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Order on Reconsideration Motion (O'SHEA)

Melvin K. Westmoreland
Superior Court of Fullton County

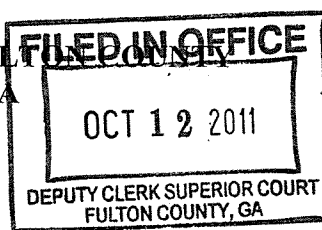
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



COPY

SCOTT A. BEALE,)
)
 Plaintiff,)
)
 vs.)
)
 RODERICK O'SHEA,)
)
 Defendant.)

CIVIL ACTION FILE NO.
FILE NO. 2010 -CV 180216

ORDER ON RODERICK O'SHEA'S MOTION FOR RECONSIDERATION

This matter is before the Court on Defendant Roderick O'Shea's ("O'Shea") Motion for Clarification or Reconsideration of Order Granting Summary Judgment and Entry of Final Judgment Consistent With Such Clarification/Reconsideration. After having considered the motion, the briefs submitted on the motions and the record of the case, the Court finds as follows:

On September 16, 2011, this Court issued a ruling granting summary judgment in favor of Scott Beale ("Beale") on his claim for anticipatory breach of a Stock Purchase Agreement. Specifically, the Court held that the Stock Purchase Agreement contemplated a formula for the price of Beale's shares based on the financial condition of the company as of December 31, 2009, or as otherwise disclosed in the Stock Purchase Agreement and accompanying materials as of May 11, 2010, with the company conducting its affairs only in the ordinary course of business. Consequently, the Court ruled that an undisclosed \$1.5 million dollar loan to FlightWorks from O'Shea was not taken in the ordinary course of business and therefore, could not be deducted from the price of Beale's shares.¹ O'Shea asks the Court to clarify or

¹ Given the fact that the loan was actually used as cash collateral and excess liquidity—in other words, the funds were pumped back into the company—the Court notes that the transaction would not ordinarily impact the purchase price of the shares. Rather, the asset would offset any reduction in the Company's value brought about by the loan.

alternatively, to reconsider its holding regarding whether the entire \$1.5 million “line of credit” is outside the ordinary course of business for purposes of calculating the purchase price of Beale’s shares. Instead, O’Shea argues that a pre-existing line of credit in the amount of \$750,000, which O’Shea contends was increased to effectuate the transaction,² should be accounted for as a pre-existing shareholder loan to reduce the purchase price because it was disclosed in FlightWorks’s December 31, 2009 financial statements. The Court is not persuaded.

The December 31, 2009, financial statement shows a zero outstanding balance on the line of credit at issue. No debt was disclosed, only access to funds up to \$1,000,000.³ “Ordinary Course of Business” is defined as an action taken only if:

- (a) Such action is consistent with the past practices of such Person and is taken in the ordinary course of the normal day-to-day operations of such Person;
- (b) Such action is not required to be authorized by the board of directors of such Person (or by any Person or group of Persons exercising similar authority); and
- (c) Such action is similar in nature and magnitude to actions customarily taken, without any authorization by the board of directors (or by any Person or group of Persons exercising similar authority), in the ordinary course of the normal day-to-day operations of other Persons that are in the same line of business as such Person.

Notwithstanding O’Shea’s conflicting explanation of the relationship of the line of credit to the transaction at issue, even if \$750,000 of the \$1.5 million loan was incurred under a pre-existing debt structure, O’Shea has not presented sufficient evidence to create an issue of fact that the maxing out of a credit line in one day in connection with a non-recurring expense (a creditor’s

However, the issue squarely before the Court is the interpretation of a contract provision governing the purchase price.

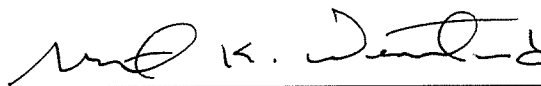
² The Court notes that O’Shea provides conflicting accounts of the structure of the transaction. At page 7 in his Response Brief in Opposition to Plaintiff’s Motion for Partial Summary Judgment, O’Shea describes the transaction as follows: “O’Shea and FW modified, by *reducing* a preexisting line of credit in the amount of \$750,000.00 to a \$500,000.00 line of credit which together with the \$1 million collateral resulted in a total obligation of \$1.5 million (the “Chase Loans”)” (emphasis added).

³ Apparently, the line of credit was reduced from \$1,000,000 to \$750,000 on October 19, 2009.

request for security in connection with a larger, credit transaction) was in the ordinary course of business, especially viewing the actions of the board in holding a board meeting to approve the transaction. O'Shea's Motion is **DENIED** with respect to Beale's claim for anticipatory breach of the Stock Purchase Agreement.

O'Shea also asks the Court to reconsider its holding with respect to Beale's claim for breach of fiduciary duty arising out of the "Change in Control Agreements" with William Lewis ("Lewis") and Daniel Lucey ("Lucey"). In its Order, the Court held that Beale had standing to pursue this claim because Beale sufficiently showed, in theory, that he suffered a special injury. O'Shea asks the Court to look further to the record that reflects Beale's failure to provide evidence of actual damages, which is required to support his claim. Upon review of the transcript of Clay Westbrook and the entire record in the case, the Court now finds that Beale has failed to establish actual evidence that he suffered damage due to the Change in Control Agreements. Accordingly, the Court hereby modifies its September 16, 2011, Order to **GRANT** summary judgment in favor of O'Shea as to Count Six.

SO ORDERED this 12th day of October, 2011.



MELVIN K. WESTMORELAND, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit.

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