Matter of Campbell v McCall's Bronxwood Funeral Home, Inc.
2016 NY Slip Op 32626(U)
December 21, 2016
Supreme Court, Bronx County
Docket Number: 17384/2007
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA- 2

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Application of Hugh W. Campbell, as the Preliminary Executor of the Estate of Emma C. Brisbane,

Petitioner(s),

DECISION/ORDER

- against -

INDEX NO: 17384/2007

For the Judicial Dissolution on McCall's Bronxwood Funeral Home, Inc.

Respondent(s).

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Hugh E. Campbell as the Executor of the Estate of Emma C. Brisbane,

INDEX No: 300513/2000

Plaintiff,

- against -

Jeffrey D. Buss, Esq. and James H. Alston, Jr.

Defendants.

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James H. Alston, Jr., and McCall's Bronxwood Funeral Home, Inc.,

Third-Party Plaintiffs,

INDEX NO: 83796/2010

- against -

High W. Campbell, Individually,

Third-Party Defendant.

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HON. ELIZABETH TAYLOR

Respondent-defendants-third-party plaintiffs' motion for summary judgment dismissing the petition in index number 17384/2007 and the complaint in

index number 300513/2010 is granted.

McCalls Bronxwood Funeral Home, Inc. ("the Corporation") was incorporated in 1966. In 1981, the three founding members and only shareholders of the Corporation, McCall, Brisbane and Alston, Sr., entered into a shareholders' agreement electing those individuals as the directors and officers of the Corporation. The 1981 agreement provided for a mechanism under which one shareholder (or his or her estate) could sell his or her shares to the Corporation or the remaining shareholders. 1981 also marked the year that defendant-third-party plaintiff Alston, Jr., began working as the administrator of the Corporation.

In 1985, McCall died. Using the stock-sale mechanism in the 1981 agreement, McCall's estate sold his one-third interest to the Corporation, making Brisbane and Alston, Sr., 50/50 shareholders.

A new shareholders' agreement was executed in 1987 between Brisbane and Alston, Sr. An updated shareholders' agreement was executed in 1993. Both the 1987 and 1993 agreements contained a mechanism under which one shareholder (or his or her estate) could sell his or her shares to the Corporation or the remaining shareholder.

In 1995, Alston, Sr., died, leaving his 50% interest in the Corporation to defendant Alston, Jr. The Corporation initially sought to purchase Alston, Jr.'s interest, but Brisbane ultimately permitted Alston, Jr., to retain the shares and join her as a 50/50 shareholder of the Corporation. Brisbane did, however, negotiate for

the transfer to her of a parcel of land owned by the Corporation. Brisbane and Alston, Jr., ultimately executed an agreement in 1998. Under that agreement, which is at the heart of the actions before the court, Brisbane and Alston, Jr., were acknowledged to be the 50/50 shareholders of the Corporation, and were elected as the directors and officers of the Corporation.

Paragraph 7 of the 1998 agreement provides, in relevant part, that:

> "If Alston or Brisbane desires to sell his or her shares of stock... he or she shall be obligated to give notice of such intent to McCalls and to the other stockholder, which notice shall contain an offer to sell all of his or her shares of stock to McCalls and McCalls shall have a right within (30) days of receipt of such notice to make an election to purchase, and the selling stock holder shall sell all shares of McCalls by him or her at the purchase price determined pursuant to the terms set forth in the agreement."

Paragraph 8 of the 1998 agreement states that

> "(a) Either stockholder shall be permitted to dispose of their shares in the corporation in their will or trust provided the legatee/beneficiary of said shares is a relative...
>
> (b) In the event the above mentioned legatee/trustee/beneficiary wishes to sell or transfer their shares of stocks than said sale or transfer shall be in accordance with paragraph 7."

In 2005, Brisbane passed away. In her will she bequeathed $200,000 of any interest owned in the Corporation to her trustee, Campbell, to support and maintain funding of the "Emma Brisbane Foundation." In addition, she bequeathed the balance of any interest owned in the Corporation to her trustee to manage, support and fund the "Emma C. Brisbane Trust Fund." This intent was recognized in a Surrogate's Court decree, dated June 11, 2008, which concluded that Brisbane's

intent was to permit her executor (Campbell) to distribute the proceeds of the sale of her interest in the Corporation directly to the Emma C. Brisbane Trust, after using the first $200,000 of proceeds to fund a charitable foundation.

On July 13, 2007, petitioner (Campbell, as the executor of Brisbane's estate) commenced a Business Corporation Law (BCL) § 1104-a proceeding to involuntarily dissolve the Corporation. Petitioner alleged that Alston, Jr., was in control of the Corporation and engaged in illegal, fraudulent or oppressive conduct toward Brisbane and her interest in the Corporation. Petitioner requested that the Corporation be dissolved because property and assets of the Corporation were being looted or wasted by Alston, Jr.[1] Respondent (the Corporation) interposed an answer asserting, among other affirmative defenses, that dissolution was not appropriate, and that the shareholders voluntarily entered into the 1998 agreement, which governs the procedure and valuation for the selling of a shareholder's interest.

In an effort to exercise its right to purchase Brisbane's interest, respondent attempted to tender $393,048 to Campbell on September 30, 2009. That sum represented the amount respondent believed was owed for Brisbane's interest under the 1998 agreement. Campbell did not accept the tender.

On January 21, 2010, plaintiff (Campbell, as the executor of Brisbane's estate) commenced an action against defendants Buss (counsel to the Corporation) and Alston, Jr. Plaintiff asserted causes of action for damages under Judiciary Law §

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[1]A cause of action for an accounting was asserted but ultimately abandoned by petitioner.

487 (against Buss), and fraud (against both defendants); both of those claims are premised upon alleged deceitful conduct in the course of the proceeding to involuntarily dissolve the Corporation. Plaintiff also asserted a cause of action for unjust enrichment (against Alston, Jr.), and conversion (against both defendants). The conversion claim was premised on plaintiff's allegations that defendants effectively converted Brisbane's interest for their own use.[2] Defendants interposed an answer with counterclaims.

Defendants commenced a third-party action against plaintiff, seeking damages on various theories.

Respondent-defendants-third party plaintiffs seek summary judgment dismissing the involuntary dissolution petition and plaintiff's complaint in the plenary action. They also seek a declaration that the September 2009 tender of $393,048 accomplished the purchase of Brisbane's shares. Respondent-defendants-third-party plaintiffs argue that the 1998 agreement dictated that petitioner-plaintiff-third-party defendant Campbell offer to sell Brisbane's shares to the Corporation for an amount dictated by the agreement. Respondent-defendants-third-party plaintiffs also argue that dissolution of the Corporation under BCL § 1104-a is neither warranted nor appropriate because that drastic remedy should not be awarded where, as here, the petitioner can obtain a fair return by means short of dissolution. Because the 1998 agreement spells out a procedure and mechanism that provides for a fair

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[2]Plaintiff did not assert a claim for damages against Alston, Jr., for violation of fiduciary duties owed to the Corporation (see BCL § 720).

return on Brisbane's investment, involuntary dissolution should be denied.

With respect to the damages and equitable relief action commenced by plaintiff against defendants, respondent-defendants-third-party plaintiffs argue that the complaint must be dismissed because plaintiff sustained no damages or harm as a result of their alleged tortuous or improper conduct.

In support of their motion, respondent-defendants-third-party plaintiffs submitted, among other things, the various shareholders' agreements, the detailed affidavits of Alston, Jr., and Buss, and a transcript evidencing the September 30, 2009 tender by respondent of the $393,048.

In opposition, petitioner-plaintiff-third-party defendant argues that it is entitled to judgment as a matter of law on the involuntary dissolution petition. Petitioner-plaintiff-third-party defendant asserts that Alston, Jr., is a person in control of the Corporation within the meaning of BCL § 1104-a who engaged in illegal or oppressive conduct against Brisbane and her estate, and that he looted and wasted corporate assets. Petitioner-plaintiff-third-party defendant asserts that paragraphs seven and eight of the 1998 agreement permit, but do not require, him to sell the Brisbane shares to the Corporation for the amount tendered by the Corporation. Upon dissolution under BCL § 1104-a, petitioner-plaintiff-third-party defendant claims he is entitled to a significantly greater sum for the Brisbane shares by operation of BCL § 1104-a(d).

In support of his opposition, petitioner-plaintiff-third-party defendant submitted, among other things, the lengthy affirmation of his counsel, the deposition testimony

of Alston, Jr., and various financial documents and business records.

BCL § 1104-a(a) ("Petitions for judicial dissolution under special circumstances") provides that:

> "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a [non-public] corporation... entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:
>
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
>
> (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation."

In determining whether involuntary dissolution under BCL § 1104-a is warranted, the court must consider (1) whether liquidation "is the only feasible means whereby the petitioner may reasonably expect to obtain a fair return on [her] investment, and (2) [w]hether liquidation... is reasonably necessary for the protection of the rights and interests, of any substantial number of shareholders or of the petitioner" (BCL § 1104-a[b]). "The determination of an application for a judicially ordered dissolution of a closely-held corporation is a matter of discretion and should not be undertaken lightly" (Matter of Harris, 118 AD2d 646, 647 [2d Dept 1986] [emphasis added]).

Here, respondent-defendants-third-party plaintiffs made a *prima facie* showing

that, under the totality of the circumstances, a remedy short or other than dissolution constitutes a feasible means of satisfying both petitioner's expectations and the rights and interests of the other shareholder (Matter of Judicial Dissolution of Kemp & Beatley, Inc., 64 NY2d 63, 73 [1984]). The 1998 agreement between Brisbane and Alston, Jr., reflects that Brisbane's expectations and the rights and interests of Alston, Jr., will be vindicated by enforcement of that agreement.[3] Additionally, under the totality of the circumstances, petitioner will obtain a fair return on Brisbane's investment under paragraphs seven, eight and nine of the 1998 agreement (see Matter of Harris, 118 AD2d at 647; see also DiPace v Figueroa, 223 AD2d 949 [3d Dept 1996]).[4] Therefore, respondent-defendants-third-party plaintiffs are entitled to summary judgment dismissing the BCL § 1104-a involuntary dissolution petition.

With respect to plaintiff's action seeking damages and equitable relief from them, respondent-defendants-third-party plaintiffs made a *prima facie* showing of entitlement to judgment as a matter of law dismissing the four causes of action in the complaint on the ground that plaintiff sustained no damages or harm as a result of respondent-defendants-third-party plaintiffs' alleged misconduct. In opposition,

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[3]Indeed, as both the 1998 agreement and Brisbane's will (as construed by the Surrogate's Court, Westchester County) make clear, she desired that her estate sell her interest in the Corporation in accordance with the agreement to fund certain specific gifts in the will.

[4]Petitioner-plaintiff-third-party defendant does not take issue with the valuation arrived at by respondent-defendants-third-party plaintiffs by employing paragraph 9 of the 1998 agreement. Petitioner-plaintiff-third-party defendant's valuation of Brisbane's shares is based on Internal Revenue Service factors utilized by his expert accountant, which factors are different from the valuation scheme in paragraph 9.

petitioner-plaintiff-third-party defendant, who did not meaningfully address those causes of action, failed to raise a triable issue of fact.

Respondent-defendants-third-party plaintiffs "request that the court... direct that the September 2009 tender of $393,048 effectively accomplished the purchase of [Brisbane's] estate's shares by the corporation at that time." However, the court does not perceive any pleaded cause of action for such relief in any of the various pleadings. Therefore, the court declines to award such relief.

Accordingly, it is hereby ordered that respondent-defendants-third-party plaintiffs' motion is granted; and it is further,

ORDERED that the involuntary dissolution petition in index number 17384/2007 is dismissed; and it is further,

ORDERED that the complaint in index number 300513/2010 is dismissed; and it is further,

ORDERED that the "third-party" action in index number 83796/2010 is hereby severed.

This constitutes the decision and order of the Court.

Dated: DEC 21 2016

Elizabeth Taylor, J.S.C.