No Shareholder (or legal representative) in restricted categories A, B or C below shall be permitted to continue to own or to assign, sell or pledge his shares of Common Stock **unless with respect thereto the Corporation or other Shareholders fail to purchase such shares** of Common Stock pursuant to this Agreement. (emphasis added)

Plaintiff's interpretation, i.e., that Defendant is required to sell the Decedent's shares to the Corporation, does not find any support in the Agreement. Nowhere in the Agreement do the parties provide for an obligation of the Decedent's Legal Representative to sell the shares. Given that the Agreement was negotiated and concluded between sophisticated, counseled businesspeople negotiating at arm's length, this Court should not distort its language to create an obligation or read the agreement as impliedly imposing an obligation that the parties never meant to include.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court:

- i) Deny Plaintiff's motion for judgment on the pleadings;
- ii) Grant Defendant's motion for judgment on the pleadings, holding that:
 - 1) Defendant is not required to tender the Certificates sell the Decedent's shares of common stock to the Corporation for Book Value;
 - 2) that Defendant continues to own the Decedent's shares of common stock; and
 - 3) that Defendant may sell the shares of common stock to third parties for any amount it deems appropriate;
- iii) awards such other and further relief as the Court may deem just and proper.

Dated this 14th day of July 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2023, a copy of the foregoing was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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