SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
05/08/2002

05/06/2002

CLERK OF THE COURT
FORM V000A

HONORABLE COLLEEN MCNALLY

K. Ballard
Deputy

CV 2001-020413

FILED: _____

CATHY S LUTJEMEYER

DONALD O LOEB

v.

LEE E MORRIS, et al.

BARRY ALLEN REISS

RULING

9:23 a.m. This is the time set for oral argument on (1) Defendants' motion for summary judgment, (2) Plaintiff's motion for partial summary judgment and (3) Defendants' motion to strike allegations of the complaint. Present personally on behalf of the Plaintiff is Donald O. Loeb, and present telephonically on behalf of the Defendants is Barry Allen Reiss.

A recording of this proceeding is made by CD and videotape in lieu of a court reporter.

The Court advises counsel of the documentation the Court has reviewed in connection with the pending motions.

Plaintiff's counsel addresses the Court regarding the status of the case. In that regard, the Court is advised that submittal of the Plaintiff's appraisal is still pending. Court and counsel discuss the same.

Oral argument on Plaintiff's motion for partial summary judgment is presented.

05/06/2002 CLERK OF THE COURT
FORM V000A

HONORABLE COLLEEN MCNALLY K. Ballard
Deputy

CV 2001-020413

IT IS ORDERED that the parties shall simultaneously exchange appraisals on May 24, 2002, and that if a third appraiser is required, that third appraisal shall be due on or before June 28, 2002.

IT IS ORDERED taking Plaintiff's motion for partial summary judgment under advisement. In that regard, the Court advises counsel that it will rule on the motion prior to the deadline for the exchange of appraisals.

IT IS FURTHER ORDERED deferring argument and ruling on Defendants' pending motion for summary judgment and motion to strike allegations of the complaint.

IT IS FURTHER ORDERED directing the parties to notify the Court no later than July 12, 2002 of the status of the case. If the matter has not been resolved by that time, oral argument on Defendants' pending motions will be reset.

9:54 a.m. Matter concludes.

LATER:

The Court heard oral argument on Plaintiff's motion for partial summary judgment and took the matter under advisement. At the parties' request, the Court did not hear argument on Defendants' motion for summary judgment and motion to strike allegations in the complaint.

Mr. Lutjemeyer and Mr. Morris were 50% shareholders in a closely held corporation. To protect themselves and their spouses in the event of one of their deaths, they executed a "Cross-Purchase Agreement." The agreement provided that upon the death of either Mr. Lutjemeyer or Mr. Morris, the decedent's shares would be transferred to the surviving stockholder and the surviving stockholder would purchase the shares for value. The manner of determining value is set out in the agreement.

The agreement also addressed the procurement of life insurance policies for each of them naming the other as beneficiary. The purpose of the insurance was "in order to assure that all or a substantial part of the purchase price for the shares of the first Shareholder to die will be available immediately in cash on his death." *Section 6, Cross-Purchase Agreement.* Mr. Lutjemeyer died on October 8, 2000. Mr. Morris received the benefits of approximately $400,000 from the life insurance policy held pursuant to the Cross-Purchase Agreement.

Plaintiff brings this action on behalf of herself and as personal representative of Mr. Lutjemeyer's estate. Plaintiff alleges breach of contract and other claims against Defendant, Mr. Morris, alleging that Defendant has spent over $200,000 of the insurance proceeds rather than holding them in trust for her. Plaintiff claims that Defendant is obligated to hold the monies pending resolution of the valuation of the shares. Plaintiff relies on the language from Section 11 of the Cross-Purchase Agreement which states that "the remaining Shareholder agrees to collect all of the proceeds accruing to him from the policies owned by him on the life of the decedent and to apply those proceeds toward payment of the purchase price for the deceased Shareholder's shares being purchased by the surviving shareholder."

Defendants claim that the language in Section 11 is permissive rather than mandatory and that the insurance proceeds were to be a source, but not an exclusive source, of payment for the shares.

The Court finds the language of Section 11 to be mandatory. It is clear that at the time of the agreement, the parties intended to protect each other's families from being placed in a position where the surviving Shareholder did not have the financial ability to buy the remaining shares. Although "trust" language was not used in the document, the parties intended for the proceeds to be available "immediately" after death. It is

undisputed that Defendants have withdrawn approximately $200,000 from the account that held the insurance proceeds.

Defendants argue that the Plaintiff's only interest is in the amount of money necessary to purchase the shares minus the amount already paid to her in salary continuation payments. However, the Court finds that the parties intended for the $400,000 insurance proceeds to be available to protect the parties' interests. The Court finds that Plaintiff is entitled to judgment as a matter of law regarding the alleged breach of Section 11 of the Cross-Purchase Agreement.

IT IS ORDERED granting Plaintiff's motion for partial summary judgment. Defendants are ordered to file an affidavit with the Court within three days of receipt of this order verifying the amount of funds remaining from the insurance proceeds. Defendants are enjoined from further depleting or expending the insurance proceeds pending further order of the Court. The Court will vacate the interim injunction upon stipulation of the parties or notice of settlement.

IT IS ORDERED affirming the Court's previous orders regarding the completion of the appraisal process.

Counsel are directed to notify the Court by July 12, 2002, regarding the status of the case and whether oral argument is requested on Defendants' motion for summary judgment and motion to strike. The Court will not rule on the motions until after notification and oral argument.