UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DUNFORD ROOFING, INC., ET AL.,	)	
	)	
Plaintiffs,	)	Case No. 1:00CV00025
	)	
v.	)	**OPINION**
	)	
RICHARD B. EARLS, ETC.,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Robert C. Wood, III, Edmunds & Williams, Lynchburg, Virginia, for plaintiffs; Stephen M. Hodges, Penn, Stuart & Eskridge, Abingdon, Virginia and B. Ervin Brown, II, Moore & Brown, Winston-Salem, North Carolina, for defendant.

Following a bench trial, this opinion sets forth the court's findings of fact and conclusions of law.

I

This dispute arises out of the sale by Richard C.D. Earls of his fifty percent interest in a closely held corporation, Dunford Roofing, Inc., to his cousin, Thomas A. Dunford, shortly before Earls' death. The purchase price of the stock interest was $500,000, payable in installments over thirteen years at seven percent interest. Dunford made a promissory note payable to Earls for the debt and the corporation joined in the note in order to guarantee its payment. In addition, Dunford pledged the corporate stock purchased from Earls as security for the note.

Earls died April 25, 1999, a little over a month after the transaction. On January 18, 2000, Dunford and the corporation filed this suit in state court against the executor and trustee of Earls' estate, claiming breach of fiduciary duty by Earls, violation of Earls' obligations as a corporate director, conflict of interest, fraud, and mutual mistake of fact. The plaintiffs claim that the purchase price for Earls' interest in the business was excessive, a fact that was known or should have been known to Earls, an accountant. The plaintiffs seek recission of the promissory note, or, in the alternative, damages to be applied to the remaining indebtedness on the note. The action was timely removed to this court[1] and after removal, the defendant answered and counterclaimed for judgment on the unpaid balance of the promissory note. The court held a bench trial, the parties have briefed the issues, and the case is now ripe for decision.

II

[1] Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2000).

As required by Federal Rule of Civil Procedure 52(a), the following constitute my findings of fact and conclusions of law.

A

The following are the findings of fact, based on my opportunity to assess the credibility of the witnesses.

1. The plaintiff and counter-defendant Thomas A. Dunford is president and sole shareholder of Dunford Roofing, Inc. and is a resident of Virginia. The plaintiff and counter- defendant Dunford Roofing, Inc. is a corporation incorporated under the laws of Virginia with its principal place of business in Virginia. Hereafter, “Dunford” will refer to the individual plaintiff and the “Company” will refer to the corporate plaintiff.

2. The defendant and counter-claimant Richard B. Earls is the son of Richard C.D. Earls who died on April 25, 1999, in Winston-Salem, North Carolina. The defendant is a resident of North Carolina and the executor of the estate and trustee under the will of Richard C.D. Earls, whose will was probated in Davie County, North Carolina. Hereafter, “Earls” will refer to the decedent, Richard C.D. Earls.

3. From the date of incorporation of the Company in 1985 through March 15, 1999, Dunford and Earls each owned fifty percent of its stock (11,500 shares each) and

served as its sole directors. During this period, the officers of the Company were Dunford, president; Earls, vice-president; and June Carr, secretary.

4. Dunford and Earls were first cousins who shared a close relationship that dated back to the death of Dunford's father, when Dunford was just fifteen years of age. Before his death, the elder Dunford chose Earls to serve as unpaid executor of his estate and as guardian of Dunford and his two brothers.

5. Dunford graduated from high school in 1976 in Tazewell County, Virginia, and entered college. After a year or so, Dunford left college and took a job in the roofing business with Montgomery Ward in Mobile, Alabama. In 1978, he got married, returned to Tazewell County, and began operating his own roofing business. Dunford operated the roofing business out of a convenience store, which he also owned, called Gas & Guzzle. Although the store has never been financially successful on its own, Dunford continues to operate it today, using loans from the Company to subsidize this business. Since 1985, Dunford borrowed $609,000 from the Company. Dunford had not yet repaid at least $240,000 of these loans at the time he purchased Earls' shares and never paid any interest on the amounts borrowed.

6. In 1983 Dunford worked mainly in the shingle roof business but had begun to install single ply rubber roofing systems. At that time there was a "tremendous market demand" for single ply rubber roofing, and there still is today. (Tr. I at 16.)

In 1984, Dunford was approved to install the "premier system in the industry," the Carlisle Roofing System. (Tr. I at 17.) The significance of this certification is that it enabled Dunford to enter a higher end market. Doing this work, however, required Dunford to post bonds secured by the assets of the Company.

7. Earls lived in West Virginia, not far from the Company's location in Tazewell, Virginia. Until 1979 he operated his own accounting practice. Thereafter, he sold the practice but operated several other businesses, including two cemeteries. He also invested in his children's businesses, including a travel agency owned by his son, Richard. In 1985, Earls approached Dunford and inquired about the possibility of their going into business together. Earls indicated that he would help incorporate the roofing business, provide working capital, participate in meetings with loan officers, and "was willing to put up his personal financial statement . . . to be considered when [borrowing] money from lending institutions.'' (Tr. I at 19.)

8. Although Dunford had not previously considered taking on a partner, their close personal relationship, as well as Dunford's respect for Earls's integrity and business acumen, convinced Dunford that it was a prudent business decision. After Dunford accepted his offer, Earls helped incorporate the business and contributed $107,500 to the Company. While he did not participate in the Company's daily operations, Earls served as vice-president of the Company and oversaw the financial

records. Earls was not paid a salary for this work. In regard to financial information, Dunford would regularly put together a package of information and take it to Earls' office, where June Carr (a long-time employee of Earls who became a Company employee after Earls sold his cemetery businesses in 1989) would prepare the Company's in-house financial statements. The Company's tax returns and formal financial statements were prepared by Charles Donchatz, a local accountant who had purchased Earls' practice and who still owed Earls money on the purchase price. Although Earls and Ms. Carr handled the Company's bookkeeping, they never denied Dunford access to the financial records of the Company. Moreover, Dunford understood financial issues, as evidenced by his refinancing of the business debt of the Company in the fall of 1998 without Earls' assistance, in order to take advantage of lower interest rates.

9. In 1990, the two men discussed Earls' ownership interest in the Company. Earls expressed disappointment with the Company's performance during the five years in which he had been involved. He stated that he intended ultimately to transfer his share of the Company to Dunford, in exchange for certain "favors" or benefits from the Company. Dunford agreed and these benefits eventually included the installation of roofs and gutters at his homes in West Virginia and North Carolina, use of an automobile, and health insurance. The Company also purchased investment real estate

in Florida at Earls' suggestion, paid taxes and loan interest on the property, and later deeded the property to Earls. During this same time period, Dunford also received benefits from the Company, including health insurance, loans, and vehicles.

10. In 1992, Earls was diagnosed with cancer. He moved to Mocksville, North Carolina, near Winston-Salem, to be near his doctor and his son, Richard. As a result of Earls' illness, Dunford became concerned about the enforceability of the 1990 agreement, recognizing that it was not in writing and that no one else was aware of it. Dunford approached Earls about their arrangement. Earls assured Dunford that he would "beat this [illness]" but that if it would make Dunford feel better, he should have a "standard worded buy sell agreement" prepared by a local Tazewell attorney who had done work for both of them. (Tr. I at 60.) Dunford thereafter had such an agreement prepared, which both of them executed on February 16, 1996 (hereafter the "1996 Shareholder Agreement").

11. The 1996 Shareholder Agreement concerns the rights of the parties to transfer their shares in the Company. Specifically, the agreement (1) requires written notice to the Company before either shareholder can transfer or attempt to transfer his shares; (2) grants a right of first refusal to the Company pursuant to which the Company shall have the right to purchase, or designate a purchaser of the shares; (3) if the Company does not exercise that right, grants to the remaining shareholder the

right to purchase the shares at the price offered by another good faith purchaser (the agreement uses the term "proportionate share," the effect of which is to permit one fifty percent shareholder to purchase all of the other fifty percent shareholder's stock); and (4) grants to the Company's board of directors the right to obtain an independent appraisal of market value of the common stock. The agreement mandates that the "[d]etermination of fair market value shall be based on the value of the [Company] as a going concern" and specifically describes the transfer of stock in the event of the death of a shareholder. Under this agreement, if one shareholder died, the other would be entitled to purchase the deceased shares at fair market value as determined by an independent appraisal. The 1996 Shareholder Agreement does not mention the 1990 oral agreement or provide for any credit in favor of Dunford or the Company for doing favors for Earls. The agreement also contains an integration clause, which provides that it "constitutes the entire agreement by and between the parties . . . and supercedes all prior understandings of and between the parties."

11. Dunford continued to visit Earls with increasing frequency as Earls' condition worsened. In early February of 1999, Earls' son advised Dunford that Earls "had little time left" and requested that Dunford make a special visit. On the next Friday evening, Dunford came to Mocksville and the two men went into Earls' library, where Dunford raised the topic of purchasing Earls' stock. Earls told Dunford to go

home and "come back next weekend and bring your financial statement down for me and let me look at it." (Tr. I at 66.) Earls had been somewhat out of touch with what had been going on with the Company because of his illness and in fact had experienced memory lapses during this period of time. Dunford returned to Mocksville the next weekend and brought the Company's financial statement with him. The two men talked about the Company, its history, future prospects, and the demand for its services. Even though he had the Company's financial statement, Earls refused to make an offer at this time. Earls asked Dunford to leave the financial statement and to return again the following weekend, and Earls would have an answer for him. Dunford returned to Mocksville the next weekend, which was the third weekend since his initial visit. The two men again went into the library, where they spent "a couple [of] hours." (Tr. I at 67.)

12. Earls told Dunford that he no longer agreed to the terms of the 1990 agreement, that "things [were] a lot different now" (Tr. I at 70), and that Dunford would now have to purchase Earls' interest in the Company. Earls also made the following statement: "Tom, I think the sun is ready to come up for Dunford Roofing . . . I think now you're in a position to make some good profits for the next ten years." (Tr. I at 67-68.) Earls further stated that he felt the Company would make at least

$150,000 per year over that period and that using these estimated revenues would yield a proper evaluation of the Company's current net worth of $1,500,000.

13. Dunford questioned Earls about this figure, because the financial statement showed the net worth of the Company to be only approximately $120,000. However, Earls stated, "Tom, I'm an expert [at] this. I've been in accounting for many, many years. I've handled many businesses. I would not take $1,000,000 for this company if I were you right now . . . Believe me, you'll see later that this is going to be a good deal for you." (Tr. I at 68.)

14. During this conversation, Earls' health had declined to the point that he was unable to sit down and talk but had to stretch out on a sofa. Earls told Dunford that the price for his stock would be $500,000 and explained to Dunford that:

> This price is non negotiable. It is a deal for you . . . . What you're paying me now is not going to be any more, is not any more than what you would be repaying in repurchasing this stock . . . . I will set this up for you in such a way that you can pay it back at a very low interest rate over a period of 13 years . . . . So it will not break your back. You've already proven that you can pay this much per month, so nothing is going to change except that I won't be here.

(Tr. I at 69.) Earls advised Dunford that "the number one thing I want you to do is keep your labor costs down." (Tr. I at 71.) Dunford then agreed to purchase the stock. Earls then told Dunford to come back in a week or so to sign the documents. Dunford returned to Mocksville the next weekend to sign the documents, approximately one month after he had first raised the issue of purchasing Earls' stock. Dunford got no independent advice concerning the purchase or the reasonableness of the purchase price. Dunford believed Earls' statements concerning the value of the Company and believed that he would be buying one-half interest in the Company under Earls' proposal for less than it was worth. He agreed to the price even though he knew that he had a right to purchase Earls' interest in the Company under the 1996 Shareholder Agreement based on an independent appraisal, because he believed he was getting a better deal than he would get from an independent appraisal.

15. The documents that Earls had prepared and that both he and Dunford executed were dated March 15, 1999. They consisted of a Contract of Sale, by which Dunford agreed to pay Earls $500,000 for his stock and the Company agreed to be a guarantor of Dunford's financial obligation, a Promissory Note made by Dunford and the Company in the principal amount of $500,000, payable in installments of principal and interest of $4,890.37 per month for thirteen years, and a Security Agreement by which Dunford pledged the purchased stock as security for the debt.

16. After the stock purchase documents were executed, Dunford continued to visit Earls' home over the next several weeks. Earls died on April 25, 1999. Dunford made his first monthly payment to Earls' estate in May. In July, Dunford received a call from Don Z. Filson, senior vice-president of Thomas Rutherfoord, Inc.,

an agency that obtained construction bonds for the Company. Dunford told him about Earl's death, and Filson asked about Earls' stock. When Dunford told him about the purchase and its price, Filson told Dunford that he was concerned about the Company's ability to continue to obtain bonds because of the $500,000 debt guaranteed by the Company and recommended that Dunford contact a certified public accountant. Dunford asked around and found Fred Shelton, an accountant in Lynchburg, Virginia, who specialized in construction companies. Shelton came to Tazewell and reviewed the books and financial records of the Company. Both Filson and Shelton wrote letters to Dunford dated July 16, 1999. In Filson's letter, he stated:

> As you know, I am very dismayed in learning that Dunford Roofing, Inc., has incurred a $500,000 debt for the purchase of the stock from Mr. Earls. Since Mr. Earls was a 50% stockholder, this infers that Dunford Roofing, Inc. is worth $1,000,000. In reviewing the December 31, 1998 balance sheet of Dunford Roofing, the company shows only a net worth of $117,990. I can't agree that Dunford Roofing is worth $1,000,000.
>
> If a debt of $500,000 (to purchase Earls' share of the stock) is assumed by the corporation or you, this will severly [sic] impact the financial condition of your company and you. When our surety is notified of this, they will terminate all surety credit to Dunford Roofing. It is safe to assume the bank will take the same position.
>
> . . . .
>
> Therefore, I strongly urge that you undo the transaction whereby Mr. Earls [sic] share in the company is purchased for $500,000.

(Pls.' Ex. 12.) Shelton similarly wrote:

> I do not mean to offend, but based upon what I saw of your financial statements as of December 31, 1998, $500,000 would appear to be an exorbitant amount to pay for one-half of your company. The "reviewed" balance sheet reflects stockholders' equity of only $117,990. It is my considered opinion that most construction companies do not appraise for much more than book-value, adjusted for hidden equity in property and equipment.
>
> If the company is truly worth $1,000,000, try to get the other party to purchase your half for $500,000.

(Pls.' Ex. 4.)

17. Only four payments were ever made on the Promissory Note and no payment was made on January 1, 2000, or thereafter. Accordingly, the defendant accelerated the entire balance due under the note, as allowed by its terms. The balance due under the note as of November 1, 2000, was $512,188.12, with interest accruing thereafter at the rate of $92.80 per day.

18. Both Shelton and Jeffrey Wall, a business valuation expert who specialized in closely held companies, each conducted independent reviews of the Company and testified at trial as to their opinions of the value of the Company as of December 31, 1998. Based upon their testimony, which I accept, I find that the Company's fair market value, as of December 31, 1998, was not more than $150,000.

19. Because of certain transactions between Earls and the Company, relating primarily to the classification of a contribution by Earls to the Company of $96,000,

and its later repayment, and after proper adjustments to the Company's accounts, Earls' estate owes the Company the sum of $55,750.81.

B

The defendant first contends that the Virginia Dead Man's Statute bars the plaintiffs' claims, since Earls is deceased and thus incapable of giving his version of the events in question.

The Dead Man's Statute provides, in pertinent part, that "[i]n an action by or against a person who, from any cause, is incapable of testifying, or by or against [a] representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony." Va. Code Ann. § 8.01-397 (Michie 2000). Because state law supplies the rule of decision in this diversity action, the Dead Man's Statute applies pursuant to Rule 601 of the Federal Rules of Evidence. *See Paul v. Gomez*, 118 F. Supp.2d 694, 695 (W. D. Va. 2000).

What constitutes "corroboration" within the meaning of the Dead Man's Statute depends upon the facts of each particular case, but generally signifies "such evidence as tends to confirm and strengthen the testimony . . . ." *Penn v. Manns*, 267 S.E.2d 126, 130 (Va. 1980). Corroboration may come from other competent evidence or from the surrounding circumstances. *See Leckie v. Lynchburg Trust & Sav. Bank*, 60 S.E.2d 923, 928 (Va. 1950).

As the trier of fact, I find that the documents evidencing the purchase of Earls' stock, as well as the uncontested evidence of the circumstances surrounding the relationship of the parties, provide the necessary corroboration to Dunford's testimony as to Earls' statements concerning the value of the Company. Accordingly, the real question is whether those statements, under the circumstances, constituted fraud.

C

There is no question but that Earls told Dunford that the value of the Company was $1,500,000, and that the valuation was not correct. Under Virginia law, a finding of constructive fraud is supported by clear and convincing proof "that a false representation of a material fact was made, innocently or negligently, and that the injured party suffered damage as a result of his reliance on the misrepresentation." *Henderson v. Henderson*, 495 S.E.2d 496, 499 (Va. 1998).

It is settled that expressions of opinion cannot form the basis for a fraud action. *See Tate v. Colony House Builders, Inc.*, 508 S.E.2d 597, 599 (Va. 1999). "The mere expressions of an opinion, however strong and positive the language may be, is no fraud" because the recipient is not justified in relying on them. *Id.* (quoting *Saxby v. S. Land Co.*, 63 S.E.2d 423, 424 (Va. 1909)).

Unfortunately, "[t]here is no certain rule by the application of which it can be determined when false representations constitute matters of opinion or matters of fact, but each case must in a large measure be adjudged on its own facts, taking into consideration the nature of the representation and the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances." *Id.* (quoting *Packard Norfolk, Inc. v. Miller*, 95 S.E.2d 207, 211 (Va. 1956)).

Based on all of the circumstances in the present case, I find that Earls' statements to Dunford as to the value of the Company constituted expressions of opinion, rather than representations of fact. Accordingly, they cannot form the basis for a cause of action based on fraud.

It was clear to Dunford that Earls' valuation of the Company was based on Earls' predictions of earnings far into the future. Dunford also knew that Earls was not involved in the operation of the business; Earls did not obtain customers or projects and did not hire or direct the work force. Dunford understood that Earls had no special expertise in the construction business and was thus unable to predict future economic trends in that field. Moreover, Dunford was keenly aware that Earls was deathly ill, was subject to memory lapses, and had no resources to study the Company's business other than the information that Dunford had supplied him.

Dunford, while he was certainly no financial expert, was not inexperienced in the practical aspects of business and was clearly able to appreciate that expressions of valuation were imprecise by their very nature. Moreover, of course, he knew that Earls was not offering this advice as a disinterested observer—Earls had an immediate financial interest in the issue. Even assuming that Dunford had a lofty opinion of Earls' honestly and ability, he knew that the higher Earls' evaluation of the worth of the Company, the higher was to be the purchase price to be received by Earls. In fact, Dunford recognized the self interest of the respective parties to this transaction when he admitted at trial that the reason he did not simply rely on the existing shareholders agreement in order to obtain Earls' stock, with its mandatory independent appraisal process, was that he thought that he was getting a better deal from Earls' offer than he would get in an independent apprisal. (Tr. I at 109-10.) In other words, he wanted to profit at Earls' expense. Dunford thus understood the possibility of self interest. Moreover, Dunford was under no pressure to accept Earls' offer. While he knew that Earls was dying, he also knew that he was protected by the existing 1996 Shareholder Agreement. It was only because of his own desire to make a better deal than he thought he would get from an independent appraisal that Dunford proceeded as he did. As human experience shows, however, greed is often a poor substitute for reasoned judgment.

In summary, a reasonable person in Dunford's position would have understood that Earls' statement as to the value of the Company was an opinion, and while it may have been worth relying upon, it cannot in the eyes of the law constitute a representation of fact.

For the same reasons, there was no mutual mistake of fact as to the value of the Company. Earls expressed his opinion as to its value and Dunford had the right and opportunity to obtain additional opinions as to that value. That he did not cannot constitute a ground for recission of the transaction. *See McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906, 917-18 (E.D. Va. 1989), *rev'd on other grounds*, 911 F.2d 723 (4th Cir. 1990) (unpublished table decision).

Similarly, in spite of the close personal relationship between Earls and Dunford, I find no breach of any fiduciary relationship. The parties dealt with each other in this transaction as mature business persons, each with his own interests at stake. In the sale of his stock, Earls had no special obligation to Dunford that was violated by his expression of opinion, even though that opinion turned out to be wrong.

While shareholders in a closely held corporation may owe a fiduciary duty to each other, such duty is as a shareholder, and not as a seller of stock. For example, majority shareholders may have a duty not to use oppressive tactics against minority shareholders, but no such behavior was involved in this case. *See Gray v. Bicknell*, 86 F.3d 1472, 1488 (8th Cir. 1996) (holding that a "fiduciary duty exists only with respect to shareholders qua shareholders" and not where shareholder is acting outside that interest.).

D

The plaintiffs contend that the transaction was a violation of Earls' duty as a director of the Company because it constituted a conflict of interest. Pursuant to Virginia law, "[a] conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect personal interest." Va. Code Ann. § 13.1-691.(A) (Michie 1999). Such a transaction is voidable, unless the transaction was approved by directors or shareholders who had no personal interest in the transaction, or the transaction was "fair to the corporation." *Id.*

Earls clearly had a personal interest in the transaction by which the Company guaranteed Dunford's indebtedness resulting from his stock purchase. Since this transaction was not approved by other disinterested directors or shareholders (there were none), the sole remaining question is whether the transaction was fair to the Company.

Fairness under this statute includes "fair price" as well as "fair dealing," *see* Lyman Johnson, *Misunderstanding Director Duties: The Strange Case of Virginia*, 56 Wash. & Lee L. Rev. 1127, 1152 (1999), and depends on the nature and circumstances of the transaction. *See Willard v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 287 (Va. 1999).

I find that the transaction was not fair to the Company. While a corporation's guarantee of a shareholder's indebtedness incurred in order to buy out a remaining owner might be beneficial to the corporation because it promoted continuity of management, here the purchase price and resulting indebtedness clearly exceeded the fair value of the stock and impairs the Company's ability to continue in its line of business.

Since the guarantee of Dunford's debt constituted a conflict of interest and was not fair to the Company, I will rescind the Company's debt to the defendant. Because the transaction is not voidable as to Dunford personally, however, I will not order recission as to the underlying transfer of Earls' stock and Dunford's resulting indebtedness and stock pledge.[2]

Dunford also seeks damages as a result of the conflict of interest. While a shareholder of a close corporation may have standing to assert such a claim against a

---

[2] The guarantee by the Company of the debt was an advantage to Earls by providing additional security for Dunford's promise to pay. It is possible that Earls would not have sold the stock on the same payment terms without this additional security, although there is no evidence on this subject in the record. In spite of that possibility, the defendant has indicated that he would not object to a recission of the Company's guarantee while leaving in place the remaining terms of the transaction. (Def.'s Br. 41.)

director, *see Byelick v. Vivadelli*, 79 F. Supp.2d 610, 624-25 (E.D. Va. 1999), there is no evidence that Dunford has suffered any such damages. I have held his purchase of the stock and resulting indebtedness unassailable and since the Company's obligation to pay has been set aside, no damages are recoverable by the Company.

E

The plaintiffs alternatively seek damages for the breach of the 1990 oral agreement by Earls in which he promised to eventually turn over his stock to Dunford in return for "favors" from the Company. For a number of different reasons, however, this contract is unenforceable.

In the first place, the oral agreement is uncorroborated, and thus a judgment on it is barred by the Dead Man's Statute. While it is true that Earls received favors or benefits from the Company, those circumstances do not reasonably corroborate a promise to transfer Earls' stock to Dunford. Earls received no regular salary from the Company and it is not surprising that, like many participants in close corporations, he obtained other financial benefits from the business. Some of the benefits he received were similar to those obtained by Dunford himself. These circumstances do not provide the necessary corroboration.

Moreover, any prior oral agreement was necessarily superceded by the 1996 Shareholder Agreement. Not only did it involve the same subject matter, but Dunford has testified that it was prepared by him in order to resolve, at least temporarily, his concerns about the enforceability of the prior agreement since he could not tie Earls down to a date by which any transfer of stock would occur.

The plaintiffs argue that they should be entitled to restitution of the benefits given to Earls on the ground of unjust enrichment. However, such a remedy is unavailable where the subject of the contract implied in law—the basis of unjust enrichment—is covered by an express contract. *See S. Biscuit Co. v. Lloyd*, 6 S.E.2d 601, 606 (Va. 1940). Here there are two such express contracts, the 1999 Shareholder Agreement and the Contract of Sale, which preclude any unjust enrichment claim.

F

The defendant has filed a counterclaim for the balance owing by Dunford on the Promissory Note. Because I decline to rescind Dunford's obligation under this note, I will enter judgment against him. The parties are agreed that Earls owed the Company the sum of $55,750.81, and I will enter judgment in that amount against the defendant.

III

A separate judgment will be entered pursuant to Federal Rule of Civil Procedure 58 in accord with the foregoing findings of fact and conclusions of law.

DATED: April 12, 2001

____

United States District Judge