

<b>Pesce v Ruggiero</b>
2018 NY Slip Op 33428(U)
December 17, 2018
Supreme Court, Kings County
Docket Number: 523313/17
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8  
-----x  
MARIA PESCE, DIANA BONELLI & FRANCES MADERO,  
Plaintiffs,

KINGS COUNTY CLERK  
FILED

2018 DEC 24 AM 10:02

- against -

CARLO RUGGIERO,  
Defendant,  
-----x

Decision and order

Index No. 523313/17

MS # 2

December 17, 2018

PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved pursuant to CPLR §3212 seeking summary judgement arguing there is no question of fact plaintiffs are entitled to judgement on the complaint. The defendant opposes the motion and has cross-moved seeking to dismiss the complaint. Papers were submitted by all parties and after reviewing the arguments of all parties this court now makes the following determination.

On May 16, 1989 an entity called Salvatore Ruggiero Realty Corporation [hereinafter 'SRRC'] entered into a lease with an entity called Bath Beach Nurseries Inc., concerning premises owned by SRRC located at 8402 New Utrecht Avenue in Kings County. A rider to the lease provided that in the event SRRC decided to sell the property "it shall first be offered to any of the children or grandchildren of the present shareholders of the SALVATORE RUGGIERO REALTY CORP" (see, Rider to Lease Agreement, §2). There is no dispute the three plaintiffs are the children of Nicoletta Pesce one of the shareholders of SRRC at the time and thus potentially enjoy a right of first refusal. On May 1, 2017 the defendant,

Carlo Ruggiero, acting as president of SRRC sold the property to another entity.

This lawsuit was commenced claiming that the defendant sold the property without first conducting a shareholder meeting and without offering the plaintiffs the right to buy the property first. The plaintiffs have moved seeking summary judgement arguing there are no questions of fact regarding those two allegations. The defendant has cross-moved seeking to dismiss the complaint arguing, essentially, that a shareholder meeting did take place and that the right of first refusal had been waived.

#### Conclusions of Law

Summary judgement may be granted where the movant establishes sufficient evidence which would compel the court to grant judgement in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgement would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

On November 7, 2016 a shareholder meeting of SRRC took place and a vote was taken approving the sale of the property. Thus, the first inquiry that must be explored concerns the shareholders of SRRC. There is no dispute that there are six owners of SRRC and they are the six children of Salvatore Ruggiero, namely Nicolette Pesce, Carlo Ruggerio, Nicholas Ruggerio, Arnello Ruggerio, Alfonso

Ruggerio and Olympia Marino. It is also undisputed that at the time of the shareholder meeting on November 7, 2016 only Carlo remained alive. Thus, concerning the shares of the remaining five siblings, estate proceedings for Nicholas Ruggiero did not take place by the time of the meeting. Nicholas' son Anthony purports to be the owner of the shares although no estate proceeding formally transferred them. Similarly, although estate proceedings for Alfonso Ruggiero had not taken place by the time the contract was signed such proceedings took place by the time of the shareholder meeting wherein Phillip Ruggiero was named the fiduciary. Thus, Phillip had the authority to vote at such meeting.

Therefore, there are significant questions of fact which demand a denial of all motions seeking summary judgement. First, there are questions, despite the lack of any administration, whether Anthony had the authority to vote on the shares of his father. Anthony testified that the shares that belonged to his father first were transferred to his mother and then to him (see, Deposition of Anthony Ruggiero, page 28). Thus, there are questions concerning that transfer and whether Anthony could have obtained them from his mother despite the lack of an administration of Nicholas' estate. Even if Anthony had no authority to vote at that meeting there has been no evidence presented concerning Arnello's share. If those voting Arnello's share had the authority

to so vote and Phillip's vote was valid, as noted, then Carlo maintained the requisite two thirds vote in which to approve the sale. These are questions which must be explored. Further, while the rider did offer the right of first refusal to the parties herein, there are questions whether a majority or two thirds vote waiving that right was effective. Five of the six shares voted in favor of the sale. As explained there are questions regarding the legality of Nicholas' share and Arnello's share. If those shares voted validly there are still questions whether such vote could waive the right of first refusal contained in the rider to the lease.

Therefore, based on the foregoing, the motions seeking summary judgement are all denied.

So ordered.

ENTER:



DATED: December 17, 2018  
Brooklyn N.Y.

Hon. Leon Ruchelsman  
JSC

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