

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION**

AARON WESLEY WYATT : **JANUARY TERM, 2002**

VS. :

RICHARD G. PHILLIPS : **NO. 4165**

KERRY ROCKFORD ENTERPRISES, INC., : **MAY TERM, 2002**
ET AL.

VS. :

AARON WESLEY WYATT : **NO. 667**

OPINION
(FINDINGS OF FACT/CONCLUSIONS OF LAW)

BY: VICTOR J. DiNUBILE, JR., J.

This is an appeal by Aaron Wesley Wyatt (hereinafter “Wyatt”) from an Order issued by this Court on July 11, 2002 arising from a four day trial in which all the parties sought various forms of equitable relief. This Court, presiding as a chancellor in equity, first issued its Order on the record at the conclusion of the trial and in writing immediately thereafter. This case involved a dispute between Wyatt and Richard G. Phillips (hereinafter “Phillips”) who are 50% shareholders in Pilot Air Freight Corporation and its holding company, Pilot Holding Company (hereinafter referred to collectively as “Pilot”). Pilot, a freight transportation company dealing in heavy weight materials, operates through a number of franchisees located throughout the country. Kerry Rockford Enterprises, Inc., one of the franchisees, brought a separate equity action against Wyatt on behalf of the franchisees which was

consolidated and tried before this Court as well. Kerry Rockford Enterprises, Inc., and the franchisees shall be collectively referred to as “Franchisees”.

Wyatt initially sought equitable relief requesting this Court to enable him to exercise his right to purchase Phillips’ shares of Pilot and become its sole owner pursuant to Sections 3(a) and (c) of the Shareholders’ Agreement entered into between the parties on January 15, 1999. (This agreement will be hereinafter referred to as “Shareholders’ Agreement” and the sections involving the purchase of Pilot’s shares will be referred to as the “Buy/Sell” or “Shotgun Provision”). Phillips vigorously contested whether Wyatt properly exercised this right. He also countered that Wyatt, as a result of his dealings with another freight transportation company, D.F. Young Company (hereinafter referred to as “D.F. Young”), breached his fiduciary duty to Pilot and therefore, was not entitled to any equitable relief. The Franchisees, concerned that the dispute between the owners of Pilot could adversely affect their franchises, brought the subsequently consolidated equity action, primarily directed against Wyatt, out of concern over his attempted purchase of Pilot and his relationship with D.F. Young. Inter alia, they sought to enjoin the sale.

This longstanding dispute between Wyatt and Phillips has generated both numerous equitable and legal actions in Philadelphia and Delaware County. A jury trial in which both sides sought money damages for alleged corporate wrongdoing was scheduled for October, 2002 before this Court. In order to attempt to simplify the issues to be presented at the jury trial, counsel entered into a Stipulation and Order on June 19, 2002. Under the terms of this Stipulation, it was agreed that the Court would decide certain equitable issues, namely, whether Wyatt was entitled to full ownership in Pilot by validly exercising his right to purchase under the Shotgun Provision of the Shareholders’ Agreement. In

addition, the Court had to determine whether full ownership in Pilot included ownership of three parcels of real estate located in three different states and titled in the name of Pilot Properties Holding Company (referred to as “Real Estate” in the Court’s Order). Finally, the Stipulation provided that the chancellor in equity decide whether Wyatt’s relationship to D.F. Young would have precluded the equitable relief which he sought as well as the relationship’s effect on his pending action in law.

The Court’s Findings and Order of July 11, 2002 are the subject matter of this appeal. In its Order, the Court voided Wyatt’s attempted purchase and established the parameters and conditions for the future purchase of Pilot’s shares. It concluded that any attempt to purchase Pilot outside the Shotgun Provision would render the offer subject to ordinary contract principles. In addition, it also provided that any future offer to sell, either through the Shotgun Provision or under ordinary contract principles, must include the realty as well. The Order further stated that Phillips had failed to prove, for the purposes of equitable relief sought by Wyatt, any wrongdoing by Wyatt as a result of his dealings with D.F. Young. It also afforded the Franchisees a right to notice of any future attempts by Wyatt and Phillips to purchase each other’s shares and precluded Wyatt from divulging any financial or confidential information about the Franchisees to D.F. Young which he may have obtained as a result of his attempt to purchase Pilot.

Both Wyatt and Phillips filed Post Trial Motions asserting that there was an insufficient factual basis for the Court to render its decision. In addition, counsel for the Franchisees, by letter to this Court dated July 27, 2002, requested that Paragraph 4 be amended to preclude Wyatt from disclosing financial and confidential information to D.F. Young from any source as opposed to merely material he might have obtained arising from any attempted purchase or sale. Since this was the stated intent of the

Court, this request is granted and Paragraph 4 is so amended. Counsel for Pilot, and joined by Phillips, requested clarification of Paragraph 3 of the Order involving its effect on Phillips' action in law against Wyatt arising from the latter's relationship with D.F. Young. While these motions and letter requesting modification were pending, new co-counsel for Wyatt (who entered their appearance after the trial on July 22, 2002) filed the within appeal to the Superior Court. It was filed prior to any decision by the Court on any of the motions and prior to the Court's rendering its formal Findings of Fact and Conclusions of Law. The appeal was filed purportedly under the guise that the issues presented to the Court were declaratory judgment actions. To the contrary, there were no declaratory judgment actions filed under the court term and numbers of the two cases tried before this Court. The Stipulation and Order of June 19, 2002 contained no declaratory judgment terminology. Co-counsel for Pilot most likely filed this appeal under the mistaken belief that the within case involved a declaratory judgment since there were two other cases, one or both of which might have been declaratory judgment actions. They were filed and later discontinued. In any event, the Post Trial Motions of Wyatt and Phillips are denied along with their Motions for Clarification. No such clarification is necessary. Paragraph 4 of the Order, however, is amended pursuant to the request of counsel for the Franchisees as follows:

4. Any and all financial and other confidential information of Pilot and its Franchisees which Wyatt may receive in the course of exercising his rights to buy/sell Pilot, or from any other source, is to remain confidential. (Amendment emphasized). This preclusion shall include disclosing this information to D.F. Young (see Court's Order denying Post Trial Motions).

There was more than ample evidence stemming from the Court's Findings of Fact to issue and base its July 11, 2002 Order. Therefore, the denial of these Post Trial Motions is proper. In light of this Court's Findings of Fact and Opinion, no further clarification of the Order is necessary.

FINDINGS OF FACT

As stated, this case involved a dispute between Wyatt and Phillips, the 50% shareholders of Pilot . Wyatt brought this action seeking equitable relief to exercise his right under the Shotgun Provision to purchase Phillips' shares in the company. Pilot is engaged in the business of transporting heavy weight materials, principally by air. It operates this business through a number of Franchisees, who perform the shipping and handling. The Franchisees perform the basic work of transportation of the materials whereas Pilot obtains the customers through advertising. It also assigns work, bills and receives payment from the customers for work performed by the various Franchisees. Once payment is received, it retains its fee/commission and forwards the balance to the Franchisee(s). Pilot also receives a fee when it grants a franchise. Today, the business grosses over \$200 million in sales per year.

Phillips first became involved in the business of Pilot in 1990 as an attorney. He had, for a period, represented the former owners, collectively referred to as "Edwards." He became chairman of the board and Chief Operating Officer in 1994. When he first became involved in its business, Pilot was losing money and was on the verge of bankruptcy. Sometime in 1994, Phillips contacted Mr. Wyatt and convinced him to loan the company money. They executed an employment agreement on April 20, 1995 as well. Over the years, their relationship became contemptuous, mainly because of differences of opinion in running the business. Their first major dispute culminated in a settlement agreement of October 28, 1998. It was followed by the signing of the aforementioned Shareholders' Agreement of January 15, 1999, which contained the Shotgun Provision which forms the basis of this Court's rulings. As a result of these accords, both Wyatt and Phillips became 50% owners of Pilot.

The Edwards, who were in bankruptcy, were removed from any ownership to the satisfaction and approval of their trustee and the Bankruptcy Court. The Shotgun Provision was drafted by their respective attorneys in order to protect one of them from the other due to their mutual distrust. It empowered either side, on certain anniversary dates, with the right to purchase the other's shares. Under the terms of the Buy/Sell Provision, after an initial offer was made, the offeree had the right to purchase at the offeror's price. This Provision only permitted the offer to contain the purchase price and terms of payment and nothing more. As stated, the purpose of the Provision was to attempt to control these contentious parties so that one could not take advantage of the other. An offeror could not make the price inordinately low for fear the other would counteroffer and purchase Pilot at the low price. On the other hand, if the price were too high, the offeror would become obligated to purchase in excess of the company's true value.

Disputes continued to escalate between the two. Phillips, as the CEO, ran the business and Wyatt felt he had little control over its operations. Suits were instituted against each other and Pilot in Philadelphia and Delaware County, alleging corporate wrongdoing. During the pending actions Wyatt, in frustration, attempted to exercise his right to purchase Pilot on one of the anniversary dates by letter dated July 31, 2001. This letter contained a number of contingencies, or conditions precedent, other than price and payment terms neither contained nor contemplated by the drafters of the Shotgun Provision. In response to Wyatt's July 31, 2001 letter was Mr. Phillips' letter of August 27, 2001 rejecting the offer. Wyatt then sent a letter of January 25, 2002 purporting to have validly exercised his right to purchase. Since Phillips refused to recognize the purported purchase, the within equitable action was commenced. The Court will not document the enumerable legal maneuverings of counsel

before the Judges of this Court and of Delaware County that have arisen from this dispute. To do so would involve a lengthy dissertation and serve no meaningful purpose. Suffice it to say, the attorneys entered into the previously referred to Stipulation and Order which resulted in the holding of the equity trial before this Court. As stated, the Court had to decide: 1) whether Wyatt validly exercised his right to purchase Pilot; 2) whether the parcels of real estate, located in Pennsylvania, Delaware and Michigan, were encompassed in the Buy/Sell Provision; and 3) whether Wyatt forfeited his right to purchase Pilot as a result of his dealings with D.F. Young.

The Court's decision to void Wyatt's attempted purchase was based on the fact that the Buy/Sell Agreement required price and payment terms and nothing more (see Paragraph 3(a) of the Shareholders' Agreement). The offer by Wyatt as exhibited in his letter of July 31, 2001 contained contingencies, such as a right to review Pilot's books and records that were never contemplated by the drafters of the Shotgun Provision. The Shotgun Provision was designed merely to govern the disputing owners of a closely held corporation. Wyatt's July 31, 2001 letter was essentially an arms-length transaction between strangers and not an attempt to follow the terms of the Shotgun Provision. The Court treated Wyatt's offer like any ordinary offer made by one party to another. Where the Shotgun Provision is not followed, ordinary contract principles of offer and acceptance apply. Since Phillips rejected Wyatt's offer by letter on August 27, 2001, the letter by Wyatt dated January 25, 2002, claiming he had exercised his rights under the Shotgun Provision, had no legal force nor effect. As a result of the Court's voiding of Wyatt's attempted purchase, the issue of whether the real estate would have been encompassed in the purchase became moot. The Court, in its Order of July 11, 2002, provided that any offer by either party, whether under the Shotgun Provision or under ordinary contract

principles, must include the Real Estate.

The final portion of the July 11, 2002 Order dealt with the third issue presented to the Court in the Stipulation. It pertained to whether Wyatt's involvement in the company of D.F. Young would preclude equitable relief and the extent if any this interest would have on the pending actions in law for damages for corporate wrongdoing, which each has asserted against the other. This Court found that there was insufficient evidence presented at this hearing of any wrongdoing on Wyatt's part concerning his relationship with D.F. Young which would have precluded him from obtaining equitable relief. The Court did, however, allow Phillips to pursue this issue in his pending actions in law. It is from this portion of the Order that Phillips takes exception and the attorney for Pilot filed a motion for clarification. The Court, in denying both motions, found as fact as follows. There were assertions made by both the Franchisees and Phillips that Wyatt breached certain fiduciary duties to Pilot as a 50% shareholder in his dealings with D.F. Young. The Court found, like Pilot, D.F. Young is also a company in the freight forwarding business. It deals primarily in international transportation through ocean freight. Pilot's business on the other hand mostly encompasses air freight transportation. Only 20% of its business is international in nature. D.F. Young is also engaged in custom brokerage whereas Pilot does not. The only evidence that Pilot is remotely engaged in custom brokerage came from the testimony that one of its franchisees in San Diego is involved in custom brokerage apart from its dealings with Pilot. Therefore, this Court concluded that Pilot does not engage in custom brokerage and is not a major competitor of D.F. Young.

Furthermore, Wyatt's relationship with D.F. Young's CEO did not constitute a breach of fiduciary duty. Sometime in 2001, Wyatt became interested in D.F. Young. He loaned his friend,

Thomas Mosimann, approximately Eight Million Dollars to purchase this corporation. Mosimann is the sole shareholder, CEO and owner of the corporation. It is presently losing money. Wyatt has no ownership interest in D.F. Young. He does, however, hold a no recourse judgment note executed in his favor from Mr. Mosimann in the amount of Eight Million Dollars. He also possesses a note in this amount against D.F. Young. In addition, Wyatt possesses a stock option for the purchase of at least 50% of the stock of D.F. Young. The option is conditioned upon Wyatt's ownership of either all or none of Pilot's stock.

Under these circumstances, it is clear that there was not sufficient evidence presented to prove that Wyatt's relationship with Mosimann and/or D.F. Young resulted in any breach of duty Wyatt may owe to Pilot. Firstly, D.F. Young is not a major competitor of Pilot. Secondly, he is precluded in both the Stock Option Agreement and this Court's Order from exercising this option to purchase D.F. Young stock until he either purchases or sells his interest in Pilot. The July 11, 2002 Order further provides in Paragraph 5, that Wyatt must seek Court approval in the interim (before he either purchases Phillips' shares or sells his stock in Pilot) in the event he desires to modify the Stock Option Provision.

In order to protect the Franchisees from any harm which might result from this rancorous dispute between the owners of Pilot, the Court provided in its Order that any and all communications of sale had to be given to their counsel. In addition, amended Paragraph 4 of the Order precludes Wyatt from disclosing any financial and confidential information of the Franchisees he may obtain regardless of the source.

CONCLUSIONS OF LAW

Both Phillips and, principally, Wyatt take issue with this Court's decision as reflected in the July 11, 2002 Order. It is clear that there was more than ample evidence presented for the Court to arrive at its factual findings upon which the Order is based. Its findings are to be accorded the weight of a jury verdict and should not be reversed on appeal. See Piercing Pagoda v. Hoffner, 351 A.2d 207 (Pa. 1976); Roberts v. Estate of Babagallo, 531 A.2d 1125 (Pa.Super. 1987). The trial judge sitting in equity was confronted with two contentious parties who have made numerous claims against each other as half owners of a closely held corporation to their mutual detriment and to that of the Franchisees. The Court's Order is an attempt to lay out certain rules to be applied so that either party could end the litigation by purchasing the stock of the other. The Order also, in the interim, is designed to protect the Franchisees until the dispute is settled. Under the facts and circumstances confronting this Court, its Order was fair and just and should not be disturbed on appeal.

BY THE COURT:

DATED: AUGUST 27, 2002

DiNUBILE, JR., J.