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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	**CASE NUMBER 04-41352**
	*	
Debtors.	*	
	*	
**********		
	*	
ELM ROAD DEVELOPMENT, CO.,	*	
***et al.*,**	*	**ADVERSARY NUMBER 08-04020**
	*	
Plaintiffs,	*	
	*	
vs.	*	
	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD., *et al.*,	*	**HONORABLE KAY WOODS**
	*	
Defendants.	*	
	*	

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MEMORANDUM OPINION CONCERNING CROSS-MOTIONS FOR SUMMARY JUDGMENT

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The following Memorandum Opinion addresses cross motions for summary judgment. Defendants Mark Gleason, Chapter 7 Trustee ("Trustee"), and Buckeye Retirement Co., LLC, Ltd. ("Buckeye")

(collectively, “Defendants”) filed Motion for Summary Judgment (“Defendants’ Motion”) (Doc. # 54) on December 12, 2008. Plaintiffs Elm Road Development Co. (“Elm Road”), Tuller Brookfield Associates, Inc. (“Tuller”), Woodland Park Retirement Housing Limited Partnership (“Woodland Park”), Daniel Daniluk (“Daniluk”), and CI Residential Property Corp. (collectively, “Plaintiffs”) filed Plaintiffs’ Motion for Summary Judgment (“Plaintiffs’ Motion”) (Doc. # 55) on December 15, 2008. Together, the parties filed Joint Stipulation of Facts Not in Dispute and Legal Issues to be Presented in Defendants’ Motion for Summary Judgment (“Stipulation”) (Doc. # 49) on November 17, 2008. On January 23, 2009, Defendants filed Motion For Leave to Reply to Plaintiffs’ Response to Defendants’ Motion for Summary Judgment (Doc. # 58), which motion was denied pursuant to separate Order on January 26, 2009. For the reasons given below, the Court finds that (i) Defendants’ Motion should be granted and (ii) Plaintiffs’ Motion should be denied.

This adversary proceeding is related to the bankruptcy case (Case No. 04-41352 and hereafter referred to as “Main Case”) of Debtors Randall J. Hake (“Hake”) and Mary Ann Hake (collectively, “Debtors”), which was commenced on March 25, 2004. The Main Case was originally filed as a chapter 11 case and converted to chapter 7 on April 26, 2006. Mary Ann Hake was denied discharge pursuant to Denial of Discharge for Mary Ann Hake (Main Case, Doc. # 777) on October 26, 2007. Hake was denied discharge pursuant to Order Denying Discharge (Adv. Pro. No. 06-4153, Doc. # 264) on March 21, 2008.

Plaintiffs commenced the instant Adversary Proceeding against Trustee, Buckeye, Hake, and Randall J. Hake Contracting Corp. ("Hake Contracting") on February 4, 2008, by filing a Complaint seeking declaratory judgment. The Complaint prays for the following relief: "that this court enter its order declaring and determining that such property [Debtors' interests in Hake Contracting, Tuller and Elm Road, as described below] is not property of the estate or, alternatively, is property of the estate but not subject to assignment or sale in contravention of the agreement existing with respect to these business entities[.]" (Compl. at unnumbered 5.) On May 12, 2008, Buckeye and Trustee each filed documents styled Answer and Affirmative Defenses to Complaint, which were docketed at Doc. # 31 and Doc. # 32, respectively. Neither Hake nor Hake Contracting filed an answer or other responsive pleading to the Complaint.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD FOR REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

> The judgment sought shall be rendered if the

> pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(c) (West 2008). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248 (1986).

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

The parties agree upon, and have stipulated to, all material facts. There are two separate business arrangements at issue here: (i) Elm Road and (ii) Woodland Park, in which both Tuller and Hake Contracting are limited partners.

1. Elm Road

Elm Road is an Ohio S corporation, having "North River Commons" as its sole asset. (Stip. ¶ 8(a).) Hake and Daniluk each own 50% of Elm Road's stock. (*Id*.) When Elm Road was incorporated, Daniluk and Hake agreed orally that "they would restrict the transfer, sale or assignment of the stock in Elm Road and require the consent of the other shareholder be obtained prior to any effective transfer of the same." (*Id.*) No writing memorializing such agreement has been produced by any party. (*Id.*)

2. Woodland Park

Woodland Park is an Ohio limited partnership, with two limited partners, Tuller (which owns a 50% interest) and Hake Contracting (which owns a 49% interest). (Stip. ¶¶ 8(b),(d).) Woodland Park's two general partners are CI Residential Property Corporation and Village of McDonald. (Stip. ¶ 8(c).) The Woodland Park partnership agreement contains "restrictions which purport to preclude or limit the sale, transfer, hypothecation or pledge of any limited partnership interest in Woodland, without the consent of the general partners[.]" (*Id.*) In pertinent part, the Woodland Park limited partnership agreement states:

> Under no circumstances will any offer, sale, transfer, assignment, hypothecation or pledge of any Limited Partner Interest be permitted unless the General Partners shall have Consented, except that the Limited Partner may sell, transfer, or assign all or any part of its Limited Partner Interest to any person related to or any entity affiliated with, or under common control with, the Limited Partner.

Woodland Park Limited Partnership Agreement Article IX § 9.02(a).[1]

Both Woodland Park limited partners are corporations. Hake owns a 32.5% interest in Tuller and a 100% interest in Hake Contracting. (Stip. ¶¶ 8(b),(d).) Daniluk and other individuals own the remaining 67.5% interest in Tuller. (Stip. ¶ 8(b).) When Tuller was incorporated as an S corporation, all its stockholders "agreed that they would restrict the transfer, sale or assignment of the stock in Tuller and require the consent of Daniel Daniluk or Randall Hake be obtained prior to any effective transfer of the same." (*Id.*) No writing memorializing such agreement has been produced by any party. (*Id.*)

B. Procedural History

1. Main Case

The Main Case was originally filed on March 25, 2004, as a chapter 11 case and converted to chapter 7 on April 26, 2006. On April 21, 2006, Debtors filed Motion for an Order Approving the Compromise of Disputes Between Debtors and Buckeye Retirement Co., L.L.C., Ltd. Including Offer of Buckeye to Buy All Assets for $650,000 ("Debtors' Motion to Compromise") (Doc. # 433). Debtors' Motion to Compromise represented Debtors' desire to accept Buckeye's

[1]Plaintiffs submitted the Woodland Park Limited Partnership Agreement to the Court as part of Exhibit 2 attached to their Motion for Summary Judgment.

$650,000 purchase offer for all Debtors' nonexempt assets,[2] including the three assets presently at issue. While Debtors' Motion to Compromise outlined several conditions of the agreement, it contained no mention of any possible restriction on the transferability of such assets. Debtors withdrew their Motion to Compromise on May 10, 2006 (Doc. # 465).

On October 18, 2007, Trustee filed Joint Motion to Approve Settlement of Trustee's Motion to Enforce Sale ("Motion to Approve Settlement") (Main Case, Doc. # 770). On November 13, 2007, Elm Road, Tuller, Woodland Park and others (collectively, "Objecting Parties")[3] filed Objection and Request for Clarification of Proposed Compromise by Elm Road Development, [sic] Co., Tuller, and Woodland Park Retirement Housing Limited Partnership and Certain Interested Shareholders and Partners ("Objection to Compromise") (Main Case, Doc. # 780). The Objection to Compromise "respectfully request[ed] this court to overrule the joint motion to approve settlement and/or clarify the terms and conditions of the proposed sale of the debtors' assets and exactly what property it is contemplated is subject to transfer or assignment[.]" (Obj. to Compr. at unnumbered 2.) On November 14, 2007, the Court held a hearing on the Motion to Approve Settlement, which was granted, as modified on the record. The Objection to Compromise was deemed to be premature because Trustee was not seeking authority to sell any assets at that time.

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[2]The other piece of the compromise included conversion of Debtors' case to chapter 7.

[3]Plaintiffs and Objecting Parties significantly overlap, but are not identical.

On December 21, 2007, Trustee filed Motion for Order Approving the Sale of Estate Assets Outside the Ordinary Course of Business Pursuant to 11 U.S.C. § 363 ("Motion to Sell") (Main Case, Doc. # 784). On January 24, 2008, the Objecting Parties filed Objection to Proposed Sale of Property and Request for Clarification of Property to be Transferred ("Objection to Sale") (Main Case, Doc. # 794). The Court held a hearing on the Motion to Sell on February 5, 2008 ("Hearing"), at which counsel for Trustee, Objecting Parties, and Buckeye attended and presented argument.

The Motion to Sell sought approval for Trustee to sell all of the bankruptcy estate's non-exempt assets to Buckeye for the total purchase price of $650,000.00 ("Purchase Price"). The Objection to Sale asserted that certain assets, including the 50% interest in Elm Road, the 32.5% stock ownership in Tuller, and the 100% stock ownership interest in Hake Contracting (collectively, the "Carve-Out Assets") could not be transferred without the consent of various other named shareholders and partners. The day prior to the Hearing, Plaintiffs commenced this Adversary Proceeding.

At the Hearing, Counsel for Trustee suggested a compromise, with the concurrence of counsel for Buckeye and the Objecting Parties, as follows: (i) Trustee and Buckeye would "carve out" the Carve-Out Assets from the sale by Trustee to Buckeye; (ii) this Court would determine whether Trustee could transfer the Carve-Out Assets; and (iii) whether or not Trustee could sell the Carve-Out Assets to Buckeye, the Purchase Price would not be reduced. This agreement was adopted by the Court and set forth in Amended Order of Court dated

March 4, 2008 ("Order Authorizing Sale") (Main Case, Doc. # 810), which authorized Trustee to sell the non-exempt estate assets to Buckeye.

2. Adversary Proceeding

Plaintiffs commenced the instant Adversary Proceeding on February 4, 2008, by filing a Complaint seeking declaratory judgment that the Carve-Out Assets are (i) not property of the estate, and/or (ii) property of the estate but not freely transferrable by Trustee. On September 10, 2008, in response to a Motion to Dismiss,[4] the Court entered Order Granting, in Part, and Denying, in Part, Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Motion for Judgment on the Pleadings (Doc. # 42), in which the Court held that the Carve-Out Assets are property of Debtors' estate.

The Court held a telephonic status conference regarding this Adversary Proceeding on October 20, 2008, at which time the Court set November 10, 2008, as the deadline by which the parties were to file motions for leave to file motions for summary judgment. Plaintiffs filed Plaintiff's [sic] Motion for Leave to File Motion for Summary Judgment (Doc. # 46) on November 10, 2008. Defendants filed Motion for Leave to File Motion for Summary Judgment (Doc. # 50) on November 17, 2008. The Court entered Order Granting Motions for Leave to File Cross Motions for Summary Judgment (Doc. # 52) on

[4]Defendants filed Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Motion for Judgment on the Pleadings on July 3, 2008 (Doc. # 35). Plaintiffs filed Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Motion for Judgment on the Pleadings on July 16, 2008 (Doc. # 36).

November 20, 2008. Defendants' Motion (Doc. # 54) was filed on December 12, 2008, and Plaintiffs' Motion (Doc. # 55) was filed on December 15, 2008. On December 29, 2008, the following documents were filed: (i) Plaintiffs' Response to Defendants' Motion for Summary Judgment (Doc. # 56); and (ii) Brief in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. # 57).

III. LEGAL ANALYSIS

Plaintiffs present two separate grounds for preventing the transfer of the Carve-Out Assets: (i) the consent agreements between and among the incorporators of both Elm Road and Tuller (collectively, "Consent Agreements"); and (ii) the provisions restricting transfer in the Woodland Park partnership agreement. The Court will examine each argument in turn.

A. Do the Incorporators' Oral Agreements Restrict Transfer of Debtors' Interests in Elm Road and Tuller?

Plaintiffs argue that (i) the Consent Agreements are legal and enforceable, equally binding on both Hake and the Trustee; and (ii) Buckeye had notice of the Consent Agreements sufficient to satisfy the statutory requirements.[5]

Defendants respond that (i) as "secret" agreements, the Consent Agreements failed to provide adequate notice; and (ii) even if the Consent Agreements are valid, they do not bind the Trustee either because (a) they are *ipso-facto* clauses, or (b) the Trustee may only

[5]Plaintiffs also assert that Buckeye is a judgment creditor, not a good faith purchaser for value. However, in the context of this transfer, Buckeye is a purchaser for value. The fact that Buckeye prevailed against Hake in a related adversary proceeding (Case No. 06-04153) did not turn Buckeye into a judgment creditor.

be bound by a right of first refusal provision.

This dispute in this Adversary Proceeding actually turns on resolution of only one question: Is an absolute consent restriction on the transfer of corporate stock a valid and enforceable restriction under Ohio law? The Court finds that it is not. Therefore, neither Hake nor Trustee is bound by such restriction.

Before proceeding with its analysis of this key issue, the Court will first clear away two extraneous issues. Because the Court is granting Defendants' Motion, it will review any disputed facts in a light most favorable to Plaintiffs for the purposes of this Opinion.

First, whether the Consent Agreements were oral or written does not determine their enforceability. With some exceptions that are not relevant here, oral agreements are generally enforceable. *Oakley v. Drydock Coal Co. (In re Oakley)*, No. 03-59297, 2008 Bankr. LEXIS 3070, at *21-22 (Bankr. S.D. Ohio Nov. 22, 2008) (In determining the validity of a stock transfer restriction, it is the agreeing shareholders' intent, "not a writing, that matters. [There is] no . . . authority that requires a restriction on the transfer of stock to be in writing in order for it to be effective among the parties.") Ohio law requires only knowledge of the restriction for a valid restriction to be effective. *See* O.R.C. § 1308.11(A) (LexisNexis 2008).[6] There was nothing secret about the Consent Agreements;

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[6]O.R.C. § 1308.11(A) reads:

> (A) A restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without actual knowledge of it unless:
>
> (1) The security is certificated and the restriction is noted conspicuously on the security certificate; or

Plaintiffs made the terms of the Consent Agreements known on November 13, 2007, more than a month before the Trustee sought permission from the Court to sell any of Debtors' assets.

Second, had the Consent Agreements been valid restrictions, they would have bound Trustee to the same extent as Hake.[7] Plaintiffs concede that Trustee has the same rights as Debtor. (Plts' Mot. at 6.) *See also*, 11 U.S.C. § 541(c). The Consent Agreements are not *ipso-facto* clauses in that they were not triggered by Debtors' bankruptcy, but had been imposed on previous stock transfers. (*Id.* at 4.) However, in attempting to sell Debtors' non-exempt assets, including the Carve-Out Assets, to Buckeye, Trustee is doing no more than what the Debtors themselves proposed to do in filing Debtors' Motion to Compromise.

Ultimately, however, this Court finds that the Consent Agreements, as stipulated by the parties, are not enforceable as valid restrictions on the transfer of stock in either Elm Road or Tuller. The parties agree, and this Court concurs, that rights of first refusal are valid and enforceable restrictions. *See, e.g., Jandel v. Precision Colors, Inc. (In re Jandel)*, 19 B.R. 415, 420 (Bankr. S.D. Ohio 1982) (finding that a right of first refusal "is not invalid as an unreasonable restriction on alienation"); *Ramun v. Ramun*, 2005-Ohio-6921, at ¶ 40 (Ohio Ct. App. 2005) (holding that

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(2) The security is uncertificated and the registered owner has been notified of the restriction.

[7]Defendants' assertion that the Trustee is only bound by right of first refusal restrictions is unsupported by case law.

Ohio recognizes reasonable restrictions on stock transfers and the right of first refusal is such a reasonable transfer); and *First National Bank of Canton v. Shanks*, 73 N.E.2d 93, 94 (Ohio C.P. Stark County 1945) ("[T]he weight of authority is that a restriction of this kind [right of first refusal] is reasonable.").

However, the Consent Agreements go far beyond a right of first refusal. The Consent Agreement language has the power to create a permanent restriction on the transfer of the stocks, which is not a proper restriction. This Court could find only two Ohio cases discussing such absolute consent restrictions, and both contrasted such restrictions with the valid right of first refusal restriction then before each court. The *Shanks* court stated:

> There is a distinct dissimilarity between a restriction which required approval of the corporation or its directors or stockholders before a transfer of shares of stock can be had, and a restriction that merely gives the corporation or the stockholders an option. The former is capable of becoming a permanent restriction, whereas the latter is only a temporary restriction adopted with the best interests of the corporation in mind. . . . It is to be noted that in practically all of the cases where restrictions have been held to be invalid, the courts have based their judgments on the fact that the restriction was a permanent prohibition. *Elevator Co. v. Miller*, 78 Neb. 441, 110 N.W. 995; *Morris v. Hussong Dyeing Co.*, 81 N.J. Eq. 256, 86 A. 1026; *Bloomingdale v. Bloomingdale*, 107 Misc. 646, 177 N.Y.S. 873; *Prindiville v. Johnson and Higgins*, 92 N.J. Eq. 515, 113 A. 915.

Shanks, 73 N.E.2d at 94 (emphasis added). The Ohio Supreme Court had reached a similar conclusion in an earlier case:

> Certainly power to regulate transfers of stock could not properly be regarded as power to prohibit the transfer, and it may be that in the interpretation of acts conferring such power it would be the duty of courts to see that prohibition is not accomplished under the guise of regulation, and that restrictions would not be permitted

> if foreign to the purpose for which the corporation is formed. The by-law here called in question contains no suggestion of a purpose to prevent the alienation of stock nor to restrict it beyond reasons suggested by a consideration of the welfare of the corporation and the express provisions of the statute. It <u>interposes no permanent impediment to the transfer</u>, providing only for an option in the directors for thirty days as a reasonable opportunity to them to dispose of stock to persons deemed desirable as holders.

Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 112 (Ohio 1910) (emphasis added). Ohio courts are not alone in drawing this distinction. *See, e.g., Vardanyan v. Close-Up Int'l, Inc.*, No. CV-06-2243, 2007 U.S. Dist. LEXIS 88292 (E.D.N.Y. Nov. 30, 2007).

"The majority view is that restrictions on the transfer of corporate stock, although usually valid, are looked upon with disfavor and are strictly construed." *Osborne v. Farinacci*, No. 6-215, 1978 Ohio App. LEXIS 9209, (Ohio Ct. App. 1978) (adopting the majority view within the context of the applicability of stock transfer restrictions on testamentary dispositions). Plaintiffs do not cite, nor could this Court find, any cases supporting their assertion that absolute consent requirements are valid restrictions on stock transfers under Ohio law. As noted above, *Shanks*, one of the cases cited by Plaintiffs, strongly suggests the opposite. The other cases Plaintiffs cite either involve right of first refusal provisions or do not otherwise directly address this issue.

Ohio law does allow absolute restrictions in partnership

agreements,[8] or in close corporation agreements,[9] but there are no corresponding provisions applicable to corporations in general. Plaintiffs argue that they have fulfilled the notice requirements of O.R.C. § 1308.11, but this provision only applies when restrictions are "otherwise lawful." O.R.C. § 1308.11 (LexisNexis 2008). The Tuller and Elm Road incorporators had the option to create these two entities as either partnerships or close corporations, but they did not choose to do so.

Finally, Plaintiffs' suggestion that Trustee could possibly sell the Carve-Out Assets to some entity other than Buckeye is not sufficient to transform the Consent Agreements into valid transfer restrictions because such suggestion is mere speculation on Plaintiffs' part.[10] Plaintiffs specifically state that <u>any</u> transfer would have to be approved by Daniluk. (Pl. Resp. at 16.) Plaintiffs fail to articulate any circumstances that would require Daniluk to

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[8]*See, e.g.*, O.R.C. § 1775.17(G).

[9]*See, e.g.*, O.R.C. § 1701.591(C)(10). However, in order to be incorporated as a close corporation, the original shareholders must all indicate their assent to such an action in writing. In pertinent part, O.R.C. § 1701.59.1 provides:

> (A) In order to qualify as a close corporation agreement under this section, the agreement shall meet the following requirements:
>
> (1) Every person who is a shareholder of the corporation at the time of the agreement's adoption, whether or not entitled to vote, shall have assented to the agreement in writing;
>
> (2) The agreement shall be set forth in the articles, the regulations, or another written instrument;
>
> (3) The agreement shall include a statement that it is to be governed by this section.

[10]Plaintiffs also argue that "Buckeye certainly would force dissolution of [Elm Road]." It is unclear to the court (i) whether this would be in Buckeye's interest or (ii) how Buckeye's 50% interest in Elm Road would give it such power. Regardless, this is all speculation on Plaintiffs' part, involving issues that are not before this Court.

give his consent.

While there is a paucity of Ohio law addressing absolute or permanent consent restrictions on the transfer of stock, what law there is indicates strongly that such restrictions are not valid and enforceable. Therefore, the Court finds that (i) the Consent Agreements are void; (ii) they do not prevent the transfer of Debtors' interests in either Tuller or Elm Road; and (iii) Trustee may sell Debtors' Elm Road and Tuller interests to Buckeye, as detailed in Order Authorizing Sale.

B. Does the Woodland Park Partnership Agreement Prevent Transfer of Debtors' Interests in Hake Contracting or Tuller?

Plaintiffs assert that the transfer restrictions in the Woodland Park partnership agreement prevent Trustee's transfer of Hake's interests in both Tuller and Hake Contracting. Plaintiffs further assert that the transfer of Hake's 100% interest in Hake Contracting violates the Woodland Park partnership agreement by essentially substituting a new limited partner, citing several cases in support of this argument. Beyond baldly stating that transfer of Hake's minority interest in Tuller also violates the Woodland Park agreement, Plaintiffs offer no rationale for this position. As explained below, the Court finds that transfer of all stock of Hake Contracting does not equal a transfer of any interest in Woodland Park. The same reasoning applies to transfer of the Tuller stock.

Defendants draw no distinction between the transfer of Hake Contracting stock and Tuller stock. Instead, they argue that (i) most case law supports their position that transfer of an interest

in a Woodland Park partner does not equal transfer of an interest in Woodland Park itself; and (ii) the cases cited by Plaintiffs are context-specific and distinguishable from the main line of jurisprudence. The Court agrees that Defendants have stated the majority rule.

The Woodland Park partnership interests are assets owned by Tuller and Hake Contracting, respectively. Trustee is not seeking to transfer any interest in Woodland Park itself, but only Debtors' shares in two of Woodland Park's corporate partners. "[O]wnership of the stock of a corporation is not synonymous with ownership of the corporate assets." *Engel v. Teleprompter Corp.*, 703 F.2d 127, 134 (5th Cir. 1983). The issue before the *Engel* court was whether merger of a corporate-partner triggered a right of first refusal provision in the subsidiary's shareholder agreement. In reaching a negative conclusion, the court contrasted a merger with purchase of corporate stock. The court noted that "[a] purchase of stock in a corporation . . . does not constitute the purchase of the corporate assets, just as a transfer of the stock of a corporation is not a transfer of the property and assets of the corporation itself." *Id.* at 131.

While neither party presented any Sixth Circuit case law on this specific issue, courts of appeal in three other Circuits have agreed with the *Engel* court. In considering a merger situation similar to that in *Engel*, the Seventh Circuit Court of Appeals reasoned:

> Yet how does a change in its ownership structure make [the corporate partner] a "stranger" to the Partnership? True, a new (indirect) owner may give [the corporate partner] new marching orders, but so may a new CEO of a partner that has no corporate parent, and a change of CEO (or a new business

> plan adopted by an old CEO) does not give other partners a buyout right.

Northeast Comm'ns of Wis., Inc. v. Centurytel, Inc., 516 F.3d 608, 611 (7th Cir. 2008). This analysis is even more compelling in a stock purchase situation. In *Kaiser v. Bowlen*, 455 F.3d 1197 (10th Cir. 2006), the Tenth Circuit Court of Appeals considered whether sale of shares in a corporate partner triggered a right of first refusal, holding that most courts considering such question have found that "transfer of corporate stock does not trigger a ROFR that only applies by its text to the assets of the corporation." *Id.* at 1208. The court noted that the distinctions between a corporation and its shareholders, between ownership of corporate stock and ownership of corporate assets, are "basic tenet[s] of American corporate law." *Id.* *See also*, *U.S. Cellular Inv. Co. of Los Angeles, Inc. v. GTE Mobilnet, Inc.*, 281 F.3d 929 (9th Cir. 2002) (Finding that transfer of a partner corporation's stock is not the same as transfer of that corporation's assets).

In deciding these cases, the courts of appeal applied the law of Texas, Wisconsin, Colorado, and California, respectively. Courts applying the law of New York (*In re Integrated Res., Inc.*, No. 90-B-10411, 1990 WL 325414 (Bankr. S.D.N.Y. Oct. 22, 1990)) and Delaware (*Baxter Pharm. Prod., Inc. v. ESI Lederle Inc.*, 1999 Del. Ch. LEXIS 47 (Del. Ch. Feb. 25, 1999)) have reached similar conclusions. There is nothing in Ohio law that distinguishes the instant case. Ohio corporations may lawfully hold the securities of other corporations. O.R.C. § 1701.03 (LexisNexis 2008).

Plaintiffs cite one Sixth Circuit case, *PPG Indus., Inc. v. Guardian Indus. Corp.,* 597 F.2d 1090 (6th Cir. 1979) in support of their argument. *PPG* dealt with the assignability of patents following merger of the corporation holding the patent assignment into another company. The court found that the language in the assignment agreement prevented the surviving corporation from using the patents. Putting to one side both (i) the specific language and context of the *PPG* agreement, which differ significantly from the instant case; and (ii) the issue of whether patent assignment law is applicable to the dispute in this Adversary Proceeding; a merger and a stock acquisition "have two entirely different legal connotations." *Engel*, 703 F.2d at 131 ("A merger of two corporations contemplates that one corporation will be absorbed by the other and will cease to exist while the absorbing corporation remains. A subsidiary corporation, on the other hand, is a legal entity separate and apart from its shareholders, notwithstanding the fact that its principal shareholder is another corporation." *Id.*). *See also, Baxter Pharm.,* 1999 Del. Ch. LEXIS 47 at *17, n.18 (finding merger cases "inapposite" to cases involving stock purchases). One of the cases cited by Plaintiffs, *Nicolas M. Salgo Assoc. v. Continental Illinois Properties*, 532 F.Supp 279 (D. Columbia 1981), applies the *PPG* rationale to another merger situation, and is thus equally inapplicable here.

In addition to reflecting a minority position, the other two cases cited by Plaintiffs are distinguishable both from the main line of case law and the facts of the instant case. Plaintiffs rely most

heavily on *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon L.P.*, 840 F.Supp. 770 (D. Oregon 1993). However, in deciding *U.S. Cellular* in favor of allowing the transfer, as cited above, the Ninth Circuit Court of Appeals distinguished *Oregon RSA* by noting that the *Oregon RSA* stock transfer was done via creation of a shell entity, "created purely for the purposes of the subterfuge." *U.S. Cellular*, 281 F.3d at 936. Here, Hake Contracting was not created as part of a subterfuge to transfer Debtor's Woodland Park interest; instead, Hake Contracting was incorporated and run by Hake as a going concern for many years. Buckeye may not be able to operate Hake Contracting as an engineering firm, but this does not render a legitimately incorporated Ohio corporation a "shell."[11] Furthermore, as mentioned above, Trustee is attempting to do no more than what Debtors themselves proposed to do before converting their case to chapter 7. Since Debtors did not raise the issue of transferability at that time, they apparently expected that either consent would be given or that it was not required.

The final case cited by Plaintiffs, *In re Asian Yard Partners*, 1995 Bankr. LEXIS 2199 (Bankr. D. Del. Sep. 18, 1995), involved interpretation of an anti-transfer provision which was much broader and more specific than the Woodland Park provision. The *Asian Yard Partners* agreement specifically forbade transfer of any partnership

[11]Plaintiffs also assert that Buckeye promised to return to Hake all interest in Hake Contracting except for the Woodland Park partnership interest. Defendants call this assertion "unfounded." In light of its analysis, the Court does not find this issue to be material. The Court does note, however, that Hake Contracting's value as an engineering consulting company is dependent on Hake's engineering license, so such an offer would not undermine the *U.S. Cellular / RSA Oregon* distinction.

interest "directly or indirectly, or by operation of law or otherwise[.]" *Id.* at *8. The court found that the plain meaning of the provision encompassed a transfer of a controlling interest in a partner entity, and the court expressly distinguished *Integrated Resources*, 1990 WL 325414, where "the anti-transfer provision was simple in scope." *Asian Yard Partners* at *17. Furthermore, *Asian Yard Partners* dealt with a transfer of the stock of a corporate general partner, and the court was concerned with change in control of the partnership. *Id.* at #18. Hake Contracting, in contrast, is a limited partner in Woodland Park, with a correspondingly limited ability to control the partnership.

Both Daniluk and Hake are sophisticated businessmen. Had they wished to include broader language in the Woodland Park partnership agreement, they could have done so.

The Court finds (i) nothing in the Woodland Park partnership agreement that restricts the transfer of the stock of either of its corporate limited partners; (ii) the Woodland Park partnership agreement does not prevent the transfer of Debtors' interests in either Tuller or Hake Contracting; and (iii) Trustee is authorized to sell Debtors' Tuller and Hake Contracting interests to Buckeye, as set forth in the Order Authorizing Sale.

IV. CONCLUSION

For the reasons set forth above, this Court finds and holds that the Carve-Out Assets are freely and legally transferable by the Trustee. In accordance with the Order Authorizing Sale, the Court

authorizes Trustee to sell the Carve-Out Assets to Buckeye effective as of March 4, 2008.

An appropriate Order will follow.

# # #

FILED

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	**CASE NUMBER 04-41352**
	*	
Debtors.	*	
	*	
**********		
	*	
ELM ROAD DEVELOPMENT, CO.,	*	
***et al.*,**	*	**ADVERSARY NUMBER 08-04020**
	*	
Plaintiffs,	*	
	*	
vs.	*	
	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD., *et al.*,	*	**HONORABLE KAY WOODS**
	*	
Defendants.	*	
	*	

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ORDER (I) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND (II) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Before the Court are (i) Motion for Summary Judgment ("Defendants' Motion") (Doc. # 54) filed by Defendants Mark Gleason,

Chapter 7 Trustee ("Trustee"), and Buckeye Retirement Co., LLC, Ltd. ("Buckeye") on December 12, 2008; and (ii) Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion") (Doc. # 55) filed by Plaintiffs Elm Road Development Co. ("Elm Road"), Tuller Brookfield Associates, Inc. ("Tuller"), Woodland Park Retirement Housing Limited Partnership, Daniel Daniluk, and CI Residential Property Corp. on December 15, 2008.

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby (i) grants Defendants' Motion; and (ii) denies Plaintiffs' Motion. The interests of Debtors Randall J. Hake and Mary Ann Hake in Elm Road, Tuller, and Randall J. Hake Contracting, Inc. are freely and legally transferable by Trustee. Pursuant to this Court's Order Authorizing Sale (Main Case, Doc. # 810) Trustee is authorized to "immediately and finally" sell and transfer such interests to Buckeye, with such transfer effective as of March 4, 2008.

# # #