

[Cite as *Ramun v. Ramun*, 2014-Ohio-4440.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MICHAEL RAMUN) CASE NO. 12 MA 61

PLAINTIFF-APPELLANT)

VS.) OPINION

JOHN RAMUN, et al.)

DEFENDANTS-APPELLEES)

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 04 CV 1738

Civil Appeal from the Court of Common
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JUDGMENT: Affirmed.

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JUDGES:
Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

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Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 29, 2014

[Cite as *Ramun v. Ramun*, 2014-Ohio-4440.]
WAITE, J.

{¶1} This appeal challenges the decision to grant summary judgment to the defendants in a case involving alleged breach of fiduciary duty and breach of oral contract in a closely held corporation. On appeal, Appellant Michael Ramun, Jr. (“Michael”) raises three assignments of error. First, Michael argues that the decision of the trial court to grant summary judgment does not constitute a final appealable order because other counterclaims relating to this case are still pending. The record reflects that the pending counterclaims are not so bound up with the claims in the instant appeal that one cannot be resolved without the other, and we conclude that the trial court’s judgment is a final appealable order. Second, Michael argues that the court erred in the breach of fiduciary duty claim because it determined that restrictions placed on Michael’s stock shares were reasonable, even though reasonableness is normally an evidentiary question left to the trier-of-fact to decide. Reasonableness can be decided as a matter of law in summary judgment. This is particularly true when the non-moving party fails to rebut the evidence, as was the case here. Finally, Michael argues that the court erred in finding that there was no oral contract, but Appellant provided no evidence establishing any of the material terms of an oral contract, and the trial court was correct as to this issue. Michael’s arguments are not supported by the record, and the judgment of the trial court is affirmed.

Statement of the Case

{¶2} The facts of this case are largely undisputed and have been fully discussed in two prior appeals. *Ramun v. Ramun*, 7th Dist. No. 05 MA 44, 2005-

Ohio-6921, *not accepted for review*, 109 Ohio St.3d 1457, 2006-Ohio-2226 (“*Ramun I*”); *Ramun v. Ramun*, 7th Dist. No. 08 MA 105, 2009-Ohio-6405 (“*Ramun II*”). Allied Consolidated Industries (“ACI”) is a closely held Ohio corporation which was formed from the restructuring of various family business entities including Allied Erecting and Dismantling Co., Inc., (“Allied Erecting”). These businesses were started by Michael Ramun, Sr. (“Michael Sr.”) and John Ramun (“John”). John is the Appellee in the instant appeal, and Michael Sr. is his father. Allied Erecting was incorporated in 1973 by Michael Sr. and John. Each owned a 50% share in the company, with John serving as the president.

{¶3} After Michael Sr. died intestate in 1986, John redeemed his father’s shares and became the sole shareholder with 100% control of the company. In 1988, John offered his brother, Appellant Michael Ramun, Jr., an option to purchase 25% of the shares of Allied Erecting. Michael was working for the company at that time. Michael exercised this option and became the vice president and treasurer of Allied Erecting. As a part of this deal, John gave Michael a bonus to cover the cost of the shares as well as any taxes that might be due from the purchase. On restructuring the company in 1990, Michael exchanged his 25% stake in Allied Erecting for equal shares in ACI, the holding company which included a number of other business entities. John owned the other 75% of the company.

{¶4} On May 3, 2004, Michael voluntarily resigned from the company and announced his intention to sell his shares to someone outside the family if ACI did not agree to repurchase the shares. In response, John called for a board meeting of ACI to be held on May 21, 2004. The meeting did not take place, but on May 20th

ACI adopted a resolution implementing a right of first refusal to ACI whenever a shareholder intended to sell stock.

{¶15} This led to the lawsuit filed by Appellant on May 20, 2004, in which Michael sought a preliminary injunction preventing ACI from enforcing the right of first refusal resolution, and claimed a breach of fiduciary duty on the theory that ACI had no authority to impose stock restrictions on his previously-acquired shares. The preliminary injunction claim was heard before a magistrate and was denied. In a decision rendered July 16, 2004, the magistrate determined that Michael could not prevail on his underlying breach of fiduciary duty claim (and thus, should not have been granted a preliminary injunction) because ACI had the authority to enact reasonable regulations governing the sale of its already existing stock.

{¶16} On August 3, 2004, ACI, at a special shareholders' meeting, amended its code of regulations to include a right of first refusal.

{¶17} Michael filed objections to the magistrate's decision denying his preliminary injunction, but the trial court overruled the objections and adopted the magistrate's decision on December 15, 2004. Michael appealed the judgment dealing with only the preliminary injunction claim and on December 22, 2005, we affirmed the judgment of the trial court, holding that:

Michael would not prevail on the merits of his claim because John was entitled to try to protect ACI by enacting a (valid reasonable) stock restriction preventing Michael from selling the stock to an outsider. As such, it can be concluded that the enactment of the May 20, 2004 resolution, though done the improper way, is not evidence of a breach

of the fiduciary duty because there was a right to enact a valid reasonable restriction.

Furthermore, all evidence presented at the evidentiary hearing indicates that John treated Michael fairly. While they both were employed by the corporation they made the same salary and received the same bonuses. In fact, one time Michael received a bonus while John did not. Additionally, John testified that his enactment of the May 20, 2004 resolution was for the preservation and in the best interest of the corporation. (Tr. 213–214). He did not want to be unfair to Michael so he implemented the right of first refusal instead of an out and out prohibition against transfer. (Tr. 213).

Consequently, evidence supports the magistrate's finding that there was no breach of a fiduciary duty, i.e. that Michael did not show by clear and convincing evidence that he had a substantial likelihood of prevailing on the merits of his breach of fiduciary claim. Thus, the trial court did not abuse its discretion in adopting this ruling.

Ramun I at ¶45-47.

{¶8} John filed a motion for summary judgment as to the original breach of fiduciary duty claim on July 6, 2006. Prior to the ruling, Michael was granted leave to file an amended complaint and did so on October 6, 2006. The amended complaint raised a new breach of fiduciary duty claim, based on the theory that John mismanaged ACI and enacted an unreasonable stock restriction. The new complaint

also added a claim of breach of oral contract, asserting that John and ACI agreed that Michael would be compensated for certain years of work, during a time period in which ACI was involved in a dispute with United States Steel Corporation (“U.S. Steel”). This dispute occurred between 1986 and 2004. The complaint does not outline any terms or conditions of the alleged oral contract, although Appellant did claim that his damages totaled \$5,000,000.

{¶19} After the amended complaint was filed, John filed a second motion for summary judgment on September 19, 2011. After full briefing and oral arguments, the trial court granted summary judgment to Appellees on the claims in Michael’s complaint and dismissed both counts on March 1, 2012. It is from this decision that Michael now appeals.

Standard of Review

{¶10} An appellate court conducts a *de novo* review of a trial court’s decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E. 241 (1996). Summary judgment is appropriate 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 the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364, N.E.2d 267 (1977). When a court considers a motion for summary judgment, the facts must be taken in the light most favorable to the nonmoving party. *Id.*

{¶11} “[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence that suggests that a reasonable factfinder could rule in that party’s favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ABUSED ITS DISCRETION IN REPRESENTING
ITS RULING ON SUMMARY JUDGMENT AS A FINAL APPEAL [SIC]
ORDER SIMPLY BY ADDING THE “NO JUST REASON FOR DELAY”
LANGUAGE WHEN THERE IS AN INTRICATELY RELATED
COUNTERCLAIM STILL PENDING.

{¶12} Michael argues that there are still counterclaims pending in the case and therefore, pursuant to Civ.R. 54(B), the decision of the trial court was not a final order and, thus, we lack jurisdiction to review this appeal. *Deutsche Bank Nat’l. Trust Co. v. Germano*, 11th Dist. No. 2010-P-0081, 2011-Ohio-3122. In order to constitute a final order, a judgment must satisfy both Civ.R. 54(B) and R.C. 2505.02. Civ.R.

54(B) allows the court to enter final judgment on less than all claims, even if there are still pending claims, counterclaims or cross-claims, if it expressly finds that there is no just reason for delay. Under R.C. 2505.02, a final order must affect a substantial right in an action that, in effect, determines the action and prevents a judgment.

{¶13} Here, the trial court included the “no just reason for delay” language cited in Civ.R. 54(B). However, “mere incantation of the required language does not turn an otherwise non-final order into a final appealable order.” See, e.g., *Noble v. Coldwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1986), citing *Cooper v. Cooper*, 14 Ohio App.3d 327, 329, 471 N.E.2d 525 (8th Dist.1984). Michael argues that the trial court abused its discretion by merely reciting the correct language without making a proper finding based on the facts of the case. He contends that the pending counterclaims are so interrelated with the issues involved in summary judgment that to dispose of one would necessarily affect the rights of the parties in the case that is still pending. *Germano, supra*.

{¶14} The pending counterclaims deal with an alleged breach of fiduciary duty by Michael involving the misappropriation of confidential, proprietary, and trade secret information from ACI to begin his own, competing business, Exodus Industrial LLC. These claims are wholly unrelated to either John’s alleged breach of fiduciary duty or to the alleged breach of oral contract. For the purpose of Civ.R. 54(B), claims are considered separate when the legal theories “require proof of substantially different facts.” *Walker v. Firelands Cmty. Hosp.*, 6th Dist. No. E-06-023, 2006-Ohio-2930, ¶20. Since the facts and proof required to settle the pending counterclaims are substantially different, the trial court had discretion to find that there was no just

reason for delay as to the partial summary judgment ruling and to render a final appealable order. Michael's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT REGARDING BREACH OF FIDUCIARY DUTY BECAUSE APPELLANT PRESENTED FACTUAL ISSUES, WHICH IF BELIEVED BY A JURY SUPPORTED A CLAIM FOR BREACH OF A FIDUCIARY DUTY AND PROVED THE STOCK RESTRICTION WAS NOT REASONABLE.

{¶15} Michael argues that questions of reasonableness are best viewed as matters of fact to be decided by a jury rather than as matters of law to be decided by the court. "Ohio courts have held that the question of reasonableness is a question for the jury and hence not an appropriate determination for summary judgment." *Pierson v. Consol. Freightways, Inc.*, 2nd Dist. No. 13394, 1993 WL 778 (Jan. 6, 1993), citing *Kelly v. Georgia-Pacific Corp.*, 46 Ohio St.3d 134, 545 N.E.2d 1244 (1989). Michael further argues that reasonable minds could differ as to the reasonableness of the restrictions enacted by Appellees. A judge should only divest the jury of such a decision as outlined in Civ.R. 56(C) if, when construing all evidence in a light most favorable to the Appellant, a jury could reasonably reach but one conclusion. *Kemock v. Mark II*, 62 Ohio App.2d 103, 117, 404 N.E.2d 766 (8th Dist.1978).

{¶16} “Ohio corporations are authorized to include share-transfer restrictions in their regulations by Section 1701.11(B)(8) of the Ohio Revised Code. Such restrictions are widely used, particularly in close corporations, so current shareholders can control the ownership and management of the corporation and prevent outsiders from ‘invading the business.’” *Puritas Metal Products, Inc. v. Cook*, 2012-Ohio-2116, 972 N.E.2d 615, ¶19 (9th Dist.), citing 12 *Jennifer L. Berger & Carol A. Jones, Fletcher Cyclopedia of the Law of Private Corporations*, Section 5454 (Rev. Vol.2004). See also, *Maurer v. Haines City Mobile Park & Sales Inc.*, 6th Dist. No. WD-00-051, 2002-Ohio-1516. Further, it is common for closely held corporations to have right of first refusal restrictions on their stock. These types of restrictions have regularly been accepted as being inherently reasonable. *Treinen v. Kollasch-Schlueter*, 179 Ohio App.3d 527, 2008-Ohio-5986, 902 N.E.2d 998, ¶21 (1st Dist.). In fact, the norm is to enact restrictions on the free alienability of shares of closely held corporations such as ACI. *Gigax v. Repka*, 83 Ohio App.3d 615, 620, 615 N.E.2d 644 (2nd Dist.1992).

{¶17} We have already held that there is no Ohio law that prohibits the placement of reasonable restrictions on already-acquired stock and that Appellees were entitled to enact reasonable stock restrictions to protect the company. *Ramun I* at ¶40, 42, 45. We also reiterated the general proposition that “Ohio does recognize that restrictions on stock transfers are reasonable,” particularly in the context of a closely held corporation. *Id.* at ¶40. Thus, the only question remaining is whether or not the specific right of first refusal enacted by ACI was reasonable.

{¶18} It is apparent that the stock restrictions were enacted to protect ACI from outside entities, particularly competitors, from gaining a foothold in the business. This provides a reasonable basis for such a restriction. *Puritas, supra*. A fiduciary duty may be breached when the majority holders misuse their power “to give the majority benefits that were not shared with the minority.” *Estate of Schroer v. Stamco Supply, Inc.*, 19 Ohio App.3d 34, 38, 482 N.E.2d 975, 980 (1st Dist.1984). The restriction in this case did not impart a unique benefit only to the majority shareholders at the expense of corporate interests or the minority. Instead, it affected all shareholders equally and promoted the corporate interest of keeping outside investors from invading the business.

{¶19} Additionally, in order to prove a breach of fiduciary duty, “[t]he complaint must state an injury to the plaintiff upon an individual claim as distinguished from an injury which directly affects the corporation and only indirectly affects the plaintiff.” *Jones v. Contemporary Image Labeling, Inc.*, 12th Dist. No. CA2009-02-017, 2009-Ohio-6178, ¶27. Here, the restriction was applied to all stockholders of the corporation and did not single out Michael.

{¶20} Michael asserts, somewhat contradictorily, that the controlling question is not whether the restriction is reasonable, but whether an issue of reasonableness can properly be decided by a court on summary judgment. In fact, Ohio courts routinely dispose of questions regarding reasonableness in summary judgment when there are no material facts in dispute. See *UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 147 Ohio App.3d 382, 2001-Ohio-8779, 770 N.E.2d 1068 (10th Dist.); *Roszak v. Princess Cruises*, 90 Ohio App.3d 109, 628 N.E.2d 77 (8th

Dist.1993). The trial court here found that “[t]he right of first refusal enacted in this case is reasonable, and [Appellant] has failed to submit any authority, from Ohio or elsewhere, to show otherwise.” (3/1/12 J.E., ¶25.) Absent some material dispute about the reasonableness of the stock restriction, there is nothing to resolve at trial and the question can be decided as a matter of law.

{¶21} We note that Michael can cite to no caselaw which supports his assertion that the restriction was unreasonable as a matter of law and amounts to a breach of fiduciary duty. “To succeed on a claim of breach of fiduciary duty, the plaintiff must prove the existence of a duty arising out of a fiduciary relationship, *failure to observe that duty*, and injury resulting proximately therefrom.” (Emphasis added.) *Spalla v. Fransen*, 188 Ohio App.3d 666, 2010-Ohio-3461, 936 N.E.2d 559, ¶29 (11th Dist.). Michael has not satisfied his burden of showing that Appellees failed to observe their fiduciary duty, not just generally or theoretically, but under the specific circumstances of this case. We have already held in both *Ramun I* and *Ramun II* that enacting a reasonable stock restriction cannot amount to a breach of fiduciary duty. Since there is no evidence to support Michael’s claim to the contrary, no reasonable jury could find that Appellees had breached a fiduciary duty.

{¶22} Michael also claims that he had been “frozen out” of the company. A freeze-out or squeeze-out “refers to manipulative use of corporate control to eliminate minority shareholders, or to reduce their share of voting power or percentage of ownership of assets, or otherwise unfairly deprive them of advantages or opportunities to which they are entitled.” *Estate of Schroer, supra*, at 38. Nothing in the record suggests that Michael was frozen out. No matter how the right of first

refusal affected his ability to sell his shares, he still maintained his 25% vote and ownership of ACI while he retained the shares.

{¶23} Finally, Michael argues that the right of first refusal enacted by ACI is unreasonable because of the clause allowing ACI to buy back all or a portion of his stocks. He contends that this restriction will make it harder for him to find a buyer and makes his stocks less valuable. Whether or not this might be theoretically possible, Michael has not provided any authority or evidence to support that this scenario occurred or will occur here. His claims on this issue amount to pure speculation.

{¶24} For the above reasons, reasonable minds can come to but one conclusion, even when viewing all evidence in a light most favorable to Michael, and that conclusion is that the right of first refusal restriction enacted by Appellees was reasonable. Therefore, Michael's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT
TO THE DEFENDANTS REGARDING BREACH OF ORAL
CONTRACT DESPITE THE EXISTENCE OF ISSUES OF MATERIAL
FACT.

{¶25} In his amended complaint Michael asserted a claim for breach of oral contract seeking compensation for a period of time that he performed work for ACI while the company was in litigation with U.S. Steel. Allegedly, he and John orally agreed that after a satisfactory settlement with U.S. Steel, both of them would receive

bonuses for their uncompensated work. Michael claims that the breach of this oral contract damaged him in excess of \$5,000,000. No other terms of this alleged contract were offered.

{¶26} Michael faces a heightened burden of proof on this breach of oral contract claim. Ohio courts have held that “[t]he burden of proof on one seeking to enforce an oral contract requires that party to prove the existence of the contract by clear and convincing evidence. ‘Clear and convincing evidence’ is evidence that will produce in the fact-finder’s mind a firm belief or conviction as to the facts sought to be established.” (Citations omitted.) *Bumgarner v. Bumgarner*, 4th Dist. No. 09CA22, 2010-Ohio-1894, ¶20. Ohio applies this heightened burden because oral contracts are disfavored. *Busch Bros. Elevator Co. v. Unit Bldg. Servs.*, 190 Ohio App.3d 413, 2010-Ohio-5320, 942 N.E.2d 404, ¶6 (1st Dist.), citing *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶15.

{¶27} To prove the existence of a contract, a plaintiff must show that both parties consented to the terms of the contract, that there was a “meeting of the minds” of both parties, and that the terms of the contract are definite and certain. *McSweeney v. Jackson*, 117 Ohio App.3d 623, 631, 691 N.E.2d 303 (4th Dist.1996). To prove a breach of contract claim, a plaintiff must show “the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.” *Doner v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994). When the terms of a contract are not sufficiently definite, the contract is unenforceable. *Isquick v. Classic Autoworks, Inc.*, 89 Ohio App.3d 767, 772, 627 N.E.2d 624 (8th Dist.1993).

{¶28} Michael claims that despite the lack of definite terms of the oral contract, it is still enforceable. He argues that the lack of definite terms is not fatal, as the court is able to substitute any terms that were still undecided as long as all the essential terms had been covered by the oral contract. He also contends that there are sufficient facts in the record for reasonable minds to differ as to whether or not a contract was formed and that summary judgment was therefore inappropriate. Reviewing this record, we disagree.

{¶29} “When an agreement to determine the amount of compensation at a future date creates indefiniteness and uncertainty regarding an essential term, there is no contract.” *Tri-County Tree & Turf v. Busse*, 12th Dist. No. 63120, 1995 WL 728507, *3 (Dec. 11, 1995). There is nothing in this record to show that there was any agreement as to any amount of compensation. In fact, it is unclear to us from Michael’s argument whether he wants to recover unpaid salary or seeks to receive some type of bonus above and beyond his salary. This indefiniteness concerning essential terms is necessarily fatal to the claim that there was ever an oral contract formed between Michael and John. A contract which lacks a “standard of compensation ascertainable by proof that would permit enforcement of the parties’ contract” is unenforceable and fails for want of consideration. *Id.* Even if Michael could establish that the parties discussed future bonuses or repayment of past salary, this does not create a contract. There is no indication from anything in the record when this alleged contract was formed. Michael merely states that it occurred sometime during the corporate litigation with U.S. Steel. The record indicates that this litigation took place between 1986 and 2004, a period of 18 years. Putting aside

for the moment the obvious statute of frauds problem arising from an unwritten contract that was not able to be performed for nearly two decades, Michael's vagueness about the creation of the contract meets no standard of proof, much less the heightened standard of proof required to establish an oral contract. Neither has Michael provided any evidence regarding when or how payment would be made, what the payment would consist of (such as cash or stock interests), or the basis for calculating the payment.

{¶30} Michael argues that the \$900,000 that John received in 2006 can somehow be used to calculate the value of the oral contract. This bonus to John was paid almost two full years after Michael had left the company. The record reflects that the bonuses paid in 2006 to ACI workers were for the work done in the preceding fiscal year, a year during which Michael was not involved in ACI. Michael's breach of contract claim, though, refers to work done prior to the company's settlement with U.S. Steel, which occurred in 2004. Therefore, it appears to us that the 2006 bonus paid to John, by itself, is irrelevant to establishing the terms of compensation for unspecified work performed by Michael prior to 2004.

{¶31} As the record does not reflect any evidence supporting the existence of an oral contract, Michael's third assignment of error is overruled.

Conclusion

{¶32} Appellant, Michael Ramun, Jr., has not established any error in the trial court judgment. The judgment is a final appealable order, even though there are counterclaims still pending, because those counterclaims require substantially different proof. Therefore, it was proper for the trial court to issue final judgment on

the breach of fiduciary duty and breach of oral contract claims. There were no outstanding issues of material fact regarding ACI's right to impose a reasonable right of first refusal on already held stocks, and Michael failed to provide proof on the record that the provision was unreasonable. Michael also failed to establish any essential terms of an alleged oral contract regarding repayment of salary or the payment of a bonus. Summary judgment was also appropriate on that claim. For these reasons, we overrule Michael's three assignments of error and affirm the judgment of the trial court.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.