

**Celauro v 4C Foods Corp.**

2014 NY Slip Op 33011(U)

November 17, 2014

Sup Ct, Kings County

Docket Number: 500373/12

Judge: David I. Schmidt

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At an IAS Term, Part Comm-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17<sup>th</sup> day of November, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,  
Justice.

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NATHAN J. CELAURO, INDIVIDUALLY; NATHAN J. CELAURO AS PRELIMINARY EXECUTOR OF THE ESTATE OF GAETANA CELAURO, THE DECEASED SOLE INCOME BENEFICIARY OF THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS VESTED BENEFICIAL OWNER OF THE SHARES OF 4C FOODS CORP. HELD BY THE SALVATORE F. CELAURO REVOCABLE TRUST AND SALVATORE F. CELAURO IRREVOCABLE LIFE INSURANCE TRUST; NATHAN J. CELAURO AS TRUSTEE AND LINDA CELAURO AS SUCCESSOR CO-TRUSTEE OF THE SALVATORE F. CELAURO CHILDREN'S TRUST F/B/O NATHAN CELAURO A/K/A THE NATHAN J. CELAURO IRREVOCABLE TRUST U/A DATED DECEMBER 26, 1991,

Plaintiffs,

- against -

Index No. 500373/12

4C FOODS CORP., JOHN A. CELAURO; ROSEANN CELAURO, INDIVIDUALLY; WAYNE J. CELAURO, INDIVIDUALLY, DIANE CELAURO CARTER, INDIVIDUALLY; ROSEANN CELAURO, MARCI PLOTKIN, AND MARY FRAGOLA, AS THE TRUSTEES OF THE JAC TRUST, DATED DECEMBER 1, 2003; SALVATRICE A. MCCrackEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE ANGELA DOUGLASS IRREVOCABLE TRUST MADE BY JOSEPH SARATELLA U/A DATED 6/19/92; SALVATRICE A. MCCrackEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE SALVATRICE A. MACCrACKEN IRREVOCABLE TRUST MADE BY JOSEPH SARATELLA U/A DATED 6/19/92; SALVATRICE A. MCCrackEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE SALVATRICE

A. MACCRACKEN IRREVOCABLE TRUST MADE BY SALVATRICE A. MCCRACKEN U/A DATED 6/19/92; DIANE CELAURO CARTER AND WAYNE J CELAURO, AS TRUSTEES OF THE KELLY CELAURO TRUST U/A DATED DECEMBER 31, 1991; DIANE CELAURO CARTER AND WAYNE J. CELAURO, AS TRUSTEES OF THE JILLIAN CELAURO TRUST U/A DATED DECEMBER 31, 1991; WAYNE J. CELAURO, AS A TRUSTEE OF THE WAYNE J. CELAURO IRREVOCABLE TRUST U/A DATED 12/26/91; DIANE CELAURO CARTER AND WAYNE J. CELAURO, AS TRUSTEES OF THE DIANE CELAURO CARTER IRREVOCABLE TRUST U/A DATED 12/26/91; SAVATRICE A. MCCRACKEN AND ANGELA DOUGLASS, AS THE TRUSTEES OF THE ANGELA DOUGLASS IRREVOCABLE TRUST MADE BY SALVATRICE L. SARATELLA U/A DATED 6/19/92; THOMAS J. ABBONDANDOLO AND LORRAINE ROSE EARLE, AS THE TRUSTEES OF THE LORRAINE ROSE EARLE IRREVOCABLE TRUST U/A DATED 12/30/91 AND THOMAS ABBONDANDOLO AND LORRAINE ROSE EARLE, AS THE TRUSTEES OF THE THOMAS JOHN ABBONDANDOLO IRREVOCABLE TRUST U/A DATED 12/30/91,

Defendants.

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The following papers numbered 1 to 4 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-4
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants 4C Foods Corp. (4C Foods), John Celauro and all other named defendants<sup>1</sup> move for an order, pursuant to CPLR 3211 (a) (1) and (7), move

<sup>1</sup> Defendant John Celauro is 4C Foods' president and chief executive officer and its majority shareholder. The remaining named defendants hold or control another 20 to 21 percent

for an order dismissing plaintiffs' verified amended complaint. Plaintiffs' cross move for an order striking the April 4, 2014 affidavit submitted by John A. Celauro in support of defendants' motion.

Defendants' motion is granted to the extent that: (1) with respect to plaintiffs' first claim for declaratory judgment, it is declared that the portion of defendants' "CONSENT OF THE HOLDERS OF THE VOTING STOCK OF 4C FOODS CORP." (CONSENT) allowing the transfer of the *non-voting* shares from the trusts controlled by Gaetana Celauro and her estate to Nathan J. Celauro constituted a timely response to the November 26, 2012, notice from Nathan J. Celauro requesting permission to transfer all the voting and non-voting shares held in trust and held by the estate of Gaetana Celauro (NOTICE) and, as such, was effective to allow such a transfer of the *non-voting* shares pursuant to the terms of section 4.3 (a) of the 4C Foods Shareholder Agreement (Agreement) as amended by the Fourth Amendment to the Agreement, and it is further declared that the portion of the CONSENT conditionally denying the transfer of the *voting* shares at issue must be deemed an unconditional denial pursuant to section 4.3 (a), and as such, defendants have effectively barred the transfer of the *voting* shares under the terms of the section 4.3 (a) of the Agreement and 4C Foods is required to purchase the *voting* shares pursuant to section 4.3 (a) (ii) of the Agreement; and (2) with respect to plaintiffs' second claim for declaratory judgment it is declared that defendants did not violate section 9.3 of the Agreement relating to 4C Foods' Subchapter S

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of 4C Foods' stock, and are controlled by or aligned with John Celauro in how they vote their stock.

status, and thus the CONSENT is not deemed a nullity and 4C Foods is not required to purchase the entirety of the voting and non-voting shares subject to the transfer request. The motion is denied to the extent that defendants seek dismissal of the amended complaint with prejudice and plaintiffs are granted leave to replead by filing an amended pleading containing causes of action addressing the validity of the denial of the transfer of the voting shares.

Plaintiffs' cross-motion is denied.

The present verified amended complaint arises out of a continuing shareholder dispute between the majority and minority shareholders of 4C Foods, a closely held family corporation.<sup>2</sup> John Celauro owns or directly controls approximately 56 percent of 4C Foods' stock and controls or has aligned with him the votes of the shareholders of another 21 percent of 4C Foods stock. As such, John Celauro controls slightly less than 78 percent of the shares of 4C Foods. Prior to December 16, 2011, the minority group was made up of plaintiff, Nathan Celauro, who owned, directly or beneficially, approximately 2 percent of 4C Foods stock, and his mother, Gaetana Celauro, who owned directly, or beneficially, approximately 20 percent of 4C Foods' stock, for a total minority control of slightly more than 22 percent of 4C Foods' stock. 4C Foods' stock includes voting common stock and non-voting common

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<sup>2</sup> The factual background is more fully detailed in this court's prior decisions in this action, which was initially commenced as a special proceeding (*Matter of Celauro v 4C Foods Corp.*, 38 Misc 3d 636 [Sup Ct, Kings County 2012]; *Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 [U] [Sup Ct, Kings County 2013]), and the decisions issued in an earlier Nassau County action (*Celauro v 4C Foods Corp.*, 30 Misc 3d 1204 [A], 2010 NY Slip Op 52264 [U] [Sup Ct Nassau County 2010], *affd* 88 AD3d 846 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]).

stock and Gaetana Celauro and Nathan Celauro owned the same percentage of non-voting common stock as they owned of voting common stock. Gaetana Celauro died on December 16, 2011, and her will provided that Nathan Celauro would be the beneficiary of the shares she owned or controlled. Nathan Celauro was thereafter appointed executor of Gaetana Celauro's estate, and, by way of the NOTICE dated November 26, 2012, he requested, pursuant to section 4.3 of the Agreement, permission to transfer all voting and non-voting shares of 4C Foods formerly held by Gaetana Celauro, or held in trusts under her control, to him.

After defendants received the NOTICE, they entered into a stipulation with plaintiffs extending defendants' the 45 day period to respond to the NOTICE provided in section 4.3 (a) of the Agreement to January 14, 2013. On January 11, 2013, defendants commenced a declaratory judgment action in Supreme Court, Nassau County, *Celauro v Celauro*, Nassau County Index No. 0426/13 (Nassau County Action), seeking a determination with respect to their right to deny the transfer of the *voting* shares formerly controlled by Gaetana Celauro and also sought injunctive relief and a temporary restraining order in Supreme Court, Nassau County in order to toll their time to respond to the NOTICE until the court determined the declaratory judgment action. The court denied the request for a temporary restraining order and injunctive relief in the Nassau County Action.

That same day, defendants responded to the notice by serving on plaintiffs the CONSENT, in which they expressly consented to the transfer of the *non-voting* shares to

Nathan (CONSENT ¶ 1). Defendants did not consent to the transfer of the *voting* shares at issue (CONSENT ¶ 2). Defendants, however conditioned this denial of consent on the courts' determination of the Nassau County Action, and further asserted that they would withdraw their objection to the transfer of the voting shares in the event that the court concluded that defendants did not have the right to deny the transfer of the voting shares (CONSENT ¶¶ 3-5).

In February 2013, plaintiffs filed and served the verified amended complaint at issue in which they plead two claims for declaratory judgment: (1) for a judgment declaring that the CONSENT violated the terms of the Agreement, that it is a nullity with respect to both the voting and non-voting shares, that defendants did not timely respond to the NOTICE, and that, pursuant to the Agreement, 4C Foods is required to buy back both the voting and non-voting shares subject to the transfer request in the NOTICE; and (2) for a judgment declaring that defendants' actions in responding to the NOTICE jeopardized the Subchapter S status of 4C Foods in violation of the Agreement, and that the CONSENT must thus be deemed a nullity requiring 4C Foods to buy back both the voting and non-voting shares subject to the transfer request in the NOTICE. Defendants now move to dismiss the verified amended complaint and plaintiffs cross move to strike the affidavit of John Celauro submitted in support of defendants' motion.

In moving, defendants contend that there is no basis under the Agreement to declare the CONSENT a nullity with respect to the non-voting shares. In support of their motion,

defendants submit an affidavit from John Celauro to which they have attached, among other things, a copy of the Agreement and the relevant amendments. While John Celauro makes some factual assertions that might not be properly addressed in the context of a CPLR 3211 (a) (1) and (7) motion, there is no ground to strike his affidavit as it is an appropriate vehicle with which to submit copies of the Agreement, the NOTICE, and the CONSENT, and other documents relied upon by defendants in making their motion (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n4 [1<sup>st</sup> Dept 2014]; *Furlander v Sichenzia Ross Friedman Ference LLP*, 79 AD3d 470, 470 [1<sup>st</sup> Dept 2010]).

Section 4.3 of the Agreement governs the transfer of shares of 4C Foods' stock between permitted transferees, which are elsewhere in the agreement defined as certain Celauro family members. This transfer provision first requires a shareholder seeking to transfer shares to a permitted transferee to provide written notice of the proposed transfer to 4C Foods and the remaining shareholders (Agreement § 4.3 [a]). Section 4.3 (a) further provides that:

“In the event that on or prior to the date that is forty-five (45) days after the date of receipt of the Proposed Transfer Notice by the [4C Foods] and the Remaining Shareholders, a written consent to the Proposed Transfer Notice for all or a portion of the Proposed Shares is signed by the holders of 4C Shares (including the Transferring Shareholder) owning not less than a majority of the then issued and outstanding shares of 4C Voting Stock . . . (a “Permitted Transfer Consent”) is delivered to the Transferring Shareholder, then such Transferring Shareholder may thereafter Transfer such portion of the Proposed Shares to the Permitted Transferee as set forth in the Permitted Transfer Consent. In the event that a Permitted

Transfer Consent is not delivered to the Transferring Shareholder during such forty-five (45) day period (the “Review Period”), or a Permitted Transfer Consent is delivered to the Transferring Shareholder, but such Permitted Transfer Consent is for less than all of the Proposed Shares, then such Transferring Shareholder shall not be permitted to Transfer any of such Proposed Shares for which such Transferring Shareholder shall not have received a Permitted Transfer Consent (the “Non-Transferable Shares”) . . .”

Finally, as is relevant here, the section 4.3 (a) (ii) requires the corporation to purchase such “non-transferrable” shares held by an estate or trust!

Plaintiffs, in seeking the declaratory judgment, assert that the CONSENT, by conditioning the denial of transfer of the voting shares on the determination in the declaratory judgment action, violated the strict requirements of section 4.3 and requires a finding deeming the entire notice a nullity. Such a position, however, must be rejected in light of the plain, unambiguous language of section 4.3 (a), the construction and interpretation of which are an issue of law for the court (*see County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 947 [2012], *lv denied* 20 NY3d 1030 [2013]; *Provident Loan Socy. of N.Y. v 190 E. 72<sup>nd</sup> St. Corp.*, 78 AD3d 501, 502-503 [2010]; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]). Namely, since section 4.3 (a) allows defendants to consent to the transfer of “all or a portion of the Proposed Shares,” the CONSENT’s unconditional allowance of the transfer of the non-voting shares is effective to make the CONSENT a “Permitted Transfer Consent” for those non-voting shares. Nothing in section 4.3 (a)’s language suggests that a defect with a portion of a permitted transfer consent that partially denies a transfer would

in any way invalidate the portion of the notice consenting to the transfer of a portion of the shares.

In light of the section 4.3 (a)'s language providing that, "In the event that . . . a Permitted Transfer Consent is delivered to the Transferring Shareholder, but such Permitted Transfer Consent is for less than all of the Proposed Shares, then such Transferring Shareholder shall not be permitted to Transfer any of such Proposed Shares for which such Transferring Shareholder shall not have received a Permitted Transfer Consent," the court further finds that defendants' attempt in the CONSENT to condition the denial on the determination of the declaratory judgment action was ineffective to so condition the consent and is thus irrelevant to the validity of the CONSENT. This is because the quoted language effectively provides that the request is deemed denied for any portion of the shares for which consent to transfer has not been provided. Indeed, given this language, defendants could only have preserved their right to grant the transfer of the voting shares upon a declaration finding that withholding consent for a transfer was improper if they had obtained injunctive relief tolling their time to submit the CONSENT prior to the delivery of the CONSENT. Accordingly, there is no basis for deeming the CONSENT a nullity and plaintiffs are not entitled to the declaration requested in their first claim for declaratory judgment.

Plaintiffs' are likewise not entitled to declaration that the CONSENT be deemed a nullity because the conditional consent with respect to the voting shares violated section 9.3

of the Agreement relating to the Subchapter S status of 4C Foods. Section 9.3 provides, as relevant here, that:

“During the term of this Agreement, each Shareholder hereby agrees that he, she or it shall not take any action which shall terminate the Subchapter S election [4C Foods] without the prior written consent of the other Shareholders. Any Transfer in violation of this Section 9.3 shall be null and void without any force and effect. Each Shareholder agrees to execute and deliver, any and all applicable documents required to effect and keep in force any Subchapter S election for [4C Foods], unless: (i) with respect to 4C, 4C Shareholders owning sixty-seven (67%) percent of the shares of 4C Voting Stock vote to terminate 4C’s Subchapter S election . . .”

In addressing this claim, the court finds that plaintiffs, in the verified amended complaint, fail to allege facts showing that section 9.3 has been breached given that plaintiffs concede that 4C Foods Subchapter S status has been preserved and given the absence of an allegation that the delivery of the CONSENT itself acted to terminate 4C Foods Subchapter S status. Even if an action’s potential impact on 4C Foods’ Subchapter S status could be deemed a violation of section 9.3, the timing of the delivery of the CONSENT in January 2013 was so removed from creating an immanent threat to 4C Foods Subchapter S status that there is no basis in law for finding a violation of section 9.3. Namely, with respect to trusts that are allowed shareholders for purposes of Subchapter S corporations, the stock at issue must be transferred to a beneficiary who may hold stock in the corporation or another qualified trust within two years of the death of the trust’s owner (*see* 26 USC § 1361[c][2][A][ii]; *International Union, United Auto., Aero., & Agr. Implement Workers v*

*Aguirre*, 410 F3d 297, 300 [6<sup>th</sup> Cir 2005]). As Gaetana Celauro died in December 2011, the issuance of the CONSENT, even in light of the attempt to condition the denial on the determination in the declaratory judgment action, created no imminent threat to 4C Food's Subchapter S status.

The CONSENT likewise created no imminent threat to the Subchapter S status with respect to the stock held by Gaetana Celauro's estate on her death. An estate is an allowed shareholder of Subchapter S stock (26 USC § 1361[b][1][B]), and an estate may properly hold such shares as long as its administration is not unduly prolonged (*see Old Virginia Brick Co. v Commissioner of Internal Revenue*, 367 F2d 276, 279-281 [4<sup>th</sup> Cir 1966]; Fed. Tax Coordinator ¶ C-7011 [2d ed 2014]). Here, given that Gaetana Celauro only died in December 2011, and Nathan Celauro was only appointed as executor in October 2012, there is nothing about the service of the CONSENT in January 2013 that could be deemed to threaten the Subchapter S status by unduly prolonging the estate (*see Peter J. Maresca Trust v Commissioner of Internal Revenue*, TC Memo 1983-501, 1983 WL 14494 [Tax Court 1983]; *cf. Brown v United States*, 890 F2d 1329, 1342-1344 [5<sup>th</sup> Cir 1989]; *Old Virginia Brick Co.*, 367 F2d at 279-281). Plaintiffs are thus not entitled to the declaration requested in the second claim for declaratory judgment.

While plaintiffs are not entitled to the requested declarations, plaintiffs correctly assert that dismissal of the declaratory judgment action is inappropriate because the verified amended complaint presents a justiciable controversy (*see Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). Nevertheless, given that there are no questions of fact

regarding the parties' rights with respect to the propriety and effect of the CONSENT, the court has treated the motion to dismiss as a motion for a declaration in defendants' favor and declared that the CONSENT does not violate the Agreement and is effective to transfer the non-voting shares and bars the transfer of the voting shares (*see 11 Kings Ctr. Corp. v City of Middletwon*, 115 AD3d 785, 787 [2d Dept 2014], *lv denied* 24 NY3d 904 [2014]; *Minovici*, 109 AD3d at 524).<sup>3</sup>

Finally, this dismissal is granted with leave to replead. As this court found in its May 28, 2013 order (*Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 [U] [Sup Ct, Kings County 2013]), the denial of the transfer of the voting shares may implicate a fiduciary duty owed by defendants, as majority shareholders, to plaintiffs as minority shareholders (*id.*; *but see Matter of TDA Indus.*, 240 AD2d 262, 262-263 [1<sup>st</sup> Dept 1997], *lv denied* 91 NY2d 805 [1998]). In considering granting leave to replead, the court bears in mind that the transfer denial came not long after a stock split reduced the value of 4C Foods' voting shares (*Matter of Celauro v 4C Foods Corp.*, 38 Misc 3d 636, 641 n4 [Sup Ct, Kings County 2012]), and that the transfer denial will eliminate plaintiffs' statutory right to petition for corporate dissolution by bringing their ownership of voting shares below the

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<sup>3</sup> The court notes that this court's prior determination granting plaintiffs' leave to amend their complaint to add the declaratory judgment cause of action (*Matter of Celauro v 4C Foods Corp.*, 39 Misc 3d 1234 [A], 2013 NY Slip Op 50875 [U] [Sup Ct, Kings County 2013]) only determined that they had a viable declaratory judgment cause of action, not that they were entitled to a favorable declaration (*see North Shore Towers Apts. Inc. v Three Towers Assoc.*, 104 AD3d 825, 827 [2d Dept 2013]).

20 percent necessary for such a petition (Business Corporation Law § 1104-a; *Lewis v Jones*, 107 AD3d 931, 932 [1985]).<sup>4</sup>

This constitutes the decision, order and declaratory judgment of the court.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT

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<sup>4</sup> The court notes that this issue is apparently already before this court in the context of the declaratory relief sought by defendants in the Nassau County Action and which was consolidated with this action and transferred to this court by way of the July 31, 2013 order issued by Supreme Court, Nassau County (Driscoll, J.). Although this court has determined that the language of section 4.3 of the Agreement rendered the conditioning the CONSENT on the determination of the Nassau County Action ineffective and irrelevant, the declaration sought by defendants in the Nassau County Action relating to the propriety of the denial of the transfer would still appear to present a justiciable controversy.