THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

October 28, 2015

MARC W. MCDONALD, ESQ
KAZAN SHAUGHNESSY & MCDONALD PLLC
746 CHESTNUT STREET
MANCHESTER NH 03104

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Case Name: **Justin S. Bielagus v John K Scanlan**
Case Number: **216-2014-CV-00752**

You are hereby notified that the Court on October 23, 2015 has entered the following order:

ORDER OF COURT -

Order made, a copy of which is enclosed herewith. (Nicolosi, J.)

W. Michael Scanlon
Clerk of Court

(534)

C: Frank P. Spinella, JR

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Justin S. Bielagus

v.

John K. Scanlan

Docket No. 216-2014-CV-752

ORDER

Plaintiff, Justin S. Bielagus, brought this claim against defendant, John K. Scanlan, for failing to extend him an option to purchase LLC shares. The Court held a bench trial on September 29, 2015. Upon consideration of the evidence, arguments, and applicable law, the Court finds and rules as follows.

Findings of Fact

Retaw, LLC ("Retaw") is a New Hampshire LLC formed in April 2007. Retaw's original members were plaintiff and members of plaintiff's family. A document titled "Limited Liability Company Agreement" (the "Retaw Agreement") set forth Retaw's original terms and conditions. (Ex. 5.)

At all relevant times, Retaw's sole asset was a 28 $^{1}/_{3}$ percent interest in Bentley Commons-Keene, LLC ("BCK"). BCK is a New Hampshire LLC formed in 2007. It owns and operates a senior care facility in Keene, New Hampshire. A document titled "Amended and Restated Operating Agreement of Bentley Commons – Keene, LLC" (the

"BCK Agreement") sets forth BCK's terms and conditions. (Ex. 8.) BCK's original members were Retaw, defendant, and two other LLCs. (Id.)

In 2008, defendant expressed a desire to expand his share of BCK. Plaintiff did not feel good about BCK's prospects at that time, and, therefore, in August 2008, tentatively agreed to sell defendant Retaw's shares in BCK for $550,000. (Ex. 4.) In September 2008, plaintiff transferred one hundred percent of the interest in Retaw to defendant by written assignment contract (the "Assignment").[1] (Ex. 1.) The Assignment was dated September 5, 2008, but plaintiff and defendant signed it about two weeks later. The Assignment transferred Retaw itself, not Retaw's shares in BCK.

The Assignment's "Background" section provides in part:

> WHEREAS, Assignor [,Justin Bielagus, an individual,] owns 100% of the members interests (the "**Interests**") of Retaw, LLC, a New Hampshire limited liability company ("**Bielagus Entity**");
>
> WHEREAS, the Bielagus Entity owns, as its sole asset, 2,833 & 1/3 Class A Units, representing 28 & 1/3% of the Percentage Interests, in Bentley Commons — Keene, LLC (the "**Company**").

(Id.) Section 2(f) states that plaintiff assigned defendant all "claims, rights, powers, privileges and remedies of Assignor under or with respect to the Interest." (Id.) Further, Section 7(a) provides in part:

> (i) Assignor . . . shall hereby transfer and convey to the Assignee good and marketable title to all of the Interests in the Bielagus Entity; (ii) there are no outstanding options, agreements, rights and/or warrants for the acquisition of any or all of the Interests (except for the right of first offer set forth in the Operating Agreement the term of which has expired . . .); and (iii) the Interest is free and clear of all liens, sales agreements, pledges, charges, encumbrances, claims, security interests, or restrictions.

(Id.)

[1] There was some testimony at trial that plaintiff did not own the entirety of Retaw at the time of the transfer, but the parties agree that this is not at issue in this case.

Plaintiff contends the phrase "the right of first offer set forth in the Operating Agreement" in the Assignment, Section 7(a)(ii) refers to an option set forth in Section 7.3 of the Retaw Agreement, which states in part:

> Option. If any member wishes to withdraw from the LLC or to transfer their interests, they shall provide written notice to Justin S. Bielagus. For a period of sixty (60) days from the date of receipt of notice, Justin S. Bielagus shall have the exclusive right and option to purchase the interests. The purchase price shall be determined by the market value of the LLC multiplied by the interests to be transferred, less a 75% fractional interest discount.

(Ex. 5.) Plaintiff testified that he placed this provision in the Retaw Agreement because he had gifted his family members' interests in Retaw and he wanted to recoup some of that gift if they sold their interests. He also testified that he believed when he signed the Assignment that this option would survive. However, he did not mention this belief to defendant prior to the signing.

Defendant argues the Assignment, Section 7(a)(ii) refers to a right of first offer set forth in Section 13.05 of the BCK Agreement. This section, titled "Right of First Offer," provides in part:

> (b) If a Member (a "Transferring Member") wishes to Transfer some or all of its Units (the "ROFO Units") to any Person other than a Permitted Transferee (a "ROFO Purchaser"), the Transferring Member shall promptly provide the Company with a written summary of the material terms on which the Transferring Member proposes to Transfer its Units "the ROFO Notice") . . .
>
> (c) Each Non-Transferring Member shall have the right to purchase up to its pro rata share . . . of the ROFO Units from the Transferring Member on the terms set forth in the ROFO Notice.

(Ex. 8.) Section 13.05(c)(ii) gives BCK members twenty days from the date of notice of sale to exercise their rights of first offer. (Id.)

On August 13, 2008, Plaintiff notified BCK members of the pending sale of Retaw to defendant and extended the members a right of first offer pursuant to the BCK Agreement. (Ex. 3.) The notice, which was drafted by the attorney who drafted the Assignment, stated, "[i]n accordance with Section 13.5 [sic] of the Company's Amended and Restated Operating Agreement (the "Operating Agreement"), [plaintiff] is notifying you of its desire to Transfer all of [plaintiff's] Units . . . in the Company to [defendant]." (Id.) None of the BCK members objected to the sale within twenty days. (Ex. 9.)

The Assignment, Section 2 calls the BCK Agreement "the operating agreement (the **'Operating Agreement'**) of the Company," and "the Operating Agreement of the Company." (Ex. 1) The only other place outside Section 7 where the Assignment uses the term "Operating Agreement" is in Section 3, which requires plaintiff to take certain actions "in order to effectively vest in the Assignee full indefeasible, merchantable, legal, equitable and beneficial title to the Interests, subject to the Operating Agreement." (Id.)

In 2012, defendant implemented a new operating agreement for Retaw. Among the many changes defendant made were the creation of Class B non-voting shares and the removal of plaintiff's option. (Ex. 6.) Defendant made the changes retroactive to 2008. He testified that he made the changes retroactive for tax reasons and that plaintiff's alleged option played no part in his decision to amend the agreement.

After the amendment, defendant transferred thirty percent of his interest in Retaw, in the form of Class B non-voting shares, to his brother and ten percent to an employee. Defendant did not notify plaintiff of his intent to transfer these shares. In August 2014, plaintiff learned of the transfer. By this time, BCK's prospects had improved significantly from its prospects in 2008. Plaintiff authorized his attorney to

make a demand invoking an option to reacquire based on Section 7.3 of the Retaw Agreement. Defendant declined. This suit followed.

Rulings of Law

Plaintiff claims that the Retaw Agreement, Section 7.3 obligated defendant to extend plaintiff an option to purchase before selling any interest in Retaw. In the Assignment, Section 7(a)(ii), plaintiff generally represented that there were no options or over the interest in Retaw. Plaintiff argues, however, that the Assignment, Section 7(a)(ii) exempts the Retaw Agreement option from those representations because it exempts "the right of first offer set forth in the Operating Agreement the term of which has expired". Defendant, in contrast, contends that the exempt right of first offer in the Assignment, Section 7(a)(ii) is the right of first offer set forth in the BCK Agreement, Section 13.05.

This case requires the Court to interpret the Assignment. "When interpreting a written agreement, [the Court] give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." Found. for Seacoast Health v. Hosp. Corp. of Am., 165 N.H. 168, 172 (2013). "[The Court] give[s] an agreement the meaning intended by the parties when they wrote it." Id. "Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used in the contract." Id. (quotation omitted).

"The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language." Birch Broad., Inc. v. Capitol Broad. Corp., 161 N.H. 192, 196 (2010) (quotation omitted). "If the agreement's

language is ambiguous, it must be determined, under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean." Id. "In applying this standard, a court should examine the contract as a whole, the circumstances surrounding execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intentions of the parties." Id. at 196–97. The Court may consider extrinsic evidence to resolve the ambiguity. Found. for Seacoast Health, 165 N.H. at 174.

Here, the Assignment is ambiguous as to whether "Operating Agreement" in Section 7(a)(ii) refers to the Retaw Agreement or the BCK Agreement. Defendant argues that the Assignment, Section 2 defines "Operating Agreement" as the BCK agreement because it states "the operating agreement (the **'Operating Agreement'**) of the Company." (Ex. 1.) The Assignment elsewhere defines term "Company" as BCK. Defendant therefore reasonably argues that the parenthetical "(the **'Operating Agreement'**)" in Section 2 defines "Operating Agreement" as the BCK Agreement.

However, parenthetical references in a contract typically pertain to the immediately preceding text. Olympus Ins. Co. v. AON Benfield, Inc., 711 F.3d 894, 898 (8th Cir.2013) (limiting term's definition "to those words preceding the parenthetical reference," and rejecting the contention that the definition "must also encompass the language following the integrated parenthetical"); Berg v. eHome Credit Corp., 848 F. Supp. 2d 841, 846 (N.D. Ill. 2012) ("[O]ne method of defining terms in an agreement is by placing a defined term in parentheses and quotation marks immediately following the definition of the term."); Dispatch Printing Co. v. Recovery Ltd. P'ship, 28 N.E.3d 562, 574 (Ohio Ct. App. 2015) ("[B]y using an integrated definition of the term Treasure, the

term includes the words which precede the parenthetical reference, not the words which follow the parenthetical."). Under this rule, the parenthetical reference, "(the **'Operating Agreement'**)," in the Assignment is defined by the immediately preceding text, "the operating agreement," and does not necessarily refer to the BCK Agreement.

Further, Section 2 of the Assignment also refers to "the Operating Agreement of the Company." (Ex. 1.) If the term "Operating Agreement" means "Operating Agreement of the Company," the words "of the Company" in Section 2 are surplusage, which is disfavored in contractual interpretation. See Thiem v. Thomas, 119 N.H. 598, 603, (1979) (("Words are only to be ignored or regarded as surplusage when to do otherwise would be either to render the document insensible or else to produce a result obviously at variance with its clear intention or purpose.") (quotation omitted)).

Section 3 of the Assignment, the only section of the Assignment outside Sections 2 and 7 that uses the term "Operating Agreement," further contributes to the ambiguity. Section 3 required plaintiff to take action "in order to effectively vest in [defendant's] full, indefeasible, merchantable, legal, equitable and beneficial title to the Interests, subject to the Operating Agreement." (Ex. 1) (emphasis added). The context of Section 7 does not make clear which operating agreement it refers to.

Because the meaning of the term "Operating Agreement" is ambiguous based solely on the Assignment language, the Court looks to extrinsic evidence to resolve the ambiguity. The most telling pieces of extrinsic evidence are the Retaw and BCK Agreements.

The Assignment, Section 7(a)(ii) refers to a "right of first offer . . . *the term of which has expired.*" (Ex. 1) (emphasis added). Plaintiff's option in the Retaw

Agreement expires sixty days after the receipt of notice of transfer. (Ex. 5.) However, this expiration period did not apply during the transfer of Retaw from plaintiff to defendant, as plaintiff was the Retaw member transferring his interest. Thus, "the term of which has expired" language is not applicable to the Retaw Agreement option.

The BCK Agreement provides that BCK members have twenty days to exercise their rights of first offer after receiving a transfer notice. Plaintiff sent the BCK members notice that he was selling Retaw on August 13, 2008. The BCK members' rights of first offer expired twenty days later, before the Assignment was signed. This suggests "right of first offer" in the Assignment, Section 7.3 refers to the right of first offer in the BCK Agreement because that right of first offer had expired, unlike the right of first offer in the Retaw Agreement.

Furthermore, the BCK Agreement uses the term "right of first offer" and is titled "Amended and Restatement Operating Agreement." (Ex. 8.) In contrast, the Retaw Agreement uses the term "option" and is titled "Limited Liability Company Agreement." (Ex. 5.) The Assignment refers to "a right of first offer" set forth in an "Operating Agreement," paralleling the language of the BCK Agreement. This further suggests that Section 7(a)(ii) of the Assignment refers to the BCK Agreement.

Plaintiff argues that the Assignment refers to the right of first offer in the Retaw Agreement because the sale of Retaw to defendant did not trigger the right of first offer in the BCK Agreement. He testified that he notified BCK members of the sale because he initially agreed to sell defendant Retaw's interest in BCK. However, he ultimately sold Retaw itself, and so, he argues, no notice was required under the BCK Agreement. Regardless of whether the BCK Agreement strictly required plaintiff to extend BCK

members a right of first offer, plaintiff did extend that right. It therefore seems reasonable that the Assignment would refer to such a right of first offer.

In light of the Retaw and BCK Agreements, the Court gives little weight to plaintiff's subjective belief that the Assignment allowed him to retain the Retaw Agreement option, especially because he never told defendant of this belief. Moreover, the initial purpose of the inclusion of the Retaw option was not for plaintiff's future economic benefit; according to plaintiff, it was included to ensure that the family interests would not be split to family outsiders. Once plaintiff obtained 100% ownership, the option no longer served that purpose.

Further, defendant's amendments to the Retaw Agreement do not indicate that defendant believed that plaintiff's option had survived. The comprehensive nature of the amendments, which expanded Retaw's operating agreement from three to thirty-eight pages, indicate that plaintiff's option was not the focus of the amendments. Rather, defendant would have had no reason to retain what he believed was an obsolete option in the operating agreement.

Finally, the Court is not persuaded by plaintiff's argument that the option in the Retaw Agreement was personal to him and so was not conveyed by the Assignment. It is true that the Assignment suggests that plaintiff conveyed his "membership interests" in Retaw. (Ex. 1.) A right of first offer is arguably not a membership interest. However, the Assignment, Section 3 states that plaintiff assigned to defendant "all rights, powers and privileges of Assignor to exercise any . . . option . . . with respect to the Interest" and "full, indefeasible, merchantable, legal, equitable, and beneficial title to the Interests." (Id.) The Assignment, Section 7(a) further states that plaintiff conveyed

"good and marketable title to all of the Interests in the Bielagus Entity" and that "the Interest is free and clear of all liens, sales agreements, pledges, charges, encumbrances, claims, security interests, or restrictions." (Id.)

These statements represent that defendant could freely sell his interest in Retaw. For example, "merchantable" means "[f]it for sale in the usual course of trade at the usual selling prices." Merchantable, Black's Law Dictionary (10th ed. 2014). The right of first offer that plaintiff contends he holds could restrict defendant from selling his interest at the usual selling price and to the buyer of his choice. Therefore, plaintiffs' argument that he retained an individual option in Retaw is defeated by the representations that plaintiff made about the marketability of the interest that he conveyed to defendant.

Conclusion

Accordingly, for the foregoing reasons, the Court finds and rules in favor of defendant. The narrative order describes the findings of fact and rulings of law on which the decision is based. Therefore, the court declines to address the parties' separate requests for findings of fact and rulings of law. See Geiss v. Bourassa, 140 N.H. 629, 632–33 (1996).

SO ORDERED.

Date: 10/23/2015

Diane M. Nicolosi
Presiding Justice