

NANCY M. HART and	:	IN THE COURT OF COMMON PLEAS OF
FIRST NATIONAL BANK OF	:	LYCOMING COUNTY, PENNSYLVANIA
BERWICK, as Co-Executors of the	:	
Estate of DELROY J. HART,	:	
Plaintiffs	:	NO. 00-01316
	:	
vs.	:	
	:	
NIC-DEL, INC., a Pennsylvania corporation:	:	PRELIMINARY OBJECTIONS
and NICHOLAS R. CATINO,	:	
Defendant	:	

**Date: February 1, 2001**

**OPINION and ORDER**

BEFORE THE COURT are Defendant’s Preliminary Objections in the nature of a demurrer to Plaintiff’s Complaint<sup>1</sup> that seeks a declaratory judgment in relation to a stock purchase agreement.<sup>2</sup> Because a demurrer cannot be granted unless a case is clear and free from doubt, Defendant’s Preliminary Objections must be overruled.

***Background***

On May 20, 1987, Delroy Hart and Nicholas Catino, as stockholders, entered into a stock agreement with the corporation, Nic-Del. Paragraph 2 of the agreement requires that upon the death of a stockholder, the deceased stockholder’s shares shall be sold to the

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<sup>1</sup> On August 16, 2000, Plaintiffs filed their Complaint seeking Declaratory Relief. On October 20, 2000, Defendants filed their response in the form of Preliminary Objections. On November 29, 2000, the Court issued an order setting the case for the May 2001 trial term. On December 12, 2000, Defendants filed their Brief in Support of Preliminary Objections to Plaintiff’s Complaint. On December 15, 2000, Plaintiffs filed an Answer and New Matter to Defendant’s Preliminary Objections. On December 18, 2000, Plaintiffs filed their Brief in Opposition to Defendants’ Preliminary Objections. On December 28, 2000, Defendants filed their Answer to a New Matter to Defendants’ Preliminary Objections.

<sup>2</sup> The demurrer asserts the plaintiffs lack standing to enforce the agreement which by its plain and only meaning does not permit the interpretation given to it in the complaint.

corporation. The agreement further requires that the corporation shall purchase those shares.

Paragraph 3 of the agreement provides the following method for the valuation of the stock:

3. Valuation of stock.

A. The purchase price for all the capital stock of the Corporation shall be an amount as set forth under Exhibit "A". The initial amount to be recorded in Exhibit "A" of this agreement shall be \$ \_\_\_\_\_ Dollars.<sup>3</sup> Annually, or as often as the parties shall agree, the amount to be paid for the deceased Stockholder's interest shall be adjusted and recorded in Exhibit "A".

B. In lieu of the above, the purchase price for the stock shall be appraised value thereof, which shall be determined as follows: The Offering Stockholder, or his transferee, in the Corporation, shall each appoint one arbitrator, who, together shall agree upon the valuation of the business interest of the deceased Stockholder. In the event the two cannot agree, they shall appoint a third arbitrator and the decision of the majority shall be binding upon both parties. In addition to all other assets of the business considered in arriving at the value of the shares, goodwill shall be included.

C. Paragraph Three (3), Subparagraph B above is to be considered in the event Exhibit "A" has not been consented to by all the parties.

The Complaint alleges the initial stock valuation on May 20, 1987 placed a starting value of \$40,000 on each shareholder's fifty thousand (50,000) shares and after the initial valuation, no adjustments were recorded on Exhibit A. Plaintiffs contend that because Exhibit A was never adjusted as required by paragraph 3A of the stock agreement, paragraph 3B should apply. Accordingly, declaratory relief would require Defendants to appoint an arbitrator to proceed with determining the stock's value under that provision.

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<sup>3</sup> The original agreement contains a blank space after the dollar sign.

In their Preliminary Objections, Defendants agree that there were no further stock valuations made by the shareholders under paragraph 3.A., but demurrer asserting that under this agreement the failure to so do is conclusive evidence of their agreement to maintain the value as originally agreed<sup>4</sup>. Therefore, Defendants contend paragraph 3.C.becomes operative to prohibit consideration of the arbitration procedure to value the stock. The parties agreed to only the initial valuation and the stock's value remains \$40,000.

Defendants further contend in their preliminary objection that Plaintiffs have no standing to enforce the agreement as the stockholder's heirs because they were not a party to the original contract.

### ***Discussion***

A preliminary objection based on legal insufficiency (demurrer) can only be granted if the plaintiff fails to set forth a cause of action, which, if proved, would entitle the plaintiff to the relief, sought. *Rose v. Wissinger*, 439 A.2d 1193 (1982). Furthermore, all well and clearly plead material, factual averments and all fairly deducible inferences can be considered. *Myers v. Ridge*, 712 A.2d 791 (Pa. Commw. 1998).

The first issue the Court must address is Plaintiff's standing. Simply put, this Court finds that Plaintiffs do have standing Plaintiffs, in their capacity as the duly-approved personal representatives of the deceased party to the agreement, have standing to enforce its provisions, and to maintain legal actions to collect assets belonging to the estate. *See* 20 Pa. C. S. §3311, *et seq.* The clear intent and stated purpose of this agreement was to provide a

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<sup>4</sup> In other words, as the parties agreed to only the initial valuation and no cause of action can be asserted to enforce paragraph 3B, under the agreement, the stock's value remains \$40,000.

means whereby the stock of a shareholder would be converted to cash for the benefit of the decedent estate's beneficiaries. Absent some provision in the agreement to the contrary, there is no basis for Defendant to assert Plaintiff, the decedent shareholder's personal representative, cannot enforce the rights the shareholders and the corporation established in the agreement.

The second issue for the Court to address is the language of the agreement. The Court finds that Plaintiff's interpretation of the agreement alleges a fairly deducible meaning of the agreement's stock purchase provisions. Of significance at this stage of the litigation is that both parties seemingly admit the agreement has certain ambiguities, at least latent if not patent ambiguities. Therefore, the agreement itself is not absolutely free from doubt as to its meaning. Consequently, Defendant's Preliminary Objections are to be **OVERRULED**.

**ORDER**

Defendant's Preliminary Objections are overruled. Pursuant to the Pennsylvania Rule of Civil Procedure 1028(d), Defendant shall have the right to plead over within twenty (20) days after notice of this order is given.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator  
C. Edward Mitchell, Esquire  
Jeffrey C. Dohrmann, Esquire  
Judges  
Jeff Wallitsch, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)