

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-287-H

FLYNN INVESTMENT PARTNERSHIP, LTD.

PLAINTIFF

V.

GENESIS PLASTICS AND ENGINEERING, LLC

DEFENDANT

**MEMORANDUM OPINION**

Genesis Plastics and Engineering, LLC (“Genesis”) urges this Court to alter, amend, or vacate its October 23, 2000 opinion granting summary judgment to Flynn Investment Partnership, LTD (the “Partnership”). The Court finds no reason to alter or amend the primary substantive conclusions in its original opinion. However, additional analysis indicates that the Court should clarify whether the Partnership is a member of Genesis under Indiana law. The Court will discuss each issue in turn.

I.

First, Genesis urges the Court to reconsider its ruling, arguing that the facts do not support a finding of waiver because the assignment of ownership from Flynn to the Partnership was of no substantive significance. Genesis contends that the members, in essence, did not relinquish anything, thus precluding a finding of waiver. After carefully reviewing the facts, this Court disagrees with the level of significance Genesis attributes to the transfer. After the transfer, Flynn and the members treated the Partnership as the owner of record in various internal documents as well as documents filed with federal and state governments. This change in

treatment would not have arisen had the assignment been of no substantive significance.

Genesis also seeks to distinguish *Bank v. Truck Insurance Exchange*, 51 F.3d 736, 739 (7<sup>th</sup> Cir. 1995), from the case at bar. There, the court found that the evidence did not show that the party who allegedly waived the contract term relinquished any right. Here, on the other hand, the three members of Genesis relinquished a right – one of first refusal – upon the transfer to the Partnership. That they mistakenly thought the transfer was of no substantive significance does not change the analysis because they knew of the transfer and they knew of their right of first refusal. Thus, the result, but not the analysis, differs from *Bank*.

This case involved unusual facts and somewhat intricate statutory analysis. The Court has reviewed its original analysis and is satisfied with it.

## II.

Genesis also requests this Court to clarify its October 23, 2000 order by limiting the holding to the transfer of ownership, rather than membership, interests. Genesis argues that the waiver of the right of first refusal only applied to the transfer of shares and not to membership, and concomitant management input, in Genesis. The Court's original waiver analysis contained in its October 23 opinion applied only to the contractual right of first refusal in Genesis's Operating Agreement. To the extent the Court referenced the Partnership being a "member" of Genesis, it did so without actually considering the express meaning of the term as it is used under Indiana law. Consequently, the Court agrees that further analysis and clarification are necessary.

When the members of Genesis waived their rights of first refusal, the Partnership became the assignee of Thomas Flynn's shares in Genesis. Under Indiana law, however, an assignment

of an interest does not entitle the assignee to become a member. IND. CODE § 23-18-6-3(b)(3) (2000). Assignees become members through the procedures outlined in the company's Operating Agreement or, if the Operating Agreement is silent on membership, through the unanimous consent of the other members. IND. CODE § 23-18-6-4(b). In other words, the Partnership could have become a member of Genesis if (1) the Operating Agreement specified procedures for becoming a member, and the Partnership met those criteria; (2) the Operating Agreement specified procedures for becoming a member, and the other members waived those requirements; or (3) the Operating Agreement did not specify procedures and the other members unanimously consented to the Partnership's membership. The Partnership has not met any of those criteria.

Neither the Operating Agreement or the Shareholders Agreement specify procedures for membership in Genesis. The Operating Agreement's restriction of membership to shareholders who are record holders of voting shares does not, by any stretch of the imagination, imply that all shareholders are automatically members. All that the Operating Agreement definition states is that being a shareholder is a necessary, but not sufficient, condition for membership.

The Court must therefore determine whether the other members unanimously consented to the Partnership's membership in Genesis. Indiana law requires that the consent "must be evidenced by a written instrument, dated and signed by the member." IND. CODE § 23-18-6-4(b). The members cannot waive the requirement of a written instrument, since it is a statutory and not contractual requirement. Though the other members may have signed and dated documents relating to the assignment of ownership or reflecting the Partnership's ownership of shares, none of those documents relate to membership or management of Genesis. As such, the statutory

requirement for membership in Genesis has not been met and, under Indiana law, the Partnership is only the assignee of Thomas Flynn's shares and cannot participate in the management of Genesis.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II  
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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**ORDER**

Defendant Genesis Plastics and Engineering, LLC has moved to alter, amend, or vacate the Court's October 23, 2000 order. The Court has set forth its views in a Memorandum Opinion. Consistent therewith and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the motion to vacate the Court's order is DENIED.

IT IS FURTHER ORDERED that the motion to amend is SUSTAINED and the Court clarifies that Plaintiff Flynn Investment Partnership, Ltd.'s interest is limited to that of ownership only and the Plaintiff is not a member of Genesis and cannot participate in the management and affairs of Genesis.

This is a final and appealable order.

This \_\_\_\_ day of January, 2001.

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JOHN G. HEYBURN II  
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record