

Tulino v Tulino

2012 NY Slip Op 33922(U)

September 18, 2012

Supreme Court, Nassau County

Docket Number: 007081/09

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 007081/09

MOTION DATE: Aug. 3, 2012
Motion Sequence # 005

ANTONIO TULINO, individually and as a
Shareholder of TULINO REALTY, INC.,
suing in the right of and on behalf of TULINO
REALTY, INC.,

Plaintiff,

-against-

MICHELE TULINO and TULINO REALTY, INC.,

Defendants.

MICHELE TULINO, individually and in behalf of
TULINO REALTY, INC.,

Counterclaim Plaintiff,

-against-

ANTONIO TULINO,

Counterclaim Defendant.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by defendant Michele Tulino for an order directing plaintiffs Antonio Tulino and Tulino Realty, Inc. to reimburse defendant for his attorney's fees is denied, with leave to renew upon the conclusion of the action.

This action arose over a dispute concerning plaintiff's right to sell his interest in a close corporation. Plaintiff Antonio Tulino owns 50% of the stock of defendant Tulino Realty, Inc. Plaintiff's brother, defendant Michele Tulino, owns the other 50% of the stock. The corporation's main asset is a commercial building located in Long Island City. It is undisputed that stock certificates representing the parties stock interests have never been issued.

On December 9, 2008, plaintiff entered into a written agreement to sell his 50% interest in Tulino Realty to Vincenzo Acquista, the tenant of the building, for \$700,000. The stock purchase agreement provides that seller shall deliver a corporate resolution signed by all shareholders consenting to and approving the sale of stock to the purchaser. The agreement further provides that it is "contingent and subject to obtaining such approval." Michele refuses to consent to the sale of plaintiff's interest to Acquista.

This action, purporting to be brought by plaintiff both individually and on behalf of the corporation, was commenced on April 14, 2009. In the first cause of action in the amended complaint, plaintiff sought an order compelling Michele, as the president of Tulino, to issue a stock certificate to Antonio representing his 50 % stock interest. In the second cause of action, plaintiff asserted a breach of fiduciary duty claim against Michele based upon his refusal to issue Antonio a stock certificate for his shares. In the third cause of action, plaintiff sought a declaratory judgment that Michele did not have a right of first refusal with respect to Antonio's shares.

In their amended answer, defendants assert a counterclaim against Antonio for breach of fiduciary duty. Defendants allege that Antonio granted more favorable lease terms to Acquista in exchange for a \$30,000 bribe and also took a portion of the rent in the form of cash directly from Acquista. In their second counterclaim, defendants allege that Antonio breached a provision in a shareholder agreement that, before selling his stock to a third party, either party would offer his stock to the other shareholder. In their third counterclaim, defendants seek an injunction restraining Antonio from selling his stock to Acquista. Defendants also assert counterclaims for unjust enrichment and conversion. By order dated December 2, 2010, plaintiff's cross motion for summary judgment dismissing defendants' counterclaims was denied. Plaintiff cancelled the contract to sell his stock to Acquista on January 26, 2011.

On February 2, 2012, plaintiff voluntarily discontinued the claims asserted in the amended complaint without prejudice. The stipulation of voluntary discontinuance provides that the action is to continue as to defendants' counterclaims.

By order to show cause dated June 19, 2012, defendant Michele Tulino moves for an order directing plaintiff Antonio Tulino and Tulino Realty to reimburse Michele his attorney's fees in defending the action pursuant to § 724 of the Business Corporation Law. In opposition to the motion, plaintiff argues that there is no shareholder agreement, by-law, or corporate resolution providing for indemnification. Plaintiff further argues that a discontinuance without prejudice does not entitle a corporate officer to indemnification of legal fees under § 724.

Business Corporation Law § 722(a) provides that a corporation may indemnify any person made a party to an action, other than one by or in the right of the corporation to procure a judgment in its favor, whether civil or criminal, against judgments, fines, amounts paid in settlement, and reasonable expenses, including attorney's fees. Thus, BCL § 722(a) authorizes a corporation to indemnify an officer or director who is named a defendant in a civil action, other than a derivative suit, for his or her legal expenses.

The gravamen of the present action was for a declaratory judgment that Antonio was entitled to sell his stock to a third party, a claim personal to Antonio. Thus, the present action is not a derivative action. Under BCL § 722(a), Tulino Realty would be authorized to reimburse Michele for his legal expenses defending the action. However, it is clear that plaintiff Antonio, as a 50 % shareholder, objects to the corporation's reimbursing Michele for his legal expenses.

Defendant relies upon Business Corporation Law § 723 (a) which provides that "A person who has been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described in section 722 shall be entitled to indemnification as authorized in such section." However, the court notes that BCL § 723(b) provides that "Except as provided in paragraph (a), any indemnification under section 722..., unless ordered by a court under section 724..., shall be made by the corporation, only if authorized in the specific case: by the board acting by a quorum consisting of directors who are not parties to such action,... or a quorum of disinterested directors... upon the opinion in writing of independent legal counsel..."

The legislative history to § 723 indicates that indemnification is "mandatory" if the

director or officer “has been completely successful, whether on the merits or otherwise” (See Legislative Studies and Reports following McKinney’s BCL § 723). However, where “the action or proceeding is settled, or the director or officer has not been wholly successful in his defense thereto, no indemnification may be allowed in such case except upon a post hoc determination...in the manner set forth in paragraph (b)...”(Id).

It is not clear that the indemnification provisions of § 723 were intended to apply to a dispute between shareholders in a close corporation. Under the traditional American rule, either partner or shareholder would be required to bear his own legal expenses. To the extent that the indemnification provisions of the BCL change this common law rule, they are to be “strictly construed” (*Baker v Health Mgmt Systems, Inc.*, 98 NY2d 80, 88 [2002]). In any event, the court interprets plaintiff’s voluntary discontinuance without prejudice as a “settlement” of the main action, rather than a “completely successful” disposition in favor of the defendant. Accordingly, defendant Michele is not entitled to indemnification pursuant to BCL § 723.

BCL § 724(a) provides that, “Notwithstanding the failure of a corporation to provide indemnification,...indemnification shall be awarded by a court to the extent authorized under section 722 and paragraph (a) of section 723.” Thus, defendant argues that he is entitled to indemnification under BCL § 724, despite the failure of Tulino Realty to provide indemnification.

The court’s reluctance to allow indemnification to a 50 % shareholder in a close corporation under BCL § 723 applies with equal force to BCL § 724. Consistent with BCL § 722 and § 723(a), the standard for indemnification under BCL § 724 appears to be whether the officer or director “acted, in good faith, for a purpose believed to be in the best interests of the corporation.” However, in the case of a close corporation, it is difficult to distinguish whether a shareholder is acting in furtherance of his or her own self-interest, as opposed to the best interest of the corporation. In the present case, defendant Michele appears to have resisted the sale of Antonio’s stock to Acquista primarily because defendant objected to converting the commercial building on the property to a condominium (See Amended answer, plaintiff’s ex F at ¶ 72). There is no basis upon which the court can determine whether Michele’s action in opposing the condominium project was taken in the best interests of Tulino Realty. Thus, defendant Michele has not shown that he is entitled under BCL § 724 to indemnification of attorney’s fees incurred in defending the declaratory judgment action.

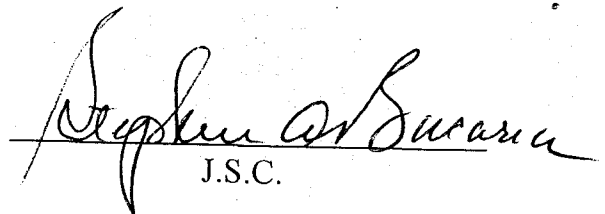
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However, defendant Michele's counterclaim for breach of fiduciary duty is derivative. In the event that defendant is successful in prosecuting that counterclaim, he may be entitled to an award of attorney's fees from the corporation (BCL § 626[e]; **Glenn v Hoteltron Systems**, 74 NY2d 386 [1989]). Accordingly, defendant Michele Tulino's motion for reimbursement of attorney's fees is denied, with leave to renew upon the conclusion of the action.

So ordered.

Dated SEP 18 2012


J.S.C.

ENTERED

SEP 21 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE