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INDEX
NO. 17441-02

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 19 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 7-14-03
Submission Date: 3-26-04
Motion Sequence No.: 003,004/MOT D

________________________________x

SAMUEL MEHDIZADEH a/k/a SOLOMON MEHDIZADEH and SHERVIN MEHDIZADEH MEHDIZADEH,
Plaintiffs,

- against -

U.S. NONWOVENS CORP., YAHYA GABAYZADEH, HELEN GABAYZADEH, SHAHRAM GABAYZADEH, EGAL GABAYZADEH, DAN GABAYZADEH, ATLANTIC PAPER & FOIL CORP. and ATLANTIC PAPER CORP.,
Defendants.

- and -

MARVIN KAGAN (a/k/a Marvin Khaghan),
Intervenor.

- and -

RODY MEHDIZADEH
Additional Defendant on the Counterclaims

________________________________x

COUNSEL FOR PLAINTIFF
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COUNSEL FOR DEFENDANTS
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(for Intervenor)
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ORDER

The following papers were read on Plaintiffs' motion for summary judgment and Intervenor's motion for summary judgment:

MEHDIZADEH v. U.S. NONWOVENS, *et al.*,
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Motion Sequence # 3
Notice of Motion dated June 20, 2003;
Affidavit of Samuel Mehdizadeh sworn to on June 13, 2003;
Affirmation of Matthew Dollinger, Esq. dated June 20, 2003;

Motion Sequence # 4
Notice of Motion dated June 20, 2003;
Affirmation of Robert M. Calica, Esq. dated June 19, 2003;
Affidavit of Marvin Kagan sworn to on June 19, 2003;
Intervenors Memorandum of Law;
Affirmation of A. Kathleen Tomlinson
Affidavit of Shaun Gabayzadeh sworn to on July 21, 2003;
Reply Memorandum of Law of Intervenor;
Transcript of Oral Argument of March 12, 2004.

Plaintiffs Samuel Mehdizadeh a/k/a Solomon Mehdizadeh ("Sam") and Shervin Mehdizadeh ("Shervin") move for summary judgment seeking specific performance of the terms of their employment agreements and their rights under the provisions of Defendant U.S. Nonwovens Corp. ("USN") stock option plan.

Intervenor Marvin Kagan ("Marvin") moves to compel USN to comply with the terms of the a stock option agreement and to compel USN to take such steps as are necessary to transfer a one-third (1/3) equity interest in USN to Sam and Shervin.

BACKGROUND

USN, a domestic corporation, manufactures non-woven paper products. It is authorized to issue up to 200 shares of common stock, no par value.

All of the authorized shares have been issued. Yahya Gabayzadeh ("Yahya"), Helen Gabayzadeh, Shahram Gabayzadeh, Egal Bagayzadeh and Dan Gabayzadeh (collectively " Gabayzadeh") each own 20 shares. Marvin owns 96 shares. David Khagahn owns 4 shares.

By agreement dated January 2, 1997, USN hired Sam as the General Manager to be responsible for its day-to-day operations. By separate agreement dated January 2, 1997, USN hired Shervin as the Assistant Manager.

Sam's employment agreement contains the following provision:

> INCENTIVE STOCK OPTION PLAN, NO DILUTION
>
> The Company represents that it has adopted an Incentive Stock Option Plan and the Employee has been designated as a Key Employee thereunder and is entitled to participate in said plan. The Company has granted an option to Employee under its Incentive Stock Option Plan pursuant to a separate Option Agreement.

Shervin's employment agreement contains the following provision:

> INCENTIVE STOCK OPTION PLAN, NO DILUTION
>
> The Company represents that it will adopt an Incentive Stock Option Plan and that Employee will been (*sic*) designated as a Key Employee thereunder and is entitled to participate in said plan. The Company will grant an option to employee under its Incentive Stock Option Plan pursuant to as separate Option Agreement.

Although Sam and Shervin's employment agreements indicate the existence of a Stock Option Plan, USN did not have a stock option plan in existence as of the date of their employment agreements.

At a joint meeting of the USN shareholders and Board of Directors held on

August 13, 1997, the shareholders and directors adopted an Incentive Stock Option Program ("Option Program"). Under the terms of a joint resolution ("Joint Resolution") of the shareholders and directors adopted the Option Program, Marvin and Yahya were designated as the Stock Option Committee ("Committee"). Marvin and Yahya were authorized to execute all documents necessary to implement the Program. The Joint Resolution also stated that stock options under the Option Program were to be granted to Sam and Shervin. Sam and Shervin were to purchase the shares at a price to be determined to be the fair market value of the shares by the President of USN.

The total number of shares which could be issued under the Option Program to Sam and Shervin was 66.67. The Option Program further provided that authorized but unissued shares or treasury shares may be used for Program. At that time, there were no unissued treasury shares.

On August 13, 1997, USN entered into an Option Agreement with Sam whereby he was granted the irrevocable option to purchase up to 40 shares of USN for $3,884.81 per share. The option ran for a period of ten (10) years. The Option Agreement expressly stated that USN was authorized to issue 200 shares, no par value and that all of the shares had been issued.

USN entered into an Option Agreement with Shervin on the same date. The agreement was identical in all respects to the option agreement entered into with Sam, except that Shervin was granted the option to purchase 26.67 shares at the same per share price.

On or about October 7, 2002, Sam and Shervin decided to exercise their respective options. They did so by sending a letter to each of the shareholders and directors of USN and by sending a letter to USN expressing their intention to exercise their option and by tendering bank checks to USN as and for the purchase price of their shares.

Despite the exercise of their option and the tender of payment for the stock, USN has failed and refused to issue stock to Sam or Shervin.

Kagan (Khaghan) was willing to comply with the option and issue stock to Sam and Shervin. Gabayzadeh was not.

Gabayzadeh asserts that USN could not and cannot comply with the options issued to Sam and Shervin since all of the authorized USN shares have already been issued. Gabayzadeh asserts the that the option was an agreement between Sam and Shervin and USN. Therefore, they argue, the individual shareholders cannot be compelled to sell or transfer their shares back to the USN treasury so as to permit USN to issue the shares that the options offer for purchase by Sam and Shervin. Gabayzadeh also asserts that Sam cannot exercise the option issued to him since he failed to execute his employment agreement.

Gabayzadeh also challenges the validity of the options. The Joint Resolution adopting the Program required Yahya and Marvin to execute the documents necessary to implement the Program. The options issued to Sam and Shervin were executed only by Marvin. The Gabayzadehs assert that in order to be valid, the options had to

executed by both Yahya and Marvin which apparently never happened.

Finally, the Gabayzadehs assert that administration of the Option Program was vested in the Committee. The Program gives the Committee "...sole and complete authority" to determine to whom stock options are to be granted, the amount of the options to be granted and the other relevant terms of such stock options. They argue that the Joint Resolution, which directs the issuance of options to Sam and Shervin, and the Program, which grants the Committee the authority to determine who will be issued options, conflict with each other.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the movant establishes that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361 (1974), See also, Mosheyev v. Polevsky, 283 A.d.2d 469 (2nd Dept., 2001); and Akseizer v. Kramer, 265 A.D.2d 365 (2nd Dept., 1999).

The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, *supra*; and Davenport v. County of Nassau, 279 A.D.2d 497 (2nd Dept.,

2001); and Bras v. Atlas Construction Corp., 166 A.D.2d 401 (2nd Dept., 1991).

When deciding a motion for summary judgment, the court must determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). The motion must be denied if the court has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept., 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept., 1984).

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-moving party all of the reasonable inferences which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept., 2001). The function of the court on a motion for summary judgment is issue finding, not issue determination. Sillman v. Twentieth Century-Fox Film Corp., *supra*. See also, Miele v. American Tobacco Co., 2 A.D. 3d 799 (2nd Dept. 2003).

A stock option agreement is a contract which will be interpreted in accordance with the general rules of contract interpretation. See, Reiner v. Wenig, 269 A.D.2d 379 (2nd Dept., 2000).

A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and Katina, Inc. v. Famiglietti, 306 A.D.2d 440 (2nd Dept., 2003).

The terms of an agreement are to be interpreted in accordance with their plain meaning. Greenfield v. Philles Records, Inc., *supra;* and Tikotzky v. New York City Transit Auth., 286 A.D.2d 493 (2nd Dept., 2001). The court is to give "...practical interpretation to the language employed and the parties' reasonable expectations." Slamow v. Del Col, 174 A.D.2d 725, 726 (2nd Dept., 1991), *aff'd.,* 79 N.Y.2d 1016 (1992). See also, AFBT II, LLC v. Country Village on Mooney Pond, Inc, 305 A.D.2d 340 (2nd Dept., 2003); and Del Vecchio v. Cohen, 288 A.D.2d 426 (2001).

The court should not interpret an agreement in such a way as would contrary to the intent of the parties. Petracca v. Petracca, 302 A.D.2d 576 (2nd Dept., 2003); and Tikotzky v. New York City Transit Auth., *supra.*

Agreements signed at different times are generally viewed as separate agreements unless their history and subject matter show them to be unified. Ripley v. International Railway of Central America, 8 N.Y.2d 430 (1960). Whether the parties intend to interpret and enforce separate agreements as a single agreement or as mutually dependent is a question of fact. The primary consideration is the intent of the parties viewed by the circumstances surrounding the transaction. Rudman v. Cowles Communications, Inc., 30 N.Y.2d 1 (1972); and Nancy Neale Enterprises, Inc. v. Eventful Enterprises, Inc., 260 A.D.2d 453 (2nd Dept., 1999). In making such a determination, the court must consider whether the agreements are all part of the same transaction. Elite Promotional Marketing, Inc. v. Stumacher, – A.D.3d –, 2004 WL1398232 (2nd Dept., 2004); and Nancy Neale Enterprises, Inc. v. Eventful

Enterprises, Inc., *supra.*

In this case, the Court must consider the provisions of Sam and Shervin's employment agreement relating the stock option plan, the Joint Resolution, the Option Program and the Option Agreements as part of one transaction and must read them together to determine Sam and Shervin's rights and USN's obligations.

The question of whether an agreement is ambiguous is a question of law to be determined by the Court. W.W.W. Assocs. v. Giacontieri, 77 N.Y.2d 157 (1990); and JJFN Holdings, Inc. v. Monarch Investment Properties, Inc., 289 A.D.2d 528 (2nd Dept., 2001). Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. See, Uribe v. Merchants Bank of New York, 92 N.Y.2d 336 (1998); and Around the Clock Delicatessen, Inc. v. Larkin, 232 A.D.2d 514 (2nd Dept., 1996).

In this case, there are both ambiguities in the documents and questions of fact which can only be decided at a trial. That is, there are unmistakeable ambiguities and conflicts between the Joint Resolution and the Option Program.

The Joint Resolution adopted the Option Program and designated Marvin and Yahya as the Committee of the Board authorized to administer the Option program. The Joint Resolution further directed USN to grant options to Sam and Shervin under the terms of the Option Program. The Joint Resolution required USN's President to establish the fair market value of the stock to be available for purchase by Sam and Shervin under their option agreements.

The Option Program provided that it would be administered by the Committee and that the Committee "shall have the sole and exclusive authority" to determine to whom to grant options, the amount of options to be granted, the terms of such options, etc.

There is clearly a conflict between the provisions of the Joint Resolution which directed the issuance of options to Sam and Shervin and the Option Program which granted the Committee "sole and exclusive authority" to determine to whom option should be granted and terms of the options.

There are also conflicts and ambiguities between the Joint Resolution and the Option Program relating the to manner in which the price of the stock to be subject to the options is established. Both require that Sam and Shervin pay "Fair Market Value" for the stock.

The Joint Resolution directed that USN's President determine what constitutes "Fair Market Value." The provisions of the Option Program relating to the establishment of "Fair Market Value" are much more complicated. In fact, the provisions of the Option Program relating to "Fair Market Value" appear to be internally conflict.

Paragraph 2 of the Option Program contains definitions and makes those definitions mandatory for the purposes of the Option Program. It defines "Fair Market Value" as the "...value of the shares as determined by the Board of Directors...in

consultation with the accountants...based on the market value of the Company's assets and good will of the Company."

In contradiction, Paragraph 3(iii) of the Option Program grants the Committee "sole and exclusive authority to determine the terms, conditions, provisions and restrictions relating to each option granted."

Paragraph 6 (a)(1) of the Option Program provides that the price of the shares shall be determined by the Committee and shall not be less than the Fair Market Value on the date the option was granted. If the Board was mandated to determine "Fair Market Value" in consultation with the corporate accountants, then the Committee does not have "sole and exclusive" authority to determine the terms of the option. Clearly, the price of the shares is a term of the option. Furthermore, if the Committee cannot set the price at less than the "Fair Market Value", it lacks "sole and exclusive authority" to determine the terms, conditions, provisions and restrictions of each option granted.

The record is devoid of any evidence that USN complied with any of the provisions of the Option Program before granting the options to Sam and Shervin. There is no evidence that the Committee ever met to determine if Sam and Shervin were to be granted options. There is no evidence in the record which would establish how the price of the options was established or if the price at which the shares which Sam and Shervin seek to purchase represents the "Fair Market Value" of those shares.

There is also an issue regarding whether USN is legally capable of complying with the options once they are issued. USN is authorized to issue up to 200 shares of

common stock at no par value. All of the shares that USN is authorized to issue have been issued. They were long since issued when the options were granted to Sam and Shervin. Paragraph 8 of the Option states that all of the shares that USN is authorized to issue have been issued. That Sam and Shervin accepted options for stock which were unavailable is indeed curious and unexplained. Such a circumstance constitutes a key question which the papers submitted on this motion do not answer. The intention of the parties as to this question can only be answered at trial since a corporation may not issue more shares than its Certificate of Incorporation authorizes it to issue. See, Marino v. Island Express Advertising Inc., 172 A.D.2d 525 (2nd Dept., 1991); Business Corporation Law §402 (a)(4).

Paragraph 5(b) of the Option Program provides that shares issued pursuant to the Program shall be issued from either authorized but unissued shares or treasury shares. At all times relevant herein, USN did not have any authorized but unissued shares or treasury shares.

This conundrum raises the issue of impossibility of performance. A contract is impossible to perform and subject to the defense of impossibility of performance "...when the means of performance make performance objectively impossible." Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 902 (1987). Additionally, the impossibility must have been a product of unanticipated events which could not have been foreseen or guarded against in the contract. *Id.* See also, Lagarenne v. Ingber, 273 A.D.2d 735 (3rd Dept., 2000). Even assuming that the option was properly granted, USN cannot

comply with the terms of the option and could not comply with its terms when the option was issued.

Under the terms of the option, USN is obligated to issue 40 shares to Sam and 26.67 shares to Shervin; effectively a one-third (1/3) interest in USN. However, USN did not and does not have authority to issue any additional shares since it has issued all of the shares that it is legally authorized to issue. Sam and Shervin were aware or, with due diligence, should have been aware of that fact at the time options were granted.

The Option Agreement is a contract between USN and Sam and Shervin. In order to permit Sam and Shervin to exercise the option, the Court would be required to compel shareholders who are not parties to the Option Agreement to sell or transfer their shares directly to Sam and Shervin or back to USN's treasury. The grant of the options to Sam and Shervin was a means to permit them to obtain an equity interest in USN. However, the Option Program was not adopted as a means to compel a forced sale of shares from unwilling shareholders.

Additionally, the Option Program was a means to obtain a capital contribution from Sam and Shervin. Under the present circumstances, the money tendered by Sam and Shervin to exercise their respective options would have to paid to the current shareholders to purchase the shares necessary to permit Sam and Shervin to purchase shares. Contrary to the apparent intent of the Option Program, if the shares are actually purchased for their fair market value, the transaction would not result in an infusion of capital into USN.

The Option Program and the options granted to Sam and Shervin were designed to permit them to acquire a one-third (1/3) equity interest in USN. That would equalize the equity interest in USN amongst the Mehdizadeh, Gabayzadeh and Kagan (Khaghan) families.

The Option Program provides that the maximum number of shares to be available through the program is 66.67 or one third (1/3) of the shares USN is authorized to issue. Arguably, the Court could compel USN to amend its Certificate of Incorporation to permit it to authorize additional shares and to issue those additional shares required to permit the exercise of the options. However, if the Court were to compel such corporate action and direct the issuance of 66.67 additional shares to Sam and Shervin, this would not accomplish the purpose of the options issued to Sam and Shervin. The issuance of 66.67 shares, with Kagan and Gabay Zadeh collectively holding 200 shares, would dilute the stock ownership and thereby not permit Sam and Shervin to collectively own one-third (1/3) of the issued and outstanding shares.

Alternatively, the Court could compel USN to amend its Certificate of Incorporation to permit it to have 100 additional shares authorized and to issue those shares to Sam and Shervin. This would permit Sam and Shervin to enough shares to give them a one-third (1/3) equity interest in USN. However, such an order would require the Court to impermissibly re-write the Option Program which specifically provides that the aggregate number of shares that may be transferred under the Option Program is 66.67.

Finally, assuming there were 66.67 shares available to be issued, there is a question as to whether Sam and Shervin could purchase all of the 66.67 shares at one time in October 2002. Paragraph 6(a)(10) of the Option Program limits the number of shares that the holder of an option may purchase for the first time in a calendar year to $100,000.00. Both Sam and Shervin sought to exercise their options for the first time in calendar year 2002. Those shares have a fair market value is in excess of $100,000.00.[1] While the plan would permits them to purchase all of this stock during calendar year 2002, they could not purchase all of the stock at one time.

Finally, there is a question relating to Sam's employment agreement. Sam was promised stock options by his employment agreement. However, Sam submitted a copy of his employment agreement in support of the motion which he had not signed. After oral argument, Sam requested permission to amend the record and to submit a fully executed copy of his employment contract. Permission was granted and he did so. However, this raises a question of fact as to whether there actually was a written agreement between USN and Sam by which he was to acquire stock options at the time in question.

Sam, Shervin and Marvin assert that the Gabayzadehs have failed to establish, through competent evidence, the existence of material facts requiring a trial. They

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[1] By exercising his option, Sam is attempting to purchase stock whose fair market value is $155,392.40. (40 shares at $3,884.81 per share). By exercising his option, Shervin is attempting to purchase stock whose fair market value is $103,607.88 (26.67 shares at $3,884.81 per share).

assert that the arguments opposing summary judgment are not supported by an affidavit made by any Gabayzadeh and were asserted for the first time by their attorney during oral argument.[2] However, before the Court reaches the issue of whether the party opposing the motion has established the existence of material issues of fact requiring a trial, the movant must establish a *prima facie* entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., *supra*: and Zuckerman v. City of New York, *supra*. If the movant fails to make *prima facie* showing of entitlement to judgment as a matter of law, then the motion must be denied regardless of the sufficiency of the opposing papers. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); See also, Widmaier v. Master Products Mfg., – A.D.3d –, 2004 WL 1514203 (2nd Dept., 2004); and Ron v. New York City Housing Auth., 262 A.D.2d 76 (1st Dept., 1999). In this case, after searching the record, it is clear that Sam, Shervin and Marvin have failed to make a *prima facie* showing of entitlement to judgment as a matter of law. Thus, their respective motions for summary judgment must be denied.

Accordingly, it is,

ORDERED, that Plaintiffs' motion for summary judgment on their first cause of action is **denied**; and it is further,

ORDERED, that Intervenor's motion for summary judgment is **denied**; and it is further,

[2]The attorney who prepared and submitted Gabayzadeh's opposition to Mehdiizadeh's and Kagan's summary judgment motions was substituted before the oral argument.

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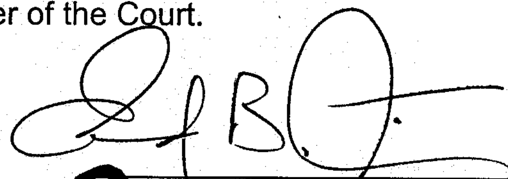
ORDERED, that counsel for the parties are directed to appear for a status conference on August 23, 2004 at 9:30 a.m.

This constitutes the decision and Order of the Court.



Dated: Mineola, NY
July 21, 2004

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
JUL 23 2004
NASSAU COUNTY
COUNTY CLERK'S OFFICE