STATE OF NORTH CAROLINA COUNTY OF NEW HANOVER		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
MICHAEL D. BRANDSON, Plaintiff v. PCJ VENTURES, LLC; PORT CITY JAVA, INC.; PCJ FRANCHISING COMPANY, LLC; PORT CITY ROASTING CO., LLC; PCJ INVESTMENTS, LLC; JAVA PARTNERS, LLC; WILD FLOUR BREAD COMPANY, LLC; and DONALD F. REYNOLDS, Defendants	)	05 CVS 4916
PORT CITY JAVA, INC.; DONALD F. REYNOLDS, JR.; STEVEN SCHNITZLER; and JOHN SUTTON, JR., Plaintiffs v. MICHAEL D. BRANDSON, Defendant	)	06 CVS 0920

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

THESE MATTERS came before the court for hearing upon (a) Michael D. Brandson's Motion for Partial Summary Judgment Declaring He is a Shareholder in Port City Java, Inc. Under No Compulsion to Transfer his Shares ("Brandson's Motion"), and

(b) Port City Java, Inc., Donald Reynolds, Jr., Steven Schnitzler and John Sutton, Jr.'s Motion for Summary Judgment Declaring that Michael D. Brandson is Compelled to Sell His Shares to Port City Java, Inc. Pursuant to a Binding Shareholders' Agreement ("PCJ's Motion," being collectively with Brandson's Motion the "Summary Judgment Motions"), and were so heard on July 11, 2007; and

THE COURT after considering the briefs, arguments of counsel, the affidavits on file, appropriate matters of record, and the ends of justice, reaches the CONCLUSIONS reflected in this Order.

I.

PROCEDURAL BACKGROUND

1. Michael D. Brandson ("Brandson") filed his Verified Complaint in New Hanover County Superior Court on December 19, 2005 (instituting the "2005 Action"). On February 21, 2006, Brandson filed, as of right, his First Amended Verified Complaint ("Brandson's Amended Complaint").

2. Port City Java, Inc., Donald Reynolds, Jr., Steven Schnitzler and John Sutton, Jr. filed their Complaint in New Hanover County Superior Court on April 22, 2006 ("PCJ's Complaint," instituting the "2006 Action").

3. On January 19, 2007, this court issued an Order to Consolidate and Schedule Briefing, thereby consolidating the 2005 Action and the 2006 Action for discovery, scheduling, filing and briefing relative to the Summary Judgment Motions.

4. Pursuant to the court's order, Brandson's Motion was filed on January 30, 2007, and PCJ's Motion was filed on March 1, 2007.

5. The court heard oral argument on the Summary Judgment Motions on July 11, 2007.

6. Subsequent to hearing oral argument, the court ordered that the Parties conduct a Mediated Settlement Conference before the court ruled on the Summary Judgment Motions.

7. The Parties have informed the court that they conducted such Mediated Settlement Conference, which resulted in an impasse.

II.

THE PARTIES

1. Port City Java, Inc. ("Port City Java") is a business corporation organized and existing under the laws of the State of North Carolina, with its principal place of business located in New Hanover County, North Carolina.

2. PCJ Ventures, LLC is a Limited Liability Company organized and existing under the laws of the State of North Carolina.

3. PCJ Franchising Company, LLC is a Limited Liability Company organized and existing under the laws of the State of North Carolina.

4. Port City Roasting Company, LLC is a Limited Liability Company organized and existing under the laws of the State of North Carolina.

5. PCJ Investments, LLC is a Limited Liability Company organized and existing under the laws of the State of North Carolina.

6. Java Partners, LLC is a Limited Liability Company organized and existing under the laws of the State of North Carolina.

7. Wild Flour Bread Company, LLC is a Limited Liability Company organized and existing under the laws of the State of North Carolina.

8. Donald F. Reynolds ("Reynolds") is a citizen and resident of New Hanover County, North Carolina. Reynolds is the President of, a Director of, and a shareholder in Port City Java.

9. Stephen Schintzler ("Schintzler") is a citizen and resident of New Hanover County, North Carolina. Schintzler is the Secretary of, the Treasurer of, a Director of, and a shareholder in Port City Java.

10. John Sutton ("Sutton") is a citizen and resident of New Hanover County, North Carolina. Sutton is a Director of, and a shareholder in, Port City Java.

11. Those parties described in Paragraphs One through Ten of this section hereinafter, collectively, being the "PCJ Parties."

12. Brandson is a citizen and resident of the State of South Carolina. Brandson is a shareholder in Port City Java.

III.

FACTUAL BACKGROUND

The court CONCLUDES that the following material facts exist without substantial controversy and are pertinent to the issues raised by the Summary Judgment Motions.

1. Incorporated in 1995, Port City Java is in the business of the retail sale of coffee and other food items. Reynolds and Steve Cohen ("Cohen") were its founders and initial shareholders.

2. In May of 1996, Port City Java employed Brandson. Pursuant to a July 28, 1996 Stock Purchase Agreement, Brandson was issued 250 shares of stock in Port City Java, making Brandson, Reynolds and Cohen equal shareholders. On or around that same time, Brandson, Reynolds and Cohen executed a document entitled

"Shareholders Agreement" (the "1996 Shareholders Agreement"). The 1996 Shareholders Agreement is a matter of record.

3. At some later time during his employment, Brandson acquired another twenty shares in Port City Java, making him the owner of a total of 270 shares ("Brandson's Shares").

4. In or around early 1998, Cohen withdrew from Port City Java and his shares were purchased for a negotiated price.

5. Following Cohen's departure, Schnitzler and Sutton were employed by, and became shareholders in, Port City Java. Thereafter, Reynolds, Brandson, Schnitzler and Sutton executed a document entitled "Shareholders Agreement," dated March 30, 1998 (the "1998 Shareholders Agreement"). The 1998 Shareholders Agreement is a matter of record.

6. In a letter to Reynolds, dated January 10, 2002, Brandson stated that his last day at Port City Java would be February 10, 2002. However, Brandson continued his employment beyond February 10, 2002.

7. During the months of May and June 2002, there were various e-mails between Brandson and Reynolds regarding Brandson's resignation, the hypothetical aftermath of the same, and the future of Port City Java.

8. On May 31, 2002, counsel for Brandson sent counsel for Port City Java a letter indicating that Brandson's last day of employment with Port City Java would be June 9, 2002. Counsel also addressed the sale of Brandson's Shares under the 1996 Shareholders Agreement, but made no reference to the 1998 Shareholders Agreement. (PCJ Compl. Ex. 2.)

9. On June 5, 2002, Brandson addressed a letter to Reynolds, Cohen, and Schnitzler regarding his impending resignation and Port City Java corporate matters. (Brandson Dep. Ex. 15.)

10. On June 8, 2002, Reynolds forwarded Brandson an e-mail in which Jeffrey Keeter, legal counsel to Port City Java, stated that the 1998 Shareholders Agreement required Brandson, if terminated, to sell his shares back to Port City Java or its shareholders at "book value." (Brandson Dep. Ex. 34.)

11. Brandson's last day of employment with Port City Java was June 9, 2002.

12. On June 10, 2002, counsel for Port City Java sent counsel for Brandson a copy of the 1998 Shareholders Agreement by facsimile. (Brandson Dep. Ex. 16.)

13. Also on June 10, 2002, Brandson sent Reynolds an e-mail regarding both Brandson's termination and the 1998 Shareholders Agreement. In the message, Brandson acknowledged that he was "in a weak negotiating position" and that "[i]f book value is fair to [Reynolds] for all the work and support [Brandson gave] the company over the six years then [Brandson would] have very little choice but to accept it." Brandson asked that Reynolds "consider [Brandson's] request and respond back to [Brandson] at [Reynolds'] earliest convenience." (PCJ Compl. Ex. 3.)

14. On June 28, 2002, Brandson received a memorandum from Reynolds, in which Reynolds stated that he was "prepared to proceed with the buyout" and asked when would be a good time to speak with Brandson "to arrange this transfer." (Brandson Dep. Ex. 18.)

15. In September of 2002, Brandson received several documents from Reynolds (the "Buyout Package"). The cover letter was dated September 9, 2002. The

package contained a written offer to buy Brandson's Shares for "net book value" as of June 30, 2002, plus a premium. Some of the documents were backdated. (Brandson Dep. Ex. 43; PCJ Compl. Exs. 4–6.)

16. On September 17, 2002, Brandson sent Reynolds an e-mail, in which Brandson acknowledged receipt of the Buyout Package and stated that he was no longer obligated to sell his shares due to the lapse of the time period allowed for offers under the 1998 Shareholders Agreement. (Brandson Dep. Ex. 45.)

17. To date, Brandson's Shares have not been sold.

IV.
DISCUSSION
A.
LEGAL STANDARD

1. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). An issue is material if its resolution would affect the outcome of the action. *Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 196, 517 S.E.2d 178, 183–84 (1999).

2. Shareholder agreements with mandatory buy-sell provisions tied to continued employment are commonly used by closely held companies in North Carolina and other jurisdictions. Use of such agreements permits owners of closely held companies to provide their employees with an additional incentive (stock ownership) to further the growth and profitability of the company. It also helps retain key employees. The employees benefit by being able to participate in any increase in the worth of the company they helped create. Such agreements generate greater interest in employees in the long-term success of the company. Properly and fairly used, they are salutary and beneficial tools for small business and their employees.

Crowder Constr. Co. v. Kiser, 1998 NCBC 2 ¶ 30 (N.C. Super. Ct. 1998), www.ncbusinesscourt.net/opinions/1998%20NCBC%202.htm, *aff'd*, 134 N.C. App. 190, 517 S.E.2d 178 (1999).

3. "The use of mandatory buy-sell provisions helps owners of small and closely held businesses to control the ownership of the business and thus facilitates and encourages the use of such agreements." *Id.* at ¶ 31. Such provisions have been upheld by North Carolina courts, *id.* at ¶ 34 (citing *Lacy J. Miller Mach. Co. v. Miller*, 58 N.C. App. 300, 293 S.E.2d 622 (1982)), and are allowed by statute, N.C. Gen. Stat. § 55-6-27 (2007).

4. "Since consensual agreements among shareholders are Agreements — the products of negotiation — they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements . . . ." *Blount v. Taft*, 295 N.C. 472, 484, 246 S.E.2d 763, 771 (1978).

5. "In interpreting a contract, the court's principle objective is to determine the intent of the parties to the agreement. Generally, when the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *Holshouser v. Shaner Hotel Group Props. One*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999) (citations and alterations omitted). However, "[i]t is axiomatic that a court cannot enforce a contract unless it can determine what it is." *F. Industries, Inc. v. Cox*, 45 N.C. App. 595, 599, 263 S.E.2d 791, 793 (1980) (quotations and alterations omitted). "In order to constitute a valid and enforceable written or verbal agreement, the parties must express themselves in such terms that the court can ascertain to a reasonable degree of certainty what they intended by their agreement." *Id.*

6. "[I]f the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury." *Holshouser*, 134 N.C. App. at 397, 518 S.E.2d at 23. "An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. Stated another way, an agreement is ambiguous if the writing leaves uncertain as to what the agreement was." *Id.* Where the court considers extrinsic evidence, it "must consider all relevant and material evidence." *Patterson v. Taylor*, 140 N.C. App. 91, 97, 535 S.E.2d 374, 378 (2000).

7. A party to a contract may waive some or all of its rights under that contract via "'an intentional relinquishment or abandonment of a known right or privilege.'" *Medearis v. Trs. of Myers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A waiver may be express or implied. *Id*. at 12, 558 S.E.2d at 206. "Although waiver is a mixed question of law and fact, it is solely a question of law when the facts are not in dispute." *Id*.

B.

THE 1998 SHAREHOLDERS AGREEMENT

8. Brandson and the PCJ Parties agree that all relevant parties executed the 1998 Shareholders Agreement, that it is enforceable, and that the Summary Judgment Motions hinge on its construction. (Brandson's Am. Compl.; PCJ's Compl.) The Parties, however, dispute the legal effect of certain language in the agreement.

9. The 1998 Shareholders Agreement is among the most poorly drafted documents ever put before this court. It is replete with typographical errors, imprecise language, and perplexing internal cross-references. Though the court here declines to so hold, the 1998 Shareholders Agreement may elude interpretation. Taking the 1998

Shareholders Agreement on its face, the court is, despite a tortured effort, unable to ascertain with any certainty what was intended by the agreement. It follows that the 1998 Shareholders Agreement is, at best, ambiguous. *See Holshouser*, 134 N.C. App. at 397, 518 S.E.2d at 23.

10. Therefore, the effort to determine the effective terms of the 1998 Shareholders Agreement will require resort to extrinsic evidence. *Id*. Though this would typically put the question in the hands of the jury, neither PCJ's Complaint nor Brandson's Amended Complaint demand a jury trial. Accordingly, the court is left to "consider all relevant and material evidence" and "determine the weight and credibility of that evidence." *Patterson*, 140 N.C. App. at 97, 535 S.E.2d at 378.

11. Though the Parties have already put a plethora of extrinsic evidence before the court, such evidence consists largely of unconfirmed communications and inconclusive testimony, and is otherwise ambiguous. The evidence offered to date is inconclusive on threshold issues raised by the Summary Judgment Motions, and is insufficient to support ruling as a matter of law.

12. By way of example, there exists a material issue of fact as to what roles the respective corporate and individual parties played in the creation of the 1998 Shareholders Agreement. Such dispute leaves the court unable to determine if it is appropriate to construe ambiguities in the 1998 Shareholders Agreement against any Party.

13. There exist other material issues of fact with regard to the 1998 Shareholders Agreement. Accordingly, the determination of the rights of the Parties will

require the taking of more evidence; and, nothing else appearing, summary judgment is improper.

C.

WAIVER

14. Each Party has raised the doctrine of waiver in support of its respective Summary Judgment Motion.

15. As previously stated, the 1998 Shareholders Agreement is unclear as to what rights it bestowed on the Parties. Further, the evidence offered to date is inconclusive, and the consideration of the issues raised will depend on determinations of credibility.

16. It follows that the court, at this time, is unable to conclude as a matter of law (a) that any Party had sufficient knowledge of its rights under the 1998 Shareholders Agreement so as to be capable of waiving such rights, see *Medearis*, 148 N.C. App. at 10, 558 S.E.2d at 206; or (b) if so, whether any Party committed a waiver. Otherwise stated, on the evidence presented to date, there exist material issues of fact as to whether any Party waived its rights under the 1998 Shareholders Agreement.

17. Accordingly, the determination of any waiver by a Party of its rights under the 1998 Shareholders Agreement will require the taking of more evidence, and summary judgment on this issue is improper.

V.

CONCLUSION

There exist material issues of fact relative to this civil action, and summary judgment for either Party is improper. Therefore, it hereby is ORDERED that:

1. Brandson's Motion is DENIED.

2. PCJ's Motion is DENIED.

3. The Parties to these civil actions shall commence the case management procedures provided by the Business Court Rules within thirty (30) days of the date of this Order.

SO ORDERED, this the 22nd day of February, 2008.

/s/ John R. Jolly, Jr.
Judge John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases