

**M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc.
v Werner**

2012 NY Slip Op 32080(U)

May 30, 2012

Sup Ct, Suffolk County

Docket Number: 22222-10

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

M.H. MANDELBAUM ORTHOTIC & PROSTHETIC
SERVICES, INC. and MARTIN H. MANDELBAUM,

Plaintiffs,

-against-

CARL WERNER and MARC WERNER,

Defendants.

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DECISION AFTER HEARING

The Court has before it three related actions. In Action #1, captioned *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum v Marc Werner*, Index Number 25256/09, the Mandelbaum plaintiffs seek damages and a permanent injunction against Marc Werner. In Action #2, *Carl Werner v M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum*, Index Number 22370/10, Carl Werner seeks a judgment declaring that he is the owner of 5% of the corporation's stock, an accounting, and an order directing defendants to issue the shares to him. In Action #3, captioned *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum v Carl Werner and Marc Werner*, Index Number 22222/10, the Mandelbaum plaintiffs seek a judgment declaring their rights under the Shareholders Agreement, specifically, that Marc Werner's transfer of his shares to Carl Werner was invalid under the Shareholder Agreement.

Common Facts

Although each action requests different relief, certain facts are common to all three. For example, the record reveals that Mandelbaum has provided prosthetic and orthotic services to patients throughout Long Island in a shop located at 116 Oakland Avenue in Port Jefferson since

1987. Mandelbaum hired Marc Werner sometime in 1991. On or about December 15, 2004, Mandelbaum offered to Marc Werner and Marc Werner purchased a 5% interest in the corporation. Marc Werner signed a Shareholders Agreement, dated December 15, 2004, in conjunction with the issuance of the shares. Such Shareholders Agreement was negotiated by the parties. The Shareholders Agreement was drafted by Mandelbaum's attorney, and reviewed by Marc Werner's attorney. The purpose of the Shareholders Agreement, as enumerated on the first page, was for the corporation and the shareholders to express their agreement regarding certain rights and obligations of each of the parties with respect to the shares and the operation of the corporation.

The Shareholders Agreement contained provisions regarding termination of employment, the sale of stock, a covenant not to compete, and continuing compensation with the corporation. For purposes of this decision, this Court will discuss the Sections relevant to the transfer of, and the restrictions on the disposition and ownership of shares. The Shareholders Agreement does not prohibit the sale, but provides the terms and conditions pursuant to which a shareholder may sell his/her shares. For example, Section 3 of the Shareholders Agreement, entitled Shareholder Employment, provided that each shareholder had the right to terminate his employment upon 60 days notice prior to an effective date of termination proposed by the shareholder and that each shareholder shall cooperate with the corporation in hiring and training a new employee to fill the shareholder's position as an employee. Section 3 (b) (i) of the Shareholders Agreement provided that Marc Werner's job duties included devoting his full time and best efforts to the affairs of the Corporation, being responsible, as the corporation's Vice President, actively participating in the clinical and orthopedic practice of the corporation, and fulfilling such other reasonable duties or responsibilities, including administrative duties. Section 4 of the Shareholders Agreement, entitled Restrictions on Disposition of Shares, paragraph (a) prohibited Marc Werner from pledging or encumbering any shares, or selling, assigning, or otherwise disposing of his shares except with the prior written consent of Mandelbaum or as specifically permitted by the Shareholders Agreement. In addition, Section 14 of the Shareholder Agreement, entitled "Covenant Not To Compete", contains terms by which Marc Werner agreed to certain time and area restrictions if he left the corporation.

Most notably, for purposes of this matter, the Court will rely upon Section 5 of the Shareholders Agreement, entitled "Lifetime Disposition of Shares". This Section provided that if Marc Werner decided to sell his shares, and received a bona fide offer from a third party, he was required to give notice to the corporation and Mandelbaum, offering to sell such shares and indicate the name of said third party and the price and terms of the sale. If the corporation declined to utilize the first option to purchase the shares, then Mandelbaum had the second option to purchase the shares rejected by the corporation. Pursuant to Section 5 (f), if there was no offer from the corporation or from Mandelbaum to exercise their options to purchase, Marc Werner would be free for the next ninety days to sell to a third party for the same price and on the same terms described in the notice, and provided that the "purchaser or assignee of Marc Werner's shares agreed to be bound by the same terms of this Agreement as Marc Werner."

On March 18, 2009, Marc Werner resigned from his position. Marc Werner informed the corporation and Mandelbaum that his father, Carl Werner, offered to purchase his shares in the corporation for \$30,000.00, and that he was giving them the opportunity to utilize their options to

purchase his shares. The corporation countered with an offer of \$20,000.00, which was rejected by Marc Werner. Subsequently, Mandelbaum did not elect to purchase the shares. While Marc Werner started his own business, Carl Werner was unable to obtain the stock certificates from the corporation or Mandelbaum.

Framed Issue Hearing

The parties have appeared numerous times before this Court in an effort to narrow and/or resolve the issues. In the fall of 2011, the parties agreed that it would be necessary to decide the question of Carl Werner's stock ownership prior to determining the remaining issues. Accordingly, the parties requested and the Court agreed to conduct a framed issue hearing. Such hearing was conducted on October 26, 2011. The parties were invited to prepare post-hearing briefs, which they submitted on March 2, 2012.

The issue presented at the framed issue hearing was the validity of the sale of Marc Werner's stock to Carl Werner. In essence, did Marc Werner's sale of his shares to Carl Werner comply with the terms of the Shareholders Agreement? More specifically, although the parties agree that Carl Werner and Marc Werner entered into a purchase agreement, and that Carl Werner paid \$30,000.00 for the shares, they disagree whether that transaction satisfied the condition precedent set forth in Section 5 in the Shareholders Agreement, i.e., that Carl Werner would assume Mark Werner's duties. The corporation and Mandelbaum argue that the transaction between Marc Werner and Carl Werner did not satisfy the terms of the Shareholder Agreement because Carl Werner was not able to fully and actively participate in the clinical and orthopedic practice. In opposition, Carl Werner argues that he agreed to the terms of the Shareholders Agreement and was ready and willing to perform as required under the Shareholders Agreement, thereby satisfying the condition precedent. The Court then heard the testimonies of Carl Werner and Martin Mandelbaum. The parties agreed to waive Marc Werner's testimony.

At the hearing, Carl Werner testified that he was employed by an electronics company and held a bachelor of science degree in electrical engineering. Carl Werner stated he made inquiries regarding the value of the stock and determined that \$30,000.00 was an appropriate offer. On June 23, 2009, the date of the purchase, he recalled signing an Adherence Agreement (Exhibit 5), receiving a bill of sale (Exhibit 6), and he wrote a check payable to Marc Werner in the amount of \$30,000.00. (Exhibit 7). Carl Werner stated that, after the purchase, he requested the financial statements from Mandelbaum but could not get such statements. Carl Werner also testified that on September 4, 2009, he received an e-mail from Mandelbaum requesting certain personal information for a surety bond. However, Carl Werner refused to provide the information until he received the stock certificates. Carl Werner stated that there was never any discussion between himself and Mandelbaum about Carl Werner's status with the corporation as an employee, but that he would work for Mandelbaum if they negotiated a new employment agreement. Carl Werner denies that he only wanted to be a passive investor. As of the date of the hearing, Carl Werner stated that he was going to retire from his current employment. Although he stated that he read the Shareholders Agreement, Carl Werner testified that he did not understand that he would become the corporation's Vice President or that he would provide full time services in the corporation in Marc Werner's place. He conceded that he had no formal training in the orthotics and prosthetics

field, no training or experience in running a medical or healthcare practice, and had never installed any prosthetic or orthotic devices.

At the hearing, Mandelbaum testified that he has been engaged in the prosthetic and orthotic services since 1979. He was certified by the American Board for Certification in Orthotics, Prosthetics and Pedorthics, and holds a Bachelor of Science degree from New York University. He stated that a person interested in working in the orthotics and prosthetics field must have a four year degree, complete certain classes in the orthotics and prosthetics disciplines, and serve a one-year affiliation for each discipline, which generally takes a total of five to ten years. He opened his practice in 1986 and obtained his patients by attending clinics at hospitals, seeing inpatients at local hospitals and patients in his office. Mandelbaum stated that he hired Marc Werner right out of college in 1991 and paid for Marc Werner to complete the orthotics and prosthetics certifications. Marc Werner actively participated in the clinical and orthopedic practice of the corporation by getting referrals, providing in-service training to physical therapists, seeing patients in the office, and visiting patients in hospitals, clinics and nursing homes.

Mandelbaum testified that as an enticement for Marc Werner to stay in the practice, Mandelbaum sold him 5% of the corporate stock with an option to buy up to 25% at a very discounted price. Mandelbaum stated that his intention was to eventually offer the corporation for sale to Marc Werner upon Mandelbaum's retirement. Mandelbaum further testified that the Shareholders Agreement (Exhibit 1) obligated Marc Werner to be an employee of the practice, to serve as the corporate Vice President, and to have responsibilities as an orthotist and prosthetist. Mandelbaum stated that when he and Marc Werner designed the Shareholders Agreement, they figured if one of them was going to sell to another party, it would be someone in the field that would be able to come in and take over that part of the practice. It was Mandelbaum's understanding that anyone who purchased the shares would have to assume Marc Werner's obligations.

Mandelbaum further testified that sometime in March, 2009, Marc Werner was not satisfied with his bonus from the previous year and discussed it with Mandelbaum. On March 18, 2009, Marc Werner tendered a letter of resignation (Exhibit 2), wherein he informed Mandelbaum that he had found a bona fide purchaser who offered to purchase his shares in the amount of \$30,000, and the name of the purchaser was Carl Werner, Marc's father. Mandelbaum stated that he was aware that Carl Werner had no expertise to contribute to the practice, no knowledge of orthotic or prosthetic services, and no management experience. Although he questioned the sale price, Mandelbaum conceded that the Shareholders Agreement did not prohibit Marc Werner from selling his shares at a profit or restrict him from selling at all. The corporation utilized its option to purchase the shares by making a counter offer in the amount of \$20,000.00 (Exhibit 3). After Marc Werner rejected that counter offer, Mandelbaum declined to use his option to purchase the shares (Exhibit 4). Mandelbaum stated that he received no requests by Carl Werner to review the finances of the practice prior to purchasing Marc Werner's shares.

Mandelbaum further testified that after the sale, Mandelbaum stated that he requested copies of the sale documents from Marc Werner. However, as of the January 12, 2010 letter (infra), such documents had not been provided. Although Carl Werner agreed in writing to adhere

to the Shareholders Agreement, Carl Werner made no effort to meet with Mandelbaum or discuss his duties in the corporation. Mandelbaum stated that pursuant to the Shareholders Agreement, the duties that Carl Werner would have been expected to perform were identical to Marc Werner's duties.

Mandelbaum testified that he sent an e-mail to Carl Werner, dated September 4, 2009 (Exhibit 8), wherein he requested personal information from Carl Werner to obtain a surety bond for medicare reimbursements for employees who owned 5% or more of the corporation and possessed no orthotic or prosthetic certifications. Despite Carl Werner's refusal to provide the requested data, Mandelbaum states that he was able to obtain the surety bond. Mandelbaum stated that a second letter was sent to Carl Werner's attorney on September 28, 2009, wherein the corporation and Mandelbaum tried to set up a meeting with Carl Werner so that Marc Werner's shares could be officially signed and transferred to Carl Werner (Exhibit 9). Mandelbaum testified that his counsel sent a third letter to Carl Werner's counsel on January 12, 2010 informing Carl Werner that while he may have purchased shares, he has repeatedly repudiated his obligation to devote his full time and best efforts to his duties as an employee of the corporation. The letter further stated: "Because it is clear that Carl Werner refuses to perform Marc Werner's responsibilities under the Shareholders Agreement (i.e., Carl Werner will not devote his full time and best efforts to the corporation and cannot actively participate in the clinical and orthopedic practice), the purported transfer of shares from Marc Werner to Carl Werner violates Section 5 (f) of the Shareholders Agreement and will not be recognized by the corporation." (Exhibit 10).

Having concluded the testimony, the parties submitted post hearing briefs. In his brief, Mandelbaum contends that the shares were not transferred to Werner inasmuch as a condition precedent in the Shareholders Agreement was not satisfied, to wit, that Carl Werner would assume Marc Werner's duties. Mandelbaum contends that the negotiations that he and Marc Werner conducted demonstrate that they intended for the Shareholders Agreement to contain a clause requiring a new purchaser of either party's shares to have the same capabilities as they did to run the practice. In addition, although Mandelbaum's counsel attempted to schedule a meeting with Carl Werner and Marc Werner in the fall of 2009, Carl Werner refused to participate, stating that he was not interested in providing services on a full-time basis for the practice. Mandelbaum then informed Carl Werner and Marc Werner that he would not deliver the shares to Carl Werner because Carl Werner did not intend to abide by the terms of the Shareholders Agreement, and could not perform Marc Werner's duties under the Shareholders Agreement. Therefore, a closing was never held, and a transfer of the shares did not take place pursuant to the Shareholders Agreement, rendering the transfer of shares from Marc Werner to Carl Werner invalid.

In his post hearing brief, Carl Werner claims that he followed the Shareholders Agreement and further executed the Adherence Agreement promising to be bound by the Shareholders Agreement at Mandelbaum's request. However, Mandelbaum repeatedly failed to deliver the shares. Carl Werner also argues that despite receiving a confirmation from Mandelbaum by e-mail that he was the new owner of the shares, Mandelbaum still refused to deliver the shares. Six months after all conditions were satisfied and more than six months after the shares should have been delivered to Carl Werner, Mandelbaum asserted a new argument, claiming that Werner wanted only to be a passive investor which allegedly put him in violation of the Shareholders

Agreement and somehow voided his entitlement to the shares. However, Carl Werner asserts that he has clearly stated that he was ready, willing, and able to come to work for the practice.

Turning to the controlling law, the Shareholders Agreement must be construed in accordance with its terms and read as a whole. Individual provisions cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Further, in construing the agreement, the Court may not rewrite it and may not distort its meaning or construe the language in a manner that would render one or more of provisions meaningless (*see e.g. J. W. Mays, Inc. v. Snyder Fulton Street, LLC*, 69 AD3d 572). “A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises” (*Klewin Bldg. Co., Inc. v Heritage Plumbing & Heating, Inc.*, 42 AD3d 559, 560, *quoting Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 337). “To make a provision in a contract a condition precedent, it must appear from the contract itself that the parties intended the provision to so operate” (22 NY Jur 2d, Contracts § 262; *see also Inwood Tower, Inc. v Fireman’s Fund Ins. Co.*, 309 AD2d 540, 540). “[I]t is for the court to decide, as a matter of law, whether an express condition precedent to performance exists under the terms of a contract” (*Rooney v Slomowitz*, 11 AD3d 864, 865). “Express conditions precedent, which are those agreed to and imposed by the parties themselves, must be literally performed” (*Preferred Mortg. Brokers, Inc. v Byfield*, 282 AD2d 589, 590, *quoting Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690).

Here, the express condition precedent appears in the Shareholders Agreement, Section 5 (f), and makes specific reference to the purchaser, in this case Carl Werner, being bound by the same terms of the Shareholders Agreement as the seller, Marc Werner, which means that Carl Werner would step into the shoes of Marc Werner as an employee of the corporation. Although Mandelbaum was prepared to accept Carl Werner as a shareholder, Carl Werner was not capable of undertaking the Marc Werner’s duties and responsibilities in the corporation, to wit, serving as the Vice President of the corporation, and actively participating in the clinical and orthopedic practice of the corporation by getting referrals, providing in-service training to physical therapists, seeing patients in the office, and visiting patients in hospitals, clinics and nursing homes. In addition, Carl Werner conceded that he was not an orthotist or a prosthetist. Carl Werner’s failure to assume Marc Werner’s duties and responsibilities upon the purchase of Marc Werner’s shares relieved Mandelbaum and the practice of any obligation to close under the Shareholders Agreement (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640).

In any event, the intent of the Shareholders Agreement was not followed literally (*Preferred Mortg. Brokers, Inc. v Byfield, supra*), thereby invalidating the sale. The Shareholders Agreement initially provided Marc Werner with an incentive to remain with the corporation (*Ruttenberg v Davidge Data Systems Corporation*, 215 AD2d 191). Thus, it can be said that Mandelbaum’s intent in the instant Shareholders Agreement was to maintain a long term relationship with Marc Werner, who was a valued and productive employee. It, therefore, follows that the Shareholders Agreement provided that only employees could be shareholders, or to admit as a shareholder another qualified individual who could fulfill Marc Werner’s role. Carl Werner asserts that the Shareholders Agreement should allow for shareholders to eventually become

employees. Even assuming, arguendo, that Carl Werner began to work for the corporation, he conceded that he could not, upon hire, be the valued and productive employee that Marc Werner had been unless and until he obtained the necessary training and certifications within five or ten years, a result not contemplated in the Shareholders Agreement. Mandelbaum's testimony supports the joint creation by him and Marc Werner of an express condition precedent which provided that any new purchaser of the shares would have the same experience and training in orthotics and prosthetics as the selling shareholder. It is, thus, clear that Marc Werner failed to follow the Shareholders Agreement literally. His purported transfer of the shares to Carl Werner violated Section 5 (f) in the Shareholders Agreement.

Accordingly, the sale of stock by Marc Werner to Carl Werner is deemed to be invalid. Consequently, Marc Werner is the owner of 5% of the shares in the Corporation.

DATED: May 30, 2012

HON. ELIZABETH HAZLITT EMERSON

J. S.C.