

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ROGER HERZIG, M.D.

PLAINTIFF

v.

CIVIL ACTION NO. 3:97CV-795-S

ONCOLOGY/HEMATOLOGY CARE, INC.

DEFENDANT

MEMORANDUM OPINION

This matter is before us on the motion of the plaintiff, Dr. Roger Herzig (“Herzig”), to alter or amend this court’s order entered on May 24, 2001. *See* DNs 97, 98. Pursuant to Fed. R. Civ. P. 59 (e), Herzig contends that “the court erred when it concluded that by the ‘language’ of the Employment Agreement and Buy-Sell Agreement Dr. Herzig’s status as shareholder ended ‘when he ceased to be an OHCI employee.’” Pl.’s Mem. in Supp., DN 100, at 6. As such, Herzig contends that he remains a shareholder in the defendant, Oncology/Hematology Care, Inc. (“OHCI”), and that he is entitled either to full rights as a shareholder or a reasonable price for the shares he owns. *See id.* at 10. The matter having been fully briefed, it is now ripe for review.

BACKGROUND

Both the court and the parties are acutely aware of the facts and circumstances which form the basis of the claims made against each other by Herzig and OHCI. It is sufficient for our purposes to note that on May 24, 2001, this court granted in part OHCI’s motion for summary judgment. *See Herzig v. Oncology-Hematology Care, Inc.*, Civil Action No. 3:97-795-S, Mem. Op. & Order, (May 24, 2001) (DN 98) (hereinafter “*Herzig I*”). Herzig now asks that we alter or amend that portion of our judgment in which, according to Herzig, we determined that Herzig was an OHCI shareholder but that his status as such ended at the time his employment terminated. *See* Pl.’s Mem. in Supp. at 6.

STANDARD OF REVIEW

Motions to alter or amend judgment pursuant to Fed. R. Civ. P. 59 (e) are “extraordinary in nature and, because they run contrary to notions of finality and repose, should be discouraged.” *In Re August, 1993 Regular Grand Jury*, 854 F.Supp. 1403, 1406 (S.D. Ind. 1994). As such, motions for reconsideration are granted “very sparingly.” *Bakari v. Beyer*, 870 F.Supp. 85, 88 (D.N.J. 1994). “Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice.” *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted).

DISCUSSION

In *Herzig I*, we concluded that even assuming that Herzig was, at one time, an OHCI shareholder, his status as such terminated when his employment ended in April of 1997. *See Herzig I* at 5-6. Herzig now argues that this finding was a clear error of law and that its reconsideration is necessary to prevent manifest injustice. *See Pl.’s Reply*, DN 110, at 3 n.3.

Herzig argues that:

the plain reading of the Buy-Sell Agreement required OHCI to act within 90 days to redeem his OHCI stock for cash. The failure of OHCI to redeem his stock as authorized by the Buy-Sell Agreement for a limited period of time was a “waiver” by OHCI of any future right to redeem Dr. Herzig’s stock.

Pl.’s Mem. in Supp. at 7. Assuming, as Herzig contends, Herzig was a shareholder and that the Buy-Sell Agreement created in OHCI a right of redemption pursuant to Ohio Rev. Code Ann. § 1701.23 (West 2001), then that right of redemption was governed by the “express terms” of the Buy-Sell Agreement. O.R.C. § 1701.23 (A) (“By the express terms of shares of any class or series, such shares may be redeemable . . . in such manner and upon such conditions, price, and notice as are provided in said express terms.”).

The Buy-Sell Agreement states that upon the termination of a shareholder’s employment, his or her shares “shall be purchased by the Corporation,” and that the “[c]losing of said purchase shall be held within . . . ninety (90) days after the termination of such employment.” Pl.’s Mem. in

Supp., DN 101, Ex. 3, at ¶ 3. If this, or any other, provision of the Buy-Sell Agreement is breached, the nonbreaching party is entitled to specific performance. *See id.* at ¶ 6 (f) (“In the event of any controversy concerning the right or obligation to purchase, sell or encumber any of the stock, such right or obligation shall be enforceable in equity by a decree of specific performance.”).

The Buy-Sell Agreement otherwise fails to define the rights and obligations of a departing shareholder-employee, such as Herzig, between the date of his “leaving the employment of the Corporation” and the date of the required closing. There is no dispute that no closing was ever held during which Herzig’s shares were exchanged for cash. Therefore, we conclude that under the terms of the Buy-Sell Agreement, our determination that “Herzig’s status as an OHCI shareholder would have ended when he ceased to be an OHCI employee” was erroneous. *Herzig I* at 5.

However, contrary to Herzig’s reading of *Herzig I*, we have yet to conclude that Herzig was at one time an OHCI shareholder. Therefore, we need not address what rights or obligations Herzig now has with respect to his OHCI shares. Rather, it is sufficient for us to conclude that our determination that Herzig’s status as an OHCI shareholder terminated when his employment ended was erroneous given the Buy-Sell Agreement’s silence on the subject.

CONCLUSION

Herzig’s motion to alter or amend that memorandum opinion and order will be granted to the extent set forth above. Counts I, II, V, and VII of Herzig’s Verified Complaint, previously dismissed, will be reinstated. A separate order will be entered this date in accordance with this opinion.

This ____ day of _____, 2001.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

Motion having been made, and the court being otherwise sufficiently advised, and for the reasons set forth in the accompanying memorandum opinion, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of the plaintiff, Roger Herzig, to alter or amend the memorandum opinion and order entered by this court on May 24, 2001 is **GRANTED**, and Counts I, II, V, and VII of his Verified Complaint, *see* DN 1, are **REINSTATED**.

IT IS SO ORDERED this ____ day of _____, 2001.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record