

STATE OF NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WESTERN PIEDMONT ANESTHESIA,)
P.A.,)
)
Plaintiff,)

v.)

DANIEL C. BARNETTE, M.D.,)
)
Defendant, and Third)
Party Plaintiff)

v.)

RONALD C. GILDERSLEEVE, M.D.,)
THOMAS R. HILL, M.D., LARRY T.)
WILLIAMS, M.D., and TODD W.)
MCKENNEY, M.D.)

Third-Party Defendants.)

**PLAINTIFF'S REPLY TO
DEFENDANT'S BRIEF IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 15.7 of the General Rules of Practice and Procedure for the North Carolina Business Court, Plaintiff Western Piedmont Anesthesia, P.A. ("Plaintiff") respectfully submits this Brief in reply to Defendant's Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings. In addition to relying on the facts, arguments and law contained in this Reply Brief, Plaintiff continues to rely on the facts, arguments and law contained in its Brief in Support of Motion for Judgment on the Pleadings, filed with this Court on August 27, 2007.

ARGUMENT

I. DEFENDANT'S RELIANCE ON *CROWDER V. KISER* IS MISPLACED

Defendant's entire argument is premised upon his assertion that Crowder v. Kiser, 134 N.C. App. 190, 517 S.E.2d 178 (1999), and Gallagher v. Lambert¹ (cited therein) *imply* that a

¹ 549 N.E.2d 136 (N.Y. 1989), reh'g denied, 552 N.E.2d 179 (N.Y. 1990).

shareholders' agreement cannot be enforced against a former employee who has alleged wrongful termination unless and until the wrongful termination suit is resolved in favor of the company/employer. This position is baseless. Both of these cases upheld an award of summary judgment specifically enforcing a shareholder agreement. Both of these cases reject arguments that terminating an employee at a time that limits the payment he will receive for his shares pursuant to the shareholders' agreement impairs the enforceability of the shareholders' agreement. In fact, the Crowder case, quoting Gallagher with approval, notes that linking the propriety of a termination to enforcement of a shareholders' agreement would "frustrate the [shareholders] agreement and would be disruptive of the settled principles governing like agreements where parties contract between themselves in advance so that there may be reliance, predictability and definitiveness between themselves on such matters." 134 N.C. App. at 211, 517 S.E.2d at 191 (quoting Gallagher, 549 N.E.2d at 137-38 (citations omitted)).

The facts in the referenced cases have no relationship to the question of whether a corporation must await the outcome of a wrongful termination suit in order to resolve the ownership issues intended to be handled expeditiously in a shareholders' agreement. In each case the defendant alleged that specific enforcement of the shareholders' agreement would be unfair because he was terminated at a time that limited his recovery under the shareholders' agreement. In Crowder, the specific question raised by defendant was "whether the termination of his employment was designed to deprive him of a full return on his investment," and it was considered by the court in the context of whether proving that fact would render enforcement of the shareholders' agreement unconscionable. Id. In this matter, Defendant does not allege anywhere in his pleadings that his termination, or the timing of his termination, had any affect on the amount payable to him pursuant to the Stockholders' Agreement. Other than providing

authority for the propriety of awarding specific performance in an action to enforce a shareholders' agreement, and clarifying the role of the defense of unconscionability in enforcement of a shareholders' agreement (See Sec. II, below), Crowder is not applicable to this case.

II. DEFENDANT CANNOT ASSERT AN UNCONSCIONABILITY DEFENSE

A. Defendant has Waived the Affirmative Defense of Unconscionability

In his opposition brief, Defendant argues that specific performance of a shareholders' agreement is only appropriate where it is reasonable and not unconscionable under the circumstances. However, unconscionability is an affirmative defense that must be affirmatively pled pursuant to Rule 8(c) of the North Carolina Rules of Civil Procedure. Howell v. Landry, 96 N.C. App. 516, 526, 386 S.E.2d 610, 616 (1989). Where the affirmative defense of unconscionability is not pled, that issue is not properly raised and should not be addressed by this Court. See id. (refusing to address the defense of unconscionability where it was neither pled nor litigated); see also State Farm Mut. Auto. Ins. Co. v. Atlantic Indemnity Co., 122 N.C. App. 67, 73, 468 S.E.2d 570 (1996) (stating that defendant's failure to plead the affirmative defense of unconscionability either in its answer or amended answer to plaintiff's complaint barred defendant from raising this issue on appeal). In Defendant's Answer to Plaintiff's Complaint, Defendant failed to plead the affirmative defense of unconscionability and did not plead facts that would amount to a defense based on unconscionability. Thus, Defendant has waived the defense of unconscionability, and this Court should not address it.

Furthermore, the language of N.C. Gen. Stat. § 55-6-27(b)² does not alter this analysis. As the Crowder v. Kiser court recognized in its discussion of the addition of the

² N.C. Gen. Stat. § 55-6-27(b) states that a restriction on the transfer of shares is valid and enforceable against the holder if the restriction is authorized by this section and is not unconscionable under the circumstances.

unconscionability language to § 55-6-27(b), the legislative intent behind that amendment was to “allow a court called upon to enforce a stock restriction agreement to consider whether the enforcement of the agreement is unconscionable *at the time enforcement is sought*,” rather than follow the general rule that unconscionability is evaluated at the time of execution of the contract. 134 N.C. App. 190, 205, 517 S.E.2d 178, 189 (1999); see also King v. King, 114 N.C. App. 454, 458 442 S.E.2d 154, 156 (1994) (“The question of unconscionability must be determined as of the time the contract was executed....”). Since the law of unconscionability as a defense to the enforcement of a contract was already well settled in North Carolina at the time of the § 55-6-27(b) amendment, “[t]he amendment does not represent an attempt to change the prior law in North Carolina with respect to unconscionable agreements.” Id. at 205-206, 517 S.E.2d at 189 (quoting North Carolina Commentary to N.C. Gen. Stat. § 55-6-27). Thus, § 55-6-27 does not otherwise alter application of the law of unconscionability in the contract context, as has been well-developed by North Carolina courts, including the requirement that unconscionability is an affirmative defense that must be pled.

B. Defendant Has Not Pled Facts in Support of a Defense of Unconscionability

Even if the Court were to consider unconscionability in this case, Defendant has failed to allege any facts to support that defense as clarified in Crowder. See 134 N.C. App. at 207, 517 S.E.2d at 190. In Crowder, rather than weighing the unconscionability of the agreement pursuant to established contract law, the defendant asked the court to weigh the unconscionability of the agreement in light of his “reasonable expectations” of being able to complete his employment and realize the full value for his shares of stock. Id. at 207, 517 S.E.2d at 190. The court refused to apply the “reasonable expectations” approach, stating:

We decline to adopt a “reasonable expectations” approach here, since such an approach would render the objective language of the written contract nugatory,

would be contrary to the express purposes for entering into stock restriction and purchase agreements, and would inevitably lead to uncertainty, delay and expense as the trial courts attempt to determine the “expectations” of a terminated employee, and to further determine whether those expectations were “reasonable.”

Id. After rejecting the “reasonable expectations” approach, the Crowder court held that the well-settled definition of unconscionability from contract law would also govern unconscionability in the context of a shareholders’ agreement. Id. at 206, 517 S.E.2d at 190.

Specifically, the court stated:

[a] court will general refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other....

Id. at 207, 517 S.E.2d at 190 (quoting Brenner v. School House, Ltd., 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citations omitted)). In the present case, Defendant failed to plead unconscionability as a defense. However, even if unconscionability were to be considered, Defendant has alleged no facts that could satisfy the difficult standard of unconscionability under Crowder. Moreover, the Crowder court’s rejection of the “reasonable expectations” approach refutes Defendant’s argument that he understood the language “*for any reason* ceases to be employed by the Corporation” in the Stockholders’ Agreement to mean “for cause.” Defendant’s expectations regarding terms in the Stockholders’ Agreement (reasonable or otherwise) have absolutely nothing to do with a determination of whether the Stockholders’ Agreement is unconscionable.

III. NO FACTUAL ALLEGATIONS REMAIN IN DISPUTE THAT WOULD PREVENT THIS COURT FROM ORDERING SPECIFIC PERFORMANCE OF THE STOCKHOLDERS' AGREEMENT

Although Defendant denied Plaintiff's allegation in ¶ 19 of the Complaint that Defendant has defaulted on his obligation under the Stockholders' Agreement, Defendant acknowledges in his Answer that he has refused to surrender his shares to Plaintiff pursuant to the Stockholders' Agreement. (See Defendant's Answer, ¶ 12). It is undisputed that Defendant's employment with Plaintiff has been terminated and that he has not sold his shares back to Plaintiff as required pursuant to the Stockholders' Agreement. (See Compl., ¶¶ 9, 12; Defendant's Answer, ¶¶ 9, 12).

The factual allegations promoted by Defendant focus on the propriety of Defendant's termination by Plaintiff. Defendant goes so far as to argue that "[a]nswering the question as to whether or not the Defendant defaulted under the Employment Agreement will also potentially answer the question as to whether the Defendant was wrongfully terminated, and thus whether or not he must sell his shares back to WPA." This position is unsupportable. The alleged breach of employment contract is not relevant to the enforcement of the Stockholders' Agreement, and there is no law to support the position that these two issues are related. In fact, if Defendant were correct in his reasoning, the very purpose of having a Stockholders' Agreement would be thwarted because every Stockholders' Agreement that linked ownership of stock to employment would be challenged by attacking the propriety of termination of employment. The ultimate resolution of Defendant's claim for breach of the Employment Agreement has no relevance to Plaintiff's entitlement to enforce the Stockholders' Agreement. Paragraph 2 of the Stockholders' Agreement requires Defendant to sell his shares back to Plaintiff upon termination "*for any reason.*" Defendant's employment has been terminated, and Defendant has admittedly refused to sell his shares back to Plaintiff.

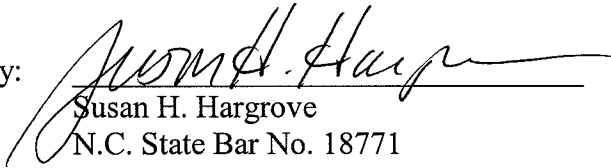
Further, Defendant fails to make any allegations against Plaintiff that would prevent this Court from ordering specific performance of the Stockholders' Agreement to require Defendant to tender his shares to Plaintiff. At most, Defendant alleges improper distribution by Plaintiff of 2006 fourth quarter profits. If this were to state a cause of action, which Plaintiff does not concede, and defendant proved facts sufficient to support it, which Plaintiff does not believe he can do, it would survive independently of enforcement of the Stockholders' Agreement. Enforcement of the Stockholders' Agreement would be effective as of January 27, 2007, the date Defendant was required to tender his shares to Plaintiff, and would therefore have no effect on any rights of Defendant as a shareholder, arising prior to that date. Accordingly, this Court should enter an Order granting Plaintiff judgment in their favor as a matter of law and requiring Defendant to sell his shares back to Plaintiff pursuant to the Stockholders' Agreement.

CONCLUSION

For the foregoing reasons in this Reply Brief as well as Plaintiff's Brief in Support of Motion for Judgment on the Pleadings, Plaintiff is entitled to judgment on the pleadings and respectfully requests the Court enter an Order compelling Defendant to tender his shares to Plaintiff for value as stated therein.

This the 27th day of September, 2007.

SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.

By: 

Susan H. Hargrove

N.C. State Bar No. 18771

Courtney H. Mischen

N.C. State Bar No. 35453

P.O. Box 2611

Raleigh, North Carolina 27602

(919) 821-1220

(919) 821-6800


CERTIFICATION OF COMPLIANCE

Pursuant to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court, counsel for Plaintiff certifies that Plaintiff's Reply to Defendant's Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings has no more than the maximum of three thousand, seven hundred and fifty (3,750) words permitted under the rule, as counted by the word-processing system used in its preparation.

This the 27th day of September, 2007.

SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.

By:



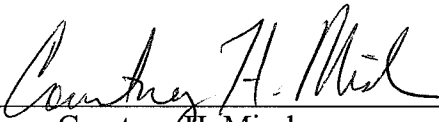
Susan H. Hargrove
N.C. State Bar No. 18771
Courtney H. Mischen
N.C. State Bar No. 35453
P.O. Box 2611
Raleigh, North Carolina 27602
(919) 821-1220
(919) 821-6800

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing document in the above-entitled action upon all other parties to this cause electronically and/or by depositing a copy thereof, postage paid in the United States mail, addressed to the attorney or attorneys for said parties as follows:

Paul E. Culpepper, Esq.
Young Morphis Back & Taylor, LLP
400 Second Avenue, NW
Post Office Drawer 2428
Hickory, North Carolina 28603-2428
paulc@hickorylaw.com
Attorney for Defendant

This the 27th day of September, 2007.



Courtney H. Mischen