In family business dispute, appraisal right deemed waived

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Because he did not serve notice in a timely manner, a trustee waived his right to seek an independent appraisal of the value of family businesses controlled by the decedent's surviving brothers, dooming a breach-of-contract claim, a Superior Court judge has decided.

In *Szawlowski Potato Farms, Inc., et al. v. Szawlowski, et al.*, Judge Kenneth W. Salinger found invalid certain amendments to a 2009 shareholder stock redemption agreement.

But with respect to the original agreement itself, the language unambiguously gave the trustee only 30 days to request an independent appraisal after the surviving brothers exercised their right to repurchase the decedent's ownership shares and interest in each of the family businesses.

The trustee did offer two responses to the surviving brothers' letter, but neither gave notice that the trustee was invoking his right to an independent appraisal. In fact, in his amended counterclaims, the trustee conceded that he did not timely invoke his right to an independent appraisal, and Salinger found that he was "bound by that allegation."

The requirement that the trustee give timely notice of his exercise of the right to an independent appraisal was a "condition precedent" to the trust's right to obtain an appraisal, Salinger noted.

"If the Trustee could ignore without consequence the deadline for seeking an independent appraisal merely by countering with his own demand that the companies buy [the decedent's] shares and interests based on the fair market value of the companies' assets, that would make the deadline superfluous and strip it of any practical meaning," Salinger wrote.

Salinger also found that the plaintiffs' offer to pay $4 million for the decedent's ownership interests was sufficiently definite to constitute a valid exercise of the companies' repurchase option, even though they had failed to specify a closing date, as the shareholder stock redemption agreement required.

The 28-page decision is Lawyers Weekly No. 12-011-23.

Case shrunk to its essence

One irony in *Szawlowski* is that the four brothers had agreed the repurchase process would be used when one died "precisely to avoid the type of collateral litigation and fighting" that has unfolded, said Joseph D. Lipchitz of Boston, corporate litigation counsel for the family businesses.

"Judge Salinger did a good job reading the contracts, applying the clear language, and shrinking the case back down to what it's all about," he said.

George W. Price of Boston, Lipchitz's co-counsel who represents two of the brothers, said another irony is that the second brother to die, on whose behalf the trustee was now objecting, had not protested when the same mechanism was used to buy out the interest of the first brother to die back in 2016.

"I think that makes this decision particularly just, since it reflects what the brothers had agreed to all along," Price said.

Lipchitz said the lesson for corporate practitioners is that they need to be familiar with the documents controlling the purchase of equity and abide by the clear and unambiguous terms.

Price added that doing so is especially important when there are multiple, integrated agreements.

"The language means something in these agreements, and counsel has to be careful to read it, know it, and act on it, if that is what is required," he said.

The trustee's attorney, James F. Martin of Springfield, had not responded to Lawyers Weekly's request for comment as of press time.

Boston attorney Stephen D. Riden said apparently it was particularly helpful to the companies that, in the notice of their intent to repurchase the decedent's interest, they had flagged the trustee's deadline to request the appraisal, which made it easier for the judge to find waiver of that right.

For his part, the trustee seemed to have treated the notice as an invitation to negotiate a settlement of all disputes between the parties, which Riden called "a completely appropriate strategy."

But at the same time, the trustee needed to expressly exercise his appraisal rights under the contract.

"The lesson there is to still keep your eye on the ball and make sure that you're sticking to the terms of the contract in case the effort to negotiate fails," Riden said.

Embodied in Salinger's decision is also a lesson on the best way to draft amendments to an agreement, said Payal Salsburg of Boston.

If a contract provision has seven "sub-provisions" and only one is being changed, it still may be best to strike the provision in its entirety and then incorporate any language being retained into the new provision, she said.

Failure to do so just creates unnecessary complications when it comes time to interpret the language, Salsburg said.

"The judge is not going to sit there and try to figure out what your intent was," she said.

Boston attorney Gary C. Bubb said if the two sides take up Salinger's suggestion to take their disputes to arbitration, the trustee may be in a disadvantageous position.

With the judge invalidating language from the 2016 and 2018 amendments, the companies may argue that determining the value of the decedent's interest should revert to the original formula — fair market value of the company's assets, minus the value of any "good will." That may be less than the $4 million the estate stood to receive, given how significant "good will" tends to be in establishing a company's value, Bubb said.

Hope of dodging dispute dashed

For decades, brothers Frank, Chester, John and Stanley Szawlowski owned and ran a potato farming business started by their grandparents. It had come to operate through four closely held corporations and a limited liability company.

John died in early 2016, leaving his three surviving brothers as the owners. Stanley then died in 2020, and his interests were transferred to the Stan and Mary Ellen Szawlowski Family Trust, with his son, Joseph E. Szawlowski, serving as trustee.

In 2009, when they were equal owners of the companies, Frank, Chester, John and Stanley entered into a shareholder stock redemption agreement that restricted the transfer of shares in the four — now five — companies and addressed what would happen when any of them died.

Upon a shareholder's death, the company would have 90 days to exercise an option to buy all or any part of the interest belonging to the deceased shareholder, with the price based on the decedent's proportionate share of the fair market value of the assets of the company, excluding the value of any "good will" belonging to the company.

If the deceased shareholder's estate believed that the proposed purchase price was unfair, it could have the purchase price set by an independent appraisal, if it requested it within 30 days of the company giving notice of its exercise of the repurchase option.

On Feb. 23, 2016, just days before John died, the four brothers entered a written "equity agreement" that set at $16 million the total value of the assets of the Szawlowski Cos., meaning that if any brother were to die, the value of his interest in all the companies would be one-quarter of that, or $4 million.

The brothers explained that they were entering into the agreement with the "hope and expectation that this agreement between the four of us would eliminate the need for disagreement or dispute" in the future.

But the plain language of the contract made clear that the $16 million valuation was not binding, Salinger wrote.

In 2018, two of the three remaining brothers, Frank and Chester, purported to execute an amendment to the original 2009 agreement, which deleted all discussion of the companies' assets and sought to base the purchase price on the agreed-upon $16 million value.

Szawlowski Potato Farms, Inc., et al. v. Szawlowski, et al.
THE ISSUE: Did a trustee forfeit the right to seek an independent appraisal when his only responses to a notice that the decedent's brothers wanted to repurchase the decedent's ownership interest in their family businesses were a counteroffer and a demand that the companies pay fair market value for the decedent's interest?

DECISION: Yes (Superior Court)

LAWYERS: Joseph D. Lipchitz, Jeffrey S. Robbins and Paige Schroeder, of Saul, Ewing, Arnstein & Lehr, Boston; George W. Price of Casner & Edwards, Boston (plaintiffs)

James F. Martin of Pullman & Comley, Springfield (defense)

Stanley died on March 4, 2020, and 18 days later the companies gave notice that they would be exercising their right to repurchase Stanley's ownership shares and interests.

The companies offered a lump sum of $4 million and a waiver of the companies' right to recoup anything Stanley owed them.

While the notice did not set a date for closing the repurchase, it did remind the trustee that he had 30 days to either accept the $4 million or request an independent appraisal.

On June 1, 2022, the trust sent a written demand that the companies repurchase Stanley's shares in an amount based on the fair market value of the companies.

Then, on June 17, 2020, it responded directly to the repurchase notice, rejecting it as a gross underestimate of the value of the trust's shares and membership interests.

The trustee then made a counteroffer, proposing to sell Stanley's ownership shares and membership interests for a lump sum of $5,333,333.33 plus other consideration, including the title to a house that is the subject of an ongoing dispute among the brothers.

Salinger noted that his decision "resolves many of the key issues that divide the parties in this and three related civil actions."

He encouraged the parties to explore a global settlement of their disputes in mediation, ordering them to report to him by the end of April whether they would be heading down that path.

Inconsequential victory

While he did not prevail on the most consequential issues in the case, the trustee did convince Salinger that the attempted 2018 amendment to the original agreement was invalid because it adversely affected Stanley's rights without his consent.

"It would not have made any rational business sense for any brother to enter into a contract that did nothing to protect the value of their ownership interests upon their death," Salinger wrote.

As for the failure to specify a closing date, Salinger determined that the Szawlowski Cos.' offer to pay $4 million for Stanley's ownership interests was sufficiently definite to constitute a valid exercise of the companies' repurchase option.

Courts are allowed to infer that the parties intended a "reasonable" closing date, if that does not change the essence of the contract, the judge noted.

Here, it made sense that the companies were not required to consummate the repurchase of Stanley's shares within a specified time because the companies needed to know first whether the trustee would request an independent appraisal.

"In the context of all the provisions of the 2009 SSRA, the initial failure to propose a closing date was not material," Salinger wrote.

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