

I.

PROCEDURAL BACKGROUND

1. This a civil action for declaratory relief with regard to the Ruth Cook Blue Living Trust, established by documents dated August 26, 1996 (the "Trust," as evidenced by the "Trust Agreement"). The Petition for Declaratory Relief, dated April 12, 2007, was filed on April 18, 2007 ("Petition"). It was verified by James M. Deal, Jr., Linda C. Dalton and Sarah C. Isaacs, as the Trustees of the Trust ("Trustees").

2. The Trust was established by Ms. Ruth Cook Blue on or about August 26, 1996, and was restated in its entirety on or about June 23, 2003. Ruth Cook Blue died in 2005.

3. By way of this action, the Trustees ask that the court determine the "value" at which certain equity stock in the Aberdeen and Rockfish Railroad Company (the "Railroad"), a short line railroad company, held by the Trust is required to be offered for sale to individual members of a certain group of shareholders (herein the "Blue Family") of the Railroad, most if not all of whom include the Respondents, as directed by Ruth Cook Blue in paragraph 8.01 of the Trust Agreement.

4. By way of their Answer with Counter-Petition/Counterclaim, dated and served on May 4, 2007, Respondents also seek a declaration from the court as to the price at which the Blue Family is to be offered the Railroad stock pursuant to the requirements of the Trust Agreement; and they seek damages for the contended failure of the Petitioners/Trustees to fulfill their obligations under paragraph 8.01 of the Trust Agreement.

5. Petitioners' served their Motion to Amend Petition ("Petitioners' Motion") on June 1, 2007.

6. Respondents served their First Motion for Partial Summary Judgment ("Respondents' Motion") on July 2, 2007.

7. Both Petitioners' Motion and Respondents' Motion have been fully briefed and argued, and are ripe for determination.

II.

THE PETITIONERS' MOTION TO AMEND

1. In their initial verified Petition, Petitioners affirmatively allege that a certain valuation report (the "Report") by the certified public accounting firm of Bowers & Company, CPAs, LLC ("Bowers"), governs the determination of the price at which stock in the Railroad is to be offered for sale pursuant to paragraph 8.01 of the Trust Agreement. The substance of their contention is that the Report establishes two possible values for the Railroad stock, and they ask the court to declare which of the two values determine the price at which the stock must be offered for sale to the Blue Family.

2. In their proposed unverified Amended Petition, Petitioners seek to abandon their allegation that the Bowers Report is determinative. Rather, in substance, they seek to amend the Petition by way of denying (a) that Bowers is the firm identified in paragraph 8.01 of the Trust Agreement, and which is charged with "establishing" the "value" of the Railroad stock directed to be offered for sale to the Blue Family; and (b) that the Report governs determination of the price at which the stock is to be offered. Further, even if the Bowers Report is deemed to be the valuation contemplated by

paragraph 8.01 of the Trust Agreement, the Trustees seek to raise a contention that the Report is materially flawed and should not be determinative.

3. Respondents oppose Petitioners' Motion. They contend that it should be denied because:

(a) Petitioners are the Trustees of the Trust; they each verified the Petition; the material allegations reflected in the verified Petition constitute either factual or judicial admissions that are binding on the Petitioners and are determinative of material issues in this civil action; and the consequences of those admissions cannot be avoided through the artifice of an amended Petition, which in effect would be tantamount to allowing an improper after-the-fact change in sworn testimony; or

(b) The substance of the Amended Petition would not change the result of Respondents' Motion, and therefore its filing would present an act of futility on the part of Petitioners.

4. Rule 15(a) of the North Carolina Rules of Civil Procedure ("Rule(s)"), clearly mandates that leave to amend a pleading "shall be freely given when justice so requires." However, if allowed, the act of amending a pleading does not of itself relieve the amending party of all burdens of material factual or legal concessions made in the initial pleading. *Hughes v. Anchor Enter., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956).

5. Whether to allow an amendment to a pleading rests in the discretion of the court. *Gladstein v. South Square Assocs., L.P.*, 39 N.C. App. 171, 177, 249 S.E.2d 827, 830 (1978) ("The motion to amend is properly addressed to the discretion of the

trial court who must weigh the motion in light of the attendant circumstances.”)(citation omitted).

6. Here, certain material factual and legal allegations of the proposed Amended Petition, which was filed prior to Respondents’ Motion, arguably are substantively different from corresponding verified allegations of the initial Petition.

7. However, the duty of construing the relevant provisions of the Trust falls to the court, notwithstanding the respective positions and contentions of the litigants.¹

8. Accordingly, in the context of this particular case, although the Petitioners’ Motion raises a number of as-yet-unanswered questions,² the substance of the amendment does not so offend the court’s sense of fair play that denial of the Petitioners’ Motion is required.

9. Therefore, in the exercise of its discretion, the court CONCLUDES that justice requires that the Petitioners’ Motion should be GRANTED.

¹ “When called upon to interpret a trust agreement . . . courts seek to ascertain the intent of the parties and, when ascertained, give effect thereto, unless forbidden by law. . . . The intent of one who creates a trust is to be determined by the language he chooses to convey his thoughts, the purpose he seeks to accomplish, and the situation of the several parties to or benefited by the trust.” *Callaham v. Newsom*, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959). Therefore, variations existing between the Petition and the Amended Petition regarding the Trustee’s contended construction of the Trust Agreement are not of material consequence in this setting. Accordingly, the court is unable to conclude that the proposed Amended Petition presents issues fatally analogous to those cases in which a futile attempt is made, by amendment or other procedural mechanism, to change prior sworn testimony or a judicially admitted position. *C.f. Allen R. Tew, P.A. v. Brown*, 135 N.C. App. 763, 522 S.E.2d 127 (1999)(providing that a trial court may decline to consider a motion to amend prior to ruling upon summary judgment when the amended pleadings are unverified.)

² For instance, the Trustees have fiduciary duties to the Trust and to its beneficiaries. See N.C. Gen. Stat. § 32-2 (2005). However, Respondents contend that a material number of the beneficiaries of the Trust are also members of the Blue Family. Consequently, the price at which the Railroad stock ultimately is valued likely will impact different beneficiaries of the Trust -- to whom the Trustees owe a high duty -- in disparate ways, depending upon their family history. This raises the question of to what extent is it appropriate for the Trustees to take a position as to value of the Railroad stock.

III.

THE RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

1. Respondents contend that the Bowers Report, as a matter of law, is the sole source for determining the "value," or price, at which the Railroad shares are to be offered to the Blue Family; and they seek summary judgment on that issue. They concede that the ultimate "value" established by the Report, and upon which the offering price is to be based, remains at issue; and they do not seek summary judgment in that regard.

2. Petitioners oppose Respondents' Motion. They contend the record does not support a conclusion that, as a matter of law (a) Bowers is the "accounting firm engaged by" the Railroad as of December 31 of the year preceding Ruth Cook Blue's death; or (b) the Bowers Report is the sole source from which the Trustees must determine the price at which the Railroad shares are to be offered to the Blue Family.

3. The court has closely examined the record in this matter, including affidavit and deposition testimony. It CONCLUDES as a matter of law that the following material facts exist without substantial controversy:

(a) The Aberdeen & Rockfish Railroad Company was organized by John A. Blue in 1892, and it has been in continuous operation since. The Railroad is a privately-held North Carolina corporation serving railway customers in the southeastern and northeastern parts of the State.

(b) John Blue was married to Ruth Cook Blue. Ruth Cook Blue, a resident of Watauga County at times material to this action, died on May 7, 2005.

(c) The Blue Family is comprised of those shareholders of Railroad stock who are descendants of John Blue, or spouse of such descendants.³

(d) Petitioner James M. Deal, Jr., Esq. (“Deal”) was Ruth Cook Blue’s attorney. He has been a North Carolina-licensed attorney since 1974, and concentrates his practice in estate and trust planning.

(e) In 1996, Deal drafted the Trust Agreement, which resides at the heart of this case. It was executed by Ruth Cook Blue on or about August 26, 1996. By that time, Ruth Cook Blue had outlived both her husband, John A. Blue, and her children. As John A. Blue’s spouse and then widow, Ruth Cook Blue became the owner of a substantial block of shares of stock in the Railroad.

(f) The Trust subsequently was restated in its entirety on June 23, 2003.

(g) Pursuant to section 3.03(c) of the Trust Agreement, the Petitioners, Sarah C. Isaacs, Linda C. Dalton and Deal, were named as Trustees of the Trust that was created upon the death of Ruth Cook Blue.

(h) The Trustees have conducted the administration of the Ruth Cook Blue Estate.

(i) Paragraph 8.01 of the Trust Agreement provides, in part, as follows:

I direct my Trustee to offer my Aberdeen & Rockfish Railroad Company stock for sale to the Blue family shareholders i.e.

³ Paragraph 8.01 of the Trust Agreement is unclear with regard to when the “shareholder” status of a potential Blue Family member should be determined. Is it as of (a) December 31 of the year preceding the death of Ruth Cook Blue, (b) the date of her death or (c) the date the shares are offered for sale (after appropriate valuation)? However -- since this question has not been raised by the parties -- for purposes this Order the court assumes the identity of the Blue Family is the same for all three possible determination dates, and no ruling on any such issue is intended.

descendants of John Blue or spouses of such descendants at the value established by the accounting firm engaged by the Railroad as of December 31 of the year preceding my death.⁴

.....

The proceeds from the sale of the Aberdeen & Rockfish Railroad Company stock shall be added to my remaining trust property and distributed in accordance with paragraph 8.02 of this Section.

(j) Since at least 1995, the Bowers firm (and its predecessors) has served as the annually-appointed auditor for the Railroad.

(k) For purposes of paragraph 8.01 of the Trust Agreement, Bowers is “the accounting firm engaged by” the Railroad as of December 31 of the year preceding the death of Ruth Cook Blue.

(l) On or about April 30, 2005, before the death of Ruth Cook Blue, Bowers issued the Report, which is formally entitled “Determination of the Fair Market Value per Share of a Minority interest in Aberdeen and Rockfish Railroad Company.” This Report purports to value the Railroad stock for estate and gift tax purposes as of December 31, 2004. In this regard, among other things, the Report contains the following qualifying language:

We [*i.e.* Bowers] understand that the results of our analysis will be used exclusively for internal use to assist the Board of Directors to determine a value of a minority interest of a share of the [Railroad’s] common stock for gift and estate tax purposes. The report will be invalid if used for any other purpose.

.....

⁴ The mechanism provided in paragraph 8.01 of the Trust Agreement for determining the proportionate rights of Blue Family members to purchase Railroad shares is susceptible to more than one interpretation. However, since this question also has not been raised by the parties, no ruling on any issue as to such prospective rights is intended by this Order.

[T]he objective of this valuation is not to determine the price or fair market value at which an interest in [the Railroad] would sell if publicly traded. Rather, the objective is to estimate the fair market value of a share of common stock of the [Railroad] as a closely held entity, on a minority, non-marketable basis.

....

The standard of value is fair market value, defined in Revenue Ruling 59-60 as “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts.

(m) By its own terms, the Bowers Report was prepared for the limited purpose of determining the fair market value between a willing buyer and a willing seller in the general marketplace of a minority interest of a share of the Railroad’s common stock for gift and estate tax purposes.

(n) By its own terms, paragraph 8.01 of the Trust Agreement limits the group of persons to whom shares of the Railroad must be offered to the Blue Family, who already are shareholders. The Trust mandate does not contemplate the Railroad stock being offered for sale in the general marketplace.

(o) The intent of Ruth Cook Blue was that the word “value,” as reflected in paragraph 8.01 of the Trust Agreement, means “fair market value” of the Railroad shares as the same would be viewed by the Trust, as prospective seller, and the Blue Family, as prospective purchasers.

4. There exist genuine issues of material fact with regard to:

(a) The intent of Ruth Cook Blue with regard to the date as of which the “value” of her Railroad shares is to be determined.

(b) The “value” of the Railroad shares of Ruth Cook Blue in the context of their being offered in a directed sale only to the Blue Family as opposed to their being offered for sale under no compulsion to the general public; and whether the Bowers Report reflects the intent of Ruth Cook Blue in that regard.

5. Accordingly, based upon the foregoing facts that exist without substantial controversy, the court CONCLUDES that:

(a) There exist no genuine issues of material fact with regard to the contention by Respondents that Bowers is the “accounting firm” whose “value” opinion shall be controlling with regard to the price at which Ruth Cook Blue’s shares of Railroad stock are to be offered for sale to the Blue Family; and Respondents therefore are entitled to summary judgment in their favor in that regard.

(b) There exist genuine issues of material fact with regard to whether the Bowers Report is controlling as to the price⁵ at which the Railroad shares are to be offered to the Blue Family; and Respondents therefore are not entitled to summary judgment in their favor in that regard.⁶

⁵ Whether the “value” opinion expressed in the Bowers Report, or a “value” opinion by Bowers not presently formulated and/or before the court, is reflective of the price at which the Railroad shares are to be offered to the Blue Family, consistent with the intent of Ruth Cook Blue, remains for further determination.

⁶ In their briefs, Petitioners attack as flawed the analytical methodology used in the Bowers Report; and they have presented argument and affidavit evidence in that regard. In light of the rulings in this Order, this issue is not directly before the court at this time. However, the court notes that since Ruth Cook Blue is deemed to have embraced the expertise of Bowers by virtue of paragraph 8.01 of the Trust Agreement, it is likely that criticism of Bowers’ valuation methodology would be of limited probative value, if it would be admissible at all. See *Classic Coffee Concepts, Inc. v. Anderson*, 2008 NCBC 1 ¶ 86 (N.C. Super. Ct. Jan. 31, 2008), <http://www.ncbusinesscourt.net/opinions/013108%20Order%2006%20CVS%202941.pdf> (providing that North Carolina courts are bound to follow the agreement of the parties as to valuation of stock)(citing *Hickory Orthopedic Ctr., P.A., v. Nicks*, 179 N.C. App. 281, 287, 633 S.E.2d 831, 835 (2006)).

NOW THEREFORE, based upon the foregoing CONCLUSIONS, it hereby is ORDERED that:

1. Petitioners' Motion to Amend Petition is GRANTED, and Petitioners' proposed Amended Petition for Declaratory Relief is deemed FILED in this action.
2. Respondents shall have thirty (30) days from the date of this Order to serve a response to the Amended Petition.
3. Respondents' First Motion for Partial Summary Judgment is GRANTED, to the effect that Bowers & Company, CPAs, LLC is the "accounting firm" whose "value" opinion shall be controlling with regard to the price at which Ruth Cook Blue's shares of stock in the Aberdeen & Rockfish Railroad Company are to be offered for sale to the Blue Family.
4. Respondents' First Motion for Partial Summary Judgment is DENIED with regard to whether the April 30, 2005 Report of Bowers & Company, CPAs LLC is controlling as to the price at which Ruth Cook Blue's shares of stock in the Aberdeen & Rockfish Railroad Company are to be offered for sale to the Blue Family.
5. Pursuant to this court's June 22, 2007 Order Granting Consent Motion to Extend Time to Conduct Case Management Meeting, the parties shall conduct a Case Management Meeting, pursuant to Rule 17.1 of the General Rules of Practice and Procedure for the North Carolina Business Court, within fifteen (15) days of the date of this Order.

This the 20th day of May, 2008.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases