

[Cite as *Kleem v. Southwest Sports Ctr., Inc.*, 2009-Ohio-3100.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92674**

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**JOHN A. KLEEM**

PLAINTIFF-APPELLEE

vs.

**SOUTHWEST SPORTS CENTER, INC., ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-624066

**BEFORE:** Rocco, J., Gallagher, P.J., and Blackmon, J.

**RELEASED:** June 25, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶ 2} Defendant-appellant, Southwest Sports Center, Inc., appeals from a common pleas court judgment in favor of plaintiff-appellee, John A. Kleem, on Kleem's claim for breach of a stock redemption agreement. Appellant argues that the court erred by denying its motion to exclude an appraisal report submitted by appellee's appraiser, Julian Vanni, and that the court therefore improperly granted appellee's motion for summary judgment and denied appellant's motion. We find no error in the proceedings below, and affirm the common pleas court's judgment.

#### Procedural History

{¶ 3} Appellee's complaint filed May 11, 2007 alleged that, in 1997, appellant had agreed to redeem stock appellee then owned in appellant. Part of the compensation appellee was to receive under the stock redemption agreement was a payment of one-third of the net proceeds from the sale of appellant's real property. If the appellant did not sell the real property, it could satisfy its obligation to appellee by paying an amount based on an appraisal process that will be discussed more fully below. Appellee alleged that the appellant refused to participate in the appraisal process and to pay the balance of the purchase

price due to appellee, in breach of the redemption agreement. Alternatively, appellee claimed that the corporation was unjustly enriched by his investment.<sup>1</sup>

{¶ 4} On January 24, 2008, appellee moved for summary judgment on his breach of contract claim. The court granted this motion in part on March 19, 2008, finding that “the stock redemption agreement provides a specific mechanism for the property’s appraisal. [Appellant] to appoint an appraiser as provided in the stock redemption agreement, paragraph 2(B). This appointment is to be made within 30 days of the journalization of this order. A written report is to be submitted 60 days thereafter.”

{¶ 5} Following a pretrial conference, the court entered the following order: “[T]he appraisers selected by the parties could not agree on a price for the subject property. Pursuant to the terms of the stock redemption agreement at 2B(2), the appraisers shall select a mutually agreed upon third appraiser to determine the value of the real property. If the appraisers cannot agree upon a third appraiser, the court shall appoint one.”

{¶ 6} The parties subsequently stipulated to the authenticity and admissibility of the three appraisals. They then submitted cross-motions for summary judgment. Appellee argued that the contract required that the three appraisals be averaged to determine the value of the property. Appellant

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<sup>1</sup>The judgment on the breach of contract claim rendered moot appellee’s unjust enrichment claim. A third claim against appellant’s majority shareholder, co-defendant, Richard Straub, for breach of fiduciary duty, was dismissed without prejudice.

asserted that the court should disregard the appraisal report prepared by appellee's appraiser in determining the property's value because it was based on unreliable information. Appellant also moved the court to exclude the appraisal report from evidence.

{¶ 7} The court overruled appellant's motion to exclude the appraisal report. It then overruled appellant's motion for summary judgment and granted appellee's cross-motion, finding appellant liable to appellee in the amount of \$136,111 plus interest and costs.

### Facts

{¶ 8} The stock redemption agreement provided that, as part of the consideration for the purchase of appellee's stock, appellant would pay appellee "[o]ne-third (1/3) of the 'Net Proceeds' realized by [appellant] upon the sale of the real property owned by [appellant]. 'Net Proceeds' for purposes of this Agreement, shall constitute the gross proceeds of any 'arms length' sale, less the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) representing the amount of debts and liens chargeable against the real property and less all normal sale and escrow expenses incurred in connection with the real property sale."

{¶ 9} In the event that appellant did not sell the real property, the stock redemption agreement provided that appellant "may, at any time before November 1, 2006, have its real property appraised as follows." According to this

procedure, appellee and a designated representative of appellant would first meet and attempt to agree on the value of the property. If they were unable to do so, they were then required to select an appraiser. If they could not agree upon an appraiser, then they would each appoint an appraiser, and the two appraisers would attempt to agree upon a price. If they could not agree, they would select a third appraiser. All three appraisers would then submit their opinions of the value of the property, and “the average of the three values shall then be a final determination of such value.”

{¶ 10} Appellee’s appraiser valued the property at \$2,500,000. Appellant’s appraiser valued the property at \$1,300,000. The third appraiser valued the property at \$1,175,000.

### Law and Analysis

{¶ 11} Appellant first argues that the court erred by denying its motion to exclude the report of appellee’s appraiser because the appraisal was based on erroneous information. Appellant had previously stipulated to the admissibility of the appraisal. Therefore, the court did not err by denying the motion to exclude the appraisal report.

{¶ 12} In any event, evidence rules concerning the admissibility of expert evidence do not control the admissibility of the appraisals here. The appraisals were not evidence from which the court was to determine the property’s value. Rather, the appraisals pertained to a contractual procedure for determining the

property's value. Therefore, evidentiary standards for determining the reliability of an appraisal did not apply.<sup>2</sup> The first assignment of error is overruled.

{¶ 13} Our ruling on the first assignment of error dictates the outcome of the second and third. Appellant urges that its motion for summary judgment should have been granted rather than appellee's because the court should have averaged only the two appraisals he deemed reliable. Calculations using this average would have resulted in no money being due to appellant. Having determined that appellee's appraiser's report was properly admitted, we find the court properly calculated the amount due to appellee based on an average of all three appraisals. Therefore, the court did not err by granting summary judgment for appellee and against appellant. The second and third assignments of error are overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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<sup>2</sup>The parties do not argue, and we do not decide, whether a contract calling for an appraisal may include an implied condition that the appraisal will conform to certain standards.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and  
PATRICIA ANN BLACKMON, J.,  
BOTH CONCUR IN JUDGMENT ONLY