STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

(FILED: May 7, 2021)

JEFFREY LIPSHIRES AND J2 CONSTRUCT, INC.	:	
	:	
v.	:	**C.A. No. NC-2020-0352**
	:	
JOHN MULVEY, EXECUTOR OF THE ESTATE OF JOHN J. BURKE, JR.	:	

DECISION

LICHT, J. Plaintiff Jeffrey Lipshires (Lipshires or Plaintiff) has moved for summary judgment with respect to his rights to purchase the deceased shareholder's shares of J2 Construct, Inc. (J2) under a buy-sell agreement. Defendant objects to Plaintiff's motion. In this case, while the facts are not in dispute, the parties contend those facts lead to different interpretations of the contract. For the reasons stated herein, the Court grants the Plaintiff's Motion for Summary Judgment.

I

Facts and Travel

Lipshires and John "Sean" J. Burke (Burke) formed J2 in or about April 2018. Both Lipshires and Burke each owned 50 percent of the outstanding and issued shares of J2. On or about February 2, 2020, Lipshires and Burke entered into a Buy-Sell Agreement (Pl.'s Mem. Supp. Mot. Summ. J., Ex. C. (Agreement)). Paragraph 4 of the Agreement provides that the surviving shareholder has the right to purchase the deceased shareholder's shares in J2 for $250,000. *Id.* It further provides that the surviving shareholder "will pay the deceased Shareholder['s] heirs an initial 10% of the full value of the deceased Shareholder's interest within 90 days of [the] date of

death and the heir[s] will provide 'seller financing' to the surviving Shareholder for the balance due . . . ." *Id.* If the surviving shareholder elects not to exercise his right to purchase the business, the Agreement requires that the parties agree on how the company will be sold and directs the parties to split the sale proceeds equally. Moreover, Section 1 of the Agreement prohibited Lipshires and Burke from "encumber[ing] their interest or any part thereof in the company . . . ." *Id.*

On February 19, 2020, Burke executed his Will naming John Mulvey (Mulvey or Defendant) as Executor of his Estate (Estate). Almost a month later, on March 13, 2020, Burke passed away. From April 28, 2020 to June 17, 2020, there were communications between the parties concerning the exercise of the option to purchase the shares. Specifically, on April 28, 2020, Lipshires' counsel contacted Mulvey, indicating that Lipshires would exercise his right to purchase Burke's shares in J2 pursuant to the Agreement. (Pl.'s Mem. Supp. Mot. Summ. J., Ex. D.) Plaintiff's counsel informed Mulvey that two liens were recorded against Burke's property—an IRS Federal Tax Lien and a Writ of Execution in the Massachusetts lawsuit, *Taneja v. Burke*, C.A. No. NC-2018-0433. *Id.* Plaintiff now acknowledges that the Massachusetts lien can only apply against real property, and therefore, cannot apply to Burke's stock. However, the IRS lien is one "on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue." (Pl.'s Mem. Supp. Mot. Summ. J., Ex. E.) The IRS lien is in an amount greater than $250,000, but Plaintiff's counsel has advised the Court that based on recent discussions with the IRS, it will discharge its lien if paid $250,000.

On June 11, 2020, Lipshires' attorney advised Defendant's attorney that Lipshires had deposited $25,000, representing the 10 percent deposit, into the Silva, Thomas, & Offenberg

escrow account at Bank Newport. (Pl.'s Mem. Supp. Mot. Summ. J., Ex. H.) The funds were to be held in escrow until Burke's Estate could provide releases from the two recorded liens.

On December 7, 2020, Plaintiff filed his Complaint. The claims advanced by Plaintiff against Defendant include a request for declaratory relief, breach of contract, and injunctive relief. Defendant filed his Answer on December 30, 2020. Plaintiff then filed this Motion for Summary Judgment on January 19, 2021. Defendant opposes summary judgment. The initial hearing, scheduled for February 15, 2021, was postponed because the parties wanted to attempt to resolve the issues. However, these efforts were unsuccessful, and oral argument via WebEx was ultimately held on April 19, 2021.

II

Standard of Review

"Summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Employers Mutual Casualty Co. v. Arbella Protective Insurance Co.*, 24 A.3d 544, 553 (R.I. 2011) (internal quotations omitted). "[S]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the Court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Education*, 93 A.3d 949, 951 (R.I. 2014) (internal quotations omitted). The moving party bears the initial burden of establishing that no such issues exist. *Heflin v. Koszela*, 774 A.2d 25, 29 (R.I. 2001). If the moving party can sustain its burden, then the "litigant opposing a motion for summary judgment has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the

pleadings, mere conclusions or mere legal opinions." *American Express Bank, FSB v. Johnson*, 945 A.2d 297, 299 (R.I. 2008) (internal quotations omitted).

III

Analysis

A

Encumbrances

Summary judgment may not be proper when the case involves an ambiguous contract. *Westinghouse Broadcasting Co., Inc. v. Dial Media, Inc.*, 122 R.I. 571, 581, 410 A.2d 986, 991-92 (1980). A contract is ambiguous if, in light of our rules of contract interpretation, it is reasonably susceptible of different constructions." *Id.* at 581, 410 A.2d at 991-92. "In interpreting a contract the parties' intention must govern if that intent can be clearly inferred from the terms of the contract and carried out consistent with settled rules of law." *Id.* at 581, 410 A.2d at 991 (citing *Hill v. M. S. Alper & Son, Inc*., 106 R.I. 38, 47, 256 A.2d 10, 15 (1969)). In *Haffenreffer v. Haffenreffer*, 994 A.2d 1226 (R.I. 2010), the Supreme Court of Rhode Island stated:

> "'In ascertaining what the intent is we must look at the instrument as a whole and not at some detached portion thereof. * * * *And, although there is no ambiguity, we will nonetheless consider the situation of the parties and the accompanying circumstances at the time the contract was entered into,* not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning.'" *Haffenreffer*, 994 A.2d at 1233 (quoting *Hill*, 106 R.I. at 47, 256 A.2d at 15) (emphasis added).

As previously stated, it is undisputed that at least one of the two liens against Burke's property—an IRS Federal Tax Lien and a Writ of Execution in the Massachusetts lawsuit, *Taneja v. Burke*, C.A. No. NC-2018-0433—applied to Burke's shares in J2. Plaintiff argues that the clear and unambiguous intent of the Agreement was to allow the surviving shareholder the right to

purchase the deceased shareholder's shares in J2, free and clear of any liens or encumbrances on those shares.

In the Agreement, under the section entitled "*1. RETIREMENT OF SHAREHOLDER,*" it states, "[a] Shareholder may not assign, sell, transfer, gift, pledge or in any manner dispose of or permit to be disposed of or to encumber their interest or any part thereof in the company . . . ." Defendant argues that because this language is located in Paragraph 1, the prohibition on encumbrances only applies if a shareholder is retiring, and therefore is not applicable to the section entitled "*4. DEATH OF A SHAREHOLDER*."

While the Court acknowledges that the Agreement is not artfully drawn, a careful reading leads the Court to a different conclusion than Defendant's assertion. First of all, under Rhode Island law, a court is bound to construe contractual terms in the context of the contract as a whole. *See Woonsocket Teachers' Guild, Local 951 v. School Committee of the City of Woonsocket,* 117 R.I. 373, 376, 367 A.2d 203, 205 (1976). In *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1991) the First Circuit held that no individual provision, even a heading, should be interpreted in isolation from its context within the document as a whole. *Navarro-Ayala*, 951 F.2d at 1352.

Secondly, both "Shareholder" and "Retiring Shareholder" are defined terms. The prohibition on assigning, selling, transferring, etc. applies to a "Shareholder" not a "Retiring Shareholder." If the restriction was meant to apply to only Retiring Shareholders, it would have been so written.

Thirdly, a careful reading of the no encumbrances paragraph demonstrates it applies to more than just retirement. The second sentence states, "[i]n the event that a Shareholder desires to assign, sell, transfer, gift, pledge or in any manner dispose of or permit to be disposed of or to

encumber their interest in the company in a manner not otherwise provided for, said interest shall be offered for sale to other Shareholders and only as outlined above of a Retiring Shareholder." (Agreement at 2.) This sentence addresses the transfer of shares in situations other than retirement because it cannot apply to a retiring shareholder, for if a shareholder chooses to retire, then only one of two things can happen—either the remaining shareholders give notice within fifteen days of their desire to purchase the remaining shares or the company will be dissolved.

Finally, it would make no sense to allow a surviving shareholder to have to pay for a deceased shareholder's shares only to then have to pay off any liens on those shares. The Agreement cannot logically lend itself to that interpretation.

Defendant contends that even if the no encumbrances clause applies in instances other than retirement, Burke did not violate the restriction. As stated above, the no encumbrances clause states in pertinent part, "[a] Shareholder may not . . . permit to be disposed of or to encumber their interest or any part thereof in the company . . . ." (Agreement at 2.) Defendant argues that in reading this section, since the clause does not say "permit to encumber," a shareholder must take an affirmative act to encumber. The sentence says, "[a] Shareholder may not . . . to encumber." *Id.* The word "to" preceding the word "encumber" does not belong. The Court notes that the word "to" does not precede any of the other prohibited actions. The only way this portion of the sentence can make sense is to delete it. With the deletion, the sentence would then read "a Shareholder may not . . . encumber." The verb "encumber" is defined as burdening with legal or financial obligations. *Encumber*, FREE DICTIONARY BY FARLEX, https://www.thefreedictionary.com/encumbers (last visited Apr. 29, 2021); *see also Newhall v. Union Mutual Fire Insurance Co.*, 52 Me. 180, 181 (1863) ("An incumbrance is an embarrassment of an estate or property, so that it cannot be disposed of without being subject to it. Bouv. Law

Dict. *Incumber*, to load with debts; as an estate is incumbered with mortgages, or with a widow's dower.") (emphasis in original). To incur a debt which results in a lien on one's property is to encumber the property. Mr. Burke failed to pay his taxes, resulting in a lien on his property, and thus encumbered the shares.

The Court finds that in considering the situation of the parties and the accompanying circumstances at the time the contract was entered into, the parties did in fact intend for the no encumbrances clause to apply in the event of the death of a shareholder. The Agreement is not "reasonably susceptible of different conclusions."

Therefore, the Court finds that Lipshires, as the surviving shareholder, has the right on the death of Burke to purchase Burke's shares for the price, terms, and conditions set forth in the Agreement free and clear of any liens, claims, or encumbrances.

B

Strict Tender Rule

Plaintiff contends that the sole issue in this case is "whether Lipshires properly exercised his right to purchase Burke's shares under the . . . Agreement." (Pl.'s Mem. Supp. Mot. Summ. J. at 7.) Plaintiff highlights that he tendered the 10 percent deposit into escrow in a timely fashion in good faith due to liens encumbering Burke's shares and evidenced his agreement to purchase the shares, thus exercising his option. Defendant asserts that Lipshires neither paid the deceased shareholder's heirs nor demonstrated a present readiness and willingness to do so, as he never relinquished control of the funds because the $25,000 check was made payable to Silva, Thomas, Martland & Offenberg, Ltd, his own attorneys, thus attaching conditions to the deposit (i.e., that the funds would be held in escrow until the estate and/or heirs can provide releases from the two recorded liens).

The "strict legal rules of tender . . . gives a right of action to a party only upon the actual performance of the thing agreed to be done by him, irrespective of the readiness of the other to do the part devolved upon him . . . ." *Guilford v. Mason*, 22 R.I. 422, 48 A. 386, 387 (1901). In *Durepo v. May*, 73 R.I. 71, 54 A.2d 15 (1947), the Rhode Island Supreme Court held that when there are to be concurrent acts, the strict rule of tender does not apply, and that a party only has to show that they are able, ready, and willing to perform their part of the agreement constituted by the exercise of the option. *Durepo*, 73 R.I. at 77, 54 A.2d at 19. Thus, the question becomes whether the Agreement called for concurrent acts.

Paragraph 4.c. of the Agreement states, "[t]he surviving Shareholder will pay the deceased Shareholders heirs an initial 10% of the full value of the deceased Shareholder's interest within 90 days of date of death and the heir will provide 'seller financing' to the surviving Shareholder for the balance due . . . The Shares will be transferred to the surviving Shareholder once the full payment of value plus accrued interest is made in full." (Agreement.) Based on this language, the Court finds that the payment of the 10 percent deposit and providing seller financing are concurrent acts.

The seller financing occurs contemporaneously with the payment of the initial 10 percent of the full value. The language of the Agreement does not state that seller financing occurs after the initial 10 percent of the full value is made. In other words, it does not provide that the surviving shareholder will make the initial 10 percent payment ***and then*** the heir will provide seller financing.

Burke breached the Agreement by encumbering his shares. With this breach, Defendant had a duty to remove the encumbrances on the shares before or when Plaintiff exercised his option and paid the deposit.

The Court recognizes that the transfer of the shares is made subsequent to the remaining shareholder making full payment of value plus accrued interest. However, the acts at issue here are the deposit of the initial 10 percent and seller financing, which, as the Court just stated, are concurrent acts. Therefore, the strict legal rule of tender does not apply, and the question becomes whether Lipshires was ready, willing, and able to perform.

The Court finds that based on the evidence, Lipshires demonstrated that he was ready, willing, and able to perform. First, on April 28, 2020, Lipshires informed Burke's Estate that he intended to exercise his right under the Agreement to purchase the shares. In May of 2020, Attorney Offenberg indicated that Lipshires would have to advance the initial 10 percent of the purchase price into escrow, so that the Estate could secure releases from the liens. A follow-up e-mail was sent to Attorney Ratcliffe again indicating the plan to deposit the initial 10 percent deposit into escrow. On June 5, 2020, Attorney Offenberg received a response stating, "[t]he Estate has not made a decision regarding the buy-sell agreement and is still considering its options." (Pl.'s Reply Mem. at 4.) On June 11, 2020, Attorney Offenberg once again sent notice regarding the 10 percent deposit in escrow. Lipshires deposited the 10 percent deposit in an escrow account at Bank Newport on June 11, 2020. These facts, which are undisputed, show a readiness and willingness to perform. *See Griffin v. Zapata*, 570 A.2d 659, 662 (R.I. 1990) (holding that where a buyer was present at a closing with the requisite checks sufficiently indicated that he was ready, willing, and able to perform, and an attorney's letter to the seller and the seller's attorney warning that legal action would be taken if the closing was not performed on or before August 29, 1986 further indicated the buyer's willingness to perform). In addition, Attorney Offenberg filed a Miscellaneous Petition for Instructions with the Probate Court on June 30, 2020, where she asked the Probate Court to instruct Lipshires as to where to pay the funds based on the Will and the

Agreement. The Miscellaneous Petition for Instructions was never heard as the Probate Court was not conducting hearings due to COVID-19 protocols.

Overall, the Estate's lack of communication and its failure to respond left Lipshires with no alternative but to place the 10 percent deposit in an escrow account. Therefore, the Court finds that Plaintiff was ready, willing, and able to perform.

C

Time Is of the Essence

"Ordinarily contract provisions relating to time do not by their mere presence in an agreement make time of the essence thereof so that a breach of the time element will excuse nonperformance." *Lajayi v. Fafiyebi*, 860 A.2d 680, 688 (R.I. 2004) (internal quotation omitted). "[E]xplicit time limits 'standing alone and without more do not indicate that the time[s] fixed for performance [are] intended by the parties to be a material or an essential part of their agreement.'" *1800 Smith Street Associates, LP v. Gencarelli*, 888 A.2d 46, 52 (R.I. 2005) (quoting *Safeway System, Inc. v. Manuel Brothers, Inc.*, 102 R.I. 136, 145–46, 228 A.2d 851, 856 (1967)). "If that party is unable to satisfy his or her burden, then performance within a reasonable time of the contemplated date is sufficient." *Id.* at 53. A "reasonable time" depends upon "the circumstances of each case." *Durepo*, 73 R.I. at 75, 54 A.2d at 18. However, "[i]t is generally held, both at law and in equity, that where the time for the exercise of an option is definite and unconditional such time is of the essence of the option." *Moulson v. Iannuccilli*, 84 R.I. 85, 89, 121 A.2d 662, 664 (1956).

Defendant argues that Lipshires has not exercised his "option" to purchase the deceased shareholder's shares in J2 as more than ninety days have passed "for performance of Mr. Lipshires' securities option." (Def.'s Mem. Opp'n Summ. J. at 8.)

There are two separate, though intertwined, timing issues—one dealing generally with the timing of the exercising of the option and a second dealing with the timing of the initial deposit. According to the language of the Agreement, there is no specific time or manner in which the surviving shareholder must evidence his agreement to buy the shares (the exercising of the option). A little more than a month after Burke's passing, on April 28, 2020, Lipshires indicated his desire to purchase Burke's shares in accordance with the Agreement. On June 11, 2020, attorneys for Lipshires again provided notice to Burke's Estate that Lipshires had exercised his right to purchase Burke's shares for the sum of $250,000. Regarding the timing of the initial deposit, the Agreement states, "[t]he surviving Shareholder will pay the deceased Shareholders heirs an initial 10% of the full value of the deceased Shareholder's interest within 90 days of date of death . . . ." (Agreement at 3.) Within such ninety days, Lipshires deposited $25,000 in an escrow account at Bank Newport, evidenced by a check dated June 10, 2020 and a Bank Newport receipt dated June 11, 2020. (Pl.'s Mem. Supp. Mot. Summ. J., Ex. H.) Simultaneously, his attorney wrote the Estate's attorney advising him of the deposit and closing with the following: "I request that the Executor sign the enclosed copy of this letter as acknowledgement of the Notice of the exercise of Mr. Lipshires option to purchase." *Id.*, Ex. G. Thus, Lipshires timely exercised his option to purchase the shares.

Accordingly, the Court concludes that Plaintiff properly exercised his option within ninety days to purchase Burke's shares in J2.

D

Breach of the Agreement by Failing to Transfer Burke's Shares to Lipshires

Plaintiff argues that despite the fact that Lipshires exercised his right in accord with the Agreement, Burke's Estate has breached the Agreement by "failing to take any action to clear Burke's shares of encumbrances, transfer Burke's shares to Lipshires, and/or provide financing for Lipshires to purchase those shares." (Pl.'s Mem. Supp. Mot. Summ. J. at 11.)

The transfer of Burke's shares to Lipshires is only to occur after "full payment of value plus accrued Interest is made in full." (Def.'s Mem. Opp'n Summ. J. at 9.) Lipshires has not paid the full value plus accrued interest of the shares and is therefore not yet entitled to receive Burke's shares. Therefore, upon Lipshires' full payment of $250,000, Defendant shall transfer Burke's shares to Plaintiff free and clear of the IRS lien or any other liens.

IV

Conclusion

Based on the foregoing, and pursuant to G.L. 1956 chapter 30 of title 9, this Court declares that (1) the no encumbrances clause of the Agreement applies when there is a death of a shareholder; (2) Burke breached the Agreement by encumbering the shares with an IRS lien; (3) the strict rule of tender does not apply in the circumstances of this case; and (4) Plaintiff's actions, including depositing the initial 10 percent deposit into an escrow account, showed that he was ready, willing, and able to perform. Once full payment for the shares has been made, Plaintiff will be entitled to the transfer of the shares. Therefore, this Court grants Plaintiff's Motion for Summary Judgment. Counsel will present an order and judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Jeffrey Lipshires and J2 Construct, Inc. v. John Mulvey, Executor of the Estate of John J. Burke, Jr.**
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DATE DECISION FILED:	**May 7, 2021**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**William M. Russo, Esq.**
For Defendant:	**J. Richard Ratcliffe, Esq.**