

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JAMES T. WOLYNI EC, SR. ,	:	No. 01-01324
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION – LAW
	:	
FRANK P. WOLYNI EC, JR. , and	:	
ALLENWOOD EQUIPMENT, INC. ,	:	Preliminary Objections
Defendant	:	

ORDER

AND NOW, this day of December 2002, it is ORDERED and DIRECTED as follows:

1. The court GRANTS the defendants' preliminary objections with respect to paragraphs 26, 27 and 28. The Agreement between the parties does not mention deductions for tax liabilities or credits for tax benefits. The court gives the plaintiff twenty days within which to amend his complaint to set forth a factual basis for any claim regarding tax liabilities or benefits. If a factual basis is not provided, the court will consider striking these paragraphs on the request of the defendants.

2. The court GRANTS the defendants' preliminary objections to Count II Accounting, Count IV Conversion, Count VII Unjust Enrichment, and Count VIII Constructive/Resulting

Trust. From reading the plaintiff's amended complaint, it does not appear that the defendants have surrendered the insurance policy for its cash value. Therefore, it does not appear that there are any monies that have been converted, or that would be subject to an accounting or a constructive trust. The court notes that information regarding the insurance policy can be obtained through discovery. The court gives the plaintiff twenty days within which to file an amended complaint either stating the insurance policy has been cashed in or removing these counts.¹

3. With respect to the remaining counts, the court DENIES the defendants' preliminary objections. Although there is some confusion/conflict between paragraphs 19 and 21 of the amended complaint, it appears there is a factual dispute between the parties whether the plaintiff's withdraw from active participation in Wolyniec Construction, Inc. constitutes retirement under the Agreement.² It appears withdraw from Allenwood Equipment Inc. would not constitute

¹ The court also would allow the plaintiff to add these counts at a later date (provided there isn't a statute of limitations problem) if the discovery process develops facts that would support them.

² At argument, plaintiff's counsel indicated that since his client withdrew from active participation in Wolyniec Construction Inc. he considers himself retired and entitled to one-half the cash value of the insurance policy. In paragraph 21, however, the amended complaint uses the language in "anticipation of retirement." Since the court has given the plaintiff twenty days to amend his complaint, it would be helpful if counsel amended paragraph 21 in accordance with his representations at oral argument to eliminate any confusion.

retirement as this event led to the Modification. However, withdraw from the construction company appears to have occurred after the Modification and may constitute retirement under the Agreement and Modification.

By The Court,

Kenneth D. Brown, J.

cc: Garth Everett, Esquire
Marc Lovecchio, Esquire