Davenport v Martin
2003 NY Slip Op 30256(U)
March 28, 2003
Supreme Court, Erie County
Docket Number: 11527/94
Judge: David J. Mahoney

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MEMORANDUM DECISION DATED MARCH 28, 2003 [12-22]

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JOSEPHINE M. DAVENPORT and
HELEN M. CALHOUN,

Plaintiffs

-vs-

CHARLES A. MARTIN, JR.,
RELIANCE BUILDING & EQUIPMENT CO., INC.,

Defendants

MEMORANDUM DECISION

Index Number: 11527/94

KAVINOKY & COOK, LLP
Marilyn A. Hochfield, Esq.
Randolph C. Oppenheimer, Esq.
Attorneys for Plaintiffs

HODGSON, RUSS, ANDREWS, WOODS
& GOODYEAR, LLP
Daniel C. Oliverio, Esq.
Kevin D. Szczepanski, Esq.
Attorneys for Defendants

MAHONEY, J.,

Plaintiffs have moved for entry of Judgment in the above-captioned action based upon the Referee's determination herein dated October 31, 2002. Defendants have filed a cross-motion seeking the Court's rejection of the Referee's Decision and have filed a supplemental cross-motion to modify the Court's Order of Reference to the Referee.

The underlying action was commenced October 6, 1994. According to the complaint, Plaintiffs were allegedly induced by actions of Defendants October 24,1988 into divesting themselves of stock they held in Defendant, Reliance, upon the representation that the papers they were signing were for the purpose of consolidating companies within the Martin Group. Of these companies, Plaintiffs held stock in Reliance and Martin Fireproofing Co., Inc. Both corporations had been founded by their father, Charles A. Martin, Sr. They were not active in the business. Defendant Martin, at the time, was an officer and stockholder in all of the companies. The basis for the claim was fraud and breach of fiduciary duty. The relief sought was a rescission of the transaction and an accounting.

In an amended complaint dated January 23, 1998, Plaintiffs withdrew their prayer for rescission and, based upon the same allegations of fraud and breach of fiduciary duty, sought instead monetary relief for the "full value" of their Reliance shares. They continued to demand an accounting from Defendants.

During the pendency of the action, the Court appointed Richard McCormick, CPA, as mediator in an attempt to bring the parties together. Mr. McCormick's efforts, extending over several months, came to naught.

The Court conducted the trial of the action without a jury beginning January 8, 1999. Final arguments and submissions were not completed until the Summer of 1999. On February 15, 2000, the Court issued a Decision finding that fraudulent conduct was not proven, but that Defendants did breach their fiduciary duty toward Plaintiffs. Plaintiffs were granted judgment March 1, 2001, restoring their stock in Reliance, or, in other words, rescinding the redemption agreement of the stock in question. The Court also directed that the amount of dividends due from 1988 forward should be calculated and determined in a separate proceeding by a Referee appointed by the Court.

The Court delayed said proceeding pending resolution of Plaintiffs' appeal to the Appellate Division. On February 15, 2000, the Appellate Division, Fourth Department, affirmed the Court's determination with respect to a breach of fiduciary duty and agreed with it that a finding of fraud was not appropriate. The Appellate Division found, however, that this Court had abused its discretion under CPLR 3017 by granting Plaintiffs a remedy they no longer sought in the form of rescission of the stock redemption agreement and restoration of their shares in Reliance.

The Memorandum Decision (294 A.D.2d 891) noted at page 892, that "the record establishes that plaintiffs no longer trust Martin", referring to their brother, Charles J. Jr. Based on this predicate, the Appellate Division ordered that Plaintiffs shall have Judgment in the amount of the fair market value of their shares of stock in Defendant Reliance Building & Equipment Co.,Inc., deducting therefrom any offsets, and the matter was remitted to this Court for further proceedings in accordance with the Memorandum Decision.

In line with the Appellate Division's Decision, we issued a formal Order August 30, 2002, appointing Richard F. Griffin, Esq., "as Referee to hear and determine the amount of the fair market value of the shares of stock held by Josephine M. Davenport and Helen M. Calhoun as of October 24, 1988, immediately prior to the subject transfer, deducting therefrom offsets, if any, to be awarded as damages to the Plaintiffs with interest to be determined by the Court". The initial Order was prepared by Mr. Griffin and modified by the attorneys for the parties. The final draft was approved by both counsel and the Court and signed it after a conference June 19, 2002. Under its terms, no testimony or additional evidence was to be received. The Order was agreed upon at the time by all counsel.

Thereafter, the Referee conducted the proceeding in line with the order. This involved extensive presentations, including proposed findings of fact and conclusions of law, together with extensive documentation relating to the financial condition of Reliance over the years in question, together with expert analysis and other evidence derived pursuant to the Order from the trial record.

In his Amended Determination dated October 31, 2002, the Referee determined the fair market value of the 3,471 & 7/8 shares of Class A common stock of Reliance owned by Plaintiff, Josephine M. Davenport, was $200,674.38 and the fair market value for the same number of shares in the same class of stock in Reliance owned by Helen M. Calhoun was also $200,674.38. These amounts, according to the findings of Referee Griffin, represented the fair market value of all of the Plaintiffs' stock holdings in Defendant, Reliance, as of October 24,1988.

The Order of this Court appointing the Referee was clear and unambiguous. As noted above, its terms were approved as to content by the attorneys representing the parties. It provided specifically that the Referee was to "hear and determine the amount of the fair market value of the shares in question" in the form of detailed findings of fact and conclusions of law based upon the evidence received at the trial.

We anticipated that when he accepted the reference, Mr. Griffin would do a thorough and efficient job as Referee, and, without question, he did so as reflected in his detailed Determination.

The Court's powers are clear under CPLR 4311, 4317(b) and 4321 in connection with Orders of Reference. A Referee's powers are governed by CPLR 4301, which includes the following: "The referee to determine the issue, or to perform an act, shall have all the powers of the court in performing a like function".

Based upon his determination and the law, we see no basis to reject the Referee's decision of October 30, 2002, nor do we see any basis for modifying the Order of Reference herein dated August 30, 2002, to retroactively modify its verbiage so that "to hear and determine" is transformed into "to hear and report". To hear and determine was our intent at the time and we find no basis in law or fact to alter the order at this juncture.

With reference to the Plaintiffs' motion to enter Judgment, we must consider three issues. The first question to be answered is whether liability was imposed on the Defendants jointly and severally. Because the relief originally granted was rescission, the issue may not have been clear in the Court's Decision of February 15, 2000. In

directing rescission at that time, we recognized that the Defendants were jointly and severally responsible and we sought to insure that relief would be promptly accorded Plaintiffs. Defendant Martin was less involved at that time in the business. We see no reason to change the Defendants' status because there is now a money judgment. Also, we believe joint and several liability to be consistent with the Appellate Division's memorandum decision.

The other two issues concern prejudgment interest: When does it begin in this case and what the rate should be.

CPLR 5004(d) provides that interest shall be calculated from "the earliest ascertainable date the cause of action existed". That date is clear: October 24, 1988. On that day Charles Martin, Jr., solicited and obtained the Plaintiff's signature on the papers redeeming Respondents' stock in Defendant, Reliance.

The second more difficult question concerns the rate at which interest should run. It has been determined the aggregate fair market value of the Plaintiffs' shares of stock, as of October 24, 1988, was $401,348.76. Interest thereon at the "statutory rate" of 9% levied from October 24, 1988 to October 31,2002, the date of the motion herein was made, would be $506,392.18. See, CPLR 5004.

The Legislative history of CPLR 5004 is worthy of note. The interest rate applicable to money judgments prior to 1964 was 6% pursuant to General Business Law Section 370. In 1964, Section 370 was repealed and the judgment rate was fixed periodically by action of the Banking Board, pursuant to General Obligations Law Section 5-504. This became cumbersome. In 1972, the CPLR was amended and the rate returned to 6%.

Professor Siegel has commented (McKinney's Annotation to CPLR 5004, page 413), that as interest rates soared in the 1970s, the 6% rate emerged as a good deal for judgment debtors. This was unintended and delayed the prompt discharge of judgments. In 1981 the Legislature took remedial steps by increasing the rate to 9%, where it stands today. Interest rates have now plummeted. Non-payment has resulted in an excellent return for judgment creditors.

CPLR 5001(a) provides: "Interest shall be recovered upon a sum awarded because of a breach of a performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the Court's discretion".

To determine if an action lies in equity or in law, the Court generally looks to the relief demanded. It has been

said, however, that the basis for jurisdiction in law or equity stands or falls on the factual allegations in the complaint, not merely the prayer for relief. New York Jurisprudence, Vol. 55 (Equity), Section 11, page 587. From the claim itself, we gain an understanding of its nature.

The Plaintiffs' first complaint filed October 19, 1994 alleges, inter alia, that Defendant, Martin, the brother of Plaintiffs, in whom they "reposed great trust and confidence" and "on whom they relied for honesty, good faith and faithful performance of his positions of trust", violated the trust reposed in him October 24, 1988 when he secured Plaintiffs' signatures on certain papers by misrepresenting them as effecting a consolidation of various corporations for the best interests of all the stockholders when they actually constituted a redemption of their stock.

There are four causes of action in all based on these or similar allegations. The second cause of action sought recision of the transaction as did the third. The fourth cause of action speaks to fraud. It was alleged that the transaction was void as permeated by fraud. The fourth cause of action contains allegations intended to support an award of punitive damages. The ad damnum clause demands recision and "damages in the amount of the full and fair value" of Plaintiffs' stockholding as of October 24, 1988 "together with

interest from said date". The clause also demanded punitive damages in the sum of One Million Dollars. In addition, an accounting was sought plus attorney and accountant's fees.

The amended complaint, filed March 26, 1998, in the body thereof, contains two causes of action based upon the same or similar factual allegations above-mentioned. The second cause of action is set forth as a basis for an award of punitive damages due to Defendant Martin's "flagrant abuse of his fiduciary relationship with his sisters".

The ad damnum in the amended complaint seeks money damages with interest from October 24, 1988 together with attorneys and accountant's fees. The demand for an accounting was withdrawn.

In our opinion, this case began in an equitable posture and it remained to the end in an equitable posture. The amendment gave definition to the relief sought, but did not transform the underlying nature of the action. Money damages had been sought under the first complaint, couched as punitive damages. Rescission as a remedy was removed and replaced by a simple demand for compensatory damages reflecting the value of the stock. The demand for punitive damages remained. It is Hornbook law that money damages may be awarded alone in an

action that sounds in equity if such a remedy is necessary to afford appropriate relief to the aggrieved party. See, McNulty v. Mt. Morris Electric Co., 172 N.Y. 410.

We conclude, therefore, that the action herein is "an action of an equitable nature", and that the Court, pursuant to CPLR 5001(a), has discretion in the matter of fixing the "interest and the rate" applicable to the judgment. The question is what rate would best serve to make Plaintiffs whole and be, at the same time, fair and equitable under the circumstances. The rate similar to post-judgment interest under 28 USC Section 1961(a) (based on the yearly sale of treasury bills) would, we believe, best serve this purpose. We would therefore ask counsel to determine the average annual rate over the period in question rounded out to the nearest tenth of a percent and advise the Court. A table found in the pocket part to 28 USC Section 1961(a) should partially suffice. It will be this rate that will be inserted into the Judgment.

Submit Judgment.

Hon. David J. Mahoney
Justice of the Supreme Court

DATED: March 28, 2003