

Adam v Bonfiglio

2021 NY Slip Op 33152(U)

June 8, 2021

Supreme Court, Westchester County

Docket Number: Index No. 54905/2016

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARIANNE ADAM, Executor Under the Last Will
and Testament of BRIAN C. FLOOD, and on behalf of
LAKE MARION POINT, INC. derivatively,

Plaintiff,

Index No. 54905/2016

TRIAL DECISION and
ORDER

-against-

DENISE BONFIGLIO and DENNIS BONFIGLIO as
Co-Executors of the Estate of VIVIAN BONFIGLIO,
DENNIS J. BONFIGLIO a/k/a DAVID J. BONFIGLIO,

Defendants.

Present:
Hon Terry Jane Ruderman

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The trial of this matter was held on March 30, 2021, and the parties submitted post-trial memoranda on May 19, 2021. Based on the evidence and the arguments, the Court decides as follows:

Plaintiff Marianne Adam, as Executor of the Estate of Brian C. Flood (the "Estate"), brings this action seeking a declaratory judgment that the Estate owns 100% of Lake Marion Point, Inc. (the "Corporation"), and, in a derivative cause of action on behalf of Lake Marion Point, Inc., seeks a judgment directing the repayment to the Corporation by the Estate of Vivian Bonfiglio of a \$65,000 payment made to Vivian Bonfiglio from the corporate account after Flood's death, and repayment to the corporation by Dennis Bonfiglio of \$9,600 paid to him and Raven Bonfiglio from the corporate account after Flood's death for "security services."

Defendants seek a declaration that based on actions taken in 2015, the Estate owns only

3.87% of the Corporation, and they counterclaim for an award of reasonable attorneys fees and costs under Florida Business Corporation Act § 607.0746 (2) (and its predecessor, § 607.07401), on the ground that “the proceeding was commenced or maintained without reasonable cause or for an improper purpose” (*see* Fla. Bus. Corp. Laws § 607.0746 [2]).

Facts and Trial Evidence

Plaintiff’s case consisted of the testimony of Marianne Adam, and documents admitted into evidence.¹ Defendants’ case consisted of the testimony of Dennis Bonfiglio and David Scileppi, Esq., and documents admitted into evidence through their testimony.

Plaintiff Marianne Adam and Vivian Bonfiglio were sisters; Brian Flood was their stepfather. Defendants Dennis Bonfiglio and Denise Bonfiglio are Vivian Bonfiglio’s son and daughter.

The Corporation was formed and incorporated in Florida in 2012, for the purpose of constructing and operating a convenience store and gas station. Flood initiated and spearheaded the process of formation of the corporation, but it was Vivian Bonfiglio who was listed in the initial filings as the incorporator and President, Secretary, Treasurer and Director. Flood also opened and funded a bank account in the Corporation’s name, out of which funds were paid during the formation and creation process. The Corporation also purchased two pieces of real property for construction of the contemplated business, one parcel for \$115,000, the other for \$30,000. It is undisputed that the funds for the acquisition of the property were derived from Flood.

¹ Defendants’ objection based on the failure to comply with CPLR 3122-a (c) was overruled; defendants were not surprised by the documents and no prejudice resulted.

Brian Flood died on December 9, 2013; Marianne Adam was named as executor of Flood's estate in his will, and she was granted letters testamentary on March 21, 2014. Marianne Adam and Vivian Bonfiglio were two of the three named residuary beneficiaries of the Estate, along with their brother Anthony Privitera. Vivian Bonfiglio died after this action was commenced, in 2017; her Estate is being administered by her children, Denise and Dennis Bonfiglio, and was substituted as a party in this action.

Following Flood's death, Adam, in her position as Flood's executor, sought to obtain from Vivian Bonfiglio documentary substantiation regarding the ownership of the Corporation. While Vivian Bonfiglio insisted that she was the sole owner of the gas station, she did not provide Adam with any documents by which Adam could confirm that claim. Adam initially testified that the only document she located on that issue in Flood's files was an unsigned copy of a stock certificate issued by Lake Marion Point, Inc., stating that Brian Flood owned 340 shares. On cross-examination, Adam acknowledged that she also located among Flood's papers an unsigned stockholder buy-sell agreement for the Corporation, reflecting that Brian Flood owned 340 shares, Vivian Bonfiglio owned 330 shares and Dennis Bonfiglio owned 330 shares. Adam also admitted to finding among Flood's papers a document (Defendants' Exhibit D) entitled Consent in Lieu of Annual Meeting of Shareholders, which appears to have been signed by Vivian Bonfiglio, Dennis Bonfiglio and Brian Flood; however, Adam expressed the view that the signature on the document purporting to be that of Brian Flood was not his, but that his name had been signed by someone else. She similarly acknowledged having found among Flood's papers a document entitled Unanimous Consent of Shareholders, from August 2013 (Defendants' Exhibit G), similarly signed by Vivian Bonfiglio, Dennis Bonfiglio and Brian Flood. She further

acknowledged that she independently obtained the Articles of Incorporation for the Corporation, filed with the Florida Secretary of State on April 16, 2012 (Plaintiff's Exhibit 7), in which it was indicated that Vivian Bonfiglio was the incorporator as well as the President, Secretary, Treasurer and Director of the Corporation, and that the Corporation was authorized to issue 1000 shares.

Adam maintained that defendants were unable to establish by competent and proper evidence that they held an ownership interest in the Corporation; she challenged the validity of any unsigned documents, and disputed the validity of any documents that purported to be signed by Flood. In the absence of what she viewed as valid proof, she contended, based on Flood's 100% funding of the Corporation up to the time of his death, that Flood was the 100% owner of the corporation.

Part of Adam's challenge to the validity of the corporate documents was that it was suspect because it was not initially provided to her. She testified that it was not until after she commenced this action that additional documentation was provided. Defendants dispute that claim, emphasizing that on November 7, 2014 an attorney named Nicholas Troiano sent Adam's counsel an email to which was attached what he referred to as the "corporate kit" (Defendants' Exhibit T). It is noted, however, that while the email asserts that Vivian Bonfiglio and Dennis Bonfiglio each owned 330 shares and Flood owned 340 shares, the list of attachments to the email, which recites various agreements, notes, minutes and bylaws, refers only to one stock certificate, namely Certificate 2 – the Stock Certificate issued to Brian Flood – and does not appear to include Certificates 1 and 3. Additionally, the body of the Troiano email acknowledges that the provided documents were unsigned.

The documents submitted as trial exhibits by defendants include all three Stock Certificates issued by Lake Marion Point, Inc. on May 14, 2012, signed by Vivian Bonfiglio as President and Dennis Bonfiglio as Secretary, Certificate Number 1 to Vivian Bonfiglio for 330 shares, Certificate Number 2 to Brian Flood for 340 shares, and Certificate Number 3 to Dennis Bonfiglio for 330 shares (Defendants' Exhibit C). Also submitted were Corporate Bylaws, along with a Consent in Lieu of Annual Meeting for the fiscal year ending December 31, 2012, signed by the three shareholders, establishing that Vivian Bonfiglio was elected Director of the Corporation (Defendants' Exhibit F); and a Unanimous Consent of Shareholders signed by Vivian Bonfiglio, Brian Flood and Dennis Bonfiglio on August 19, 2013, resolving that they, as Directors, would continue to hold office until the next annual meeting or until successors were elected (Defendants' Exhibit G).

On defendants' case, Dennis Bonfiglio testified to his and his mother's close relationship with Brian Flood, whom he referred to as his grandfather, and regarding the process by which the Corporation was formed at Flood's instigation and direction, with the three shareholders.

Dennis Bonfiglio testified that after Flood died, Vivian Bonfiglio paid construction fees and contractor liens from her personal account. Then, based on a joint written consent of Vivian Bonfiglio and Dennis Bonfiglio dated April 27, 2015, a notice of Shareholder Action dated April 30, 2015 announced that the Corporation intended to raise equity financing from its shareholders through the sale of additional shares. The announcement stated that "the Company was required to amend and restate its articles of incorporation to increase the number of authorized shares of the Company's common stock from 1,000 shares to 10,000,000 shares" (Defendants' Exhibit Q). Amended and Restated Articles of Incorporation which included that information were filed on

April 29, 2015 (Defendants' Exhibit R).

By a document dated July 17, 2015, entitled Unanimous Written Consent of the Board of Directors of Lake Marion Point, Inc., executed by the Board of Directors consisting of Vivian Bonfiglio and Dennis Bonfiglio, it was stated that the officers of the Corporation directed the Corporation to issue to Vivian Bonfiglio 7,576 shares of common stock of the Corporation out of the authorized but unissued common stock, based on her contributions of capital to the Corporation (Defendants' Exhibit M). One of those recited contributions was made on or about June 17, 2015, by a \$107,720 payment made on behalf of the Corporation to subcontractor Precision Petroleum, Inc., to settle a default judgment against the Corporation. The second recited contribution was a payment of \$387,012 made on or about July 14, 2015 on behalf of the Corporation to Creative Convenience Corporation, the general contractor, to settle all its outstanding lawsuits against the Corporation.

It is undisputed that Vivian Bonfiglio wrote a check for \$387,012.61 from her personal account, payable to Creative Consulting, the construction management company handling the construction of the gas station, to which the Corporation owed money (Defendants' Exhibit I). However, the date on which the check was written is in question. The date appearing on the check was July 15, 2014, but the bank's processing information indicates that it was processed in July 2015, leading defendants to suggest that the written date was in error.

In another document entitled Unanimous Written Consent of the Board of Directors of Lake Marion Point, Inc., dated August 3, 2015, the Board of Directors stated that on or about July 29, 2015, Vivian Bonfiglio contributed \$13,610 to the Corporation as capital by way of making payments on behalf of the Corporation for engineering and site clean-up services, and

that the Board issued 208 shares of the Corporation's common stock to Ms. Bonfiglio, setting the per share price at \$65.30 per share (Defendants' Exhibit L).

Defendants' final witness was David Scileppi, Esq., an attorney retained by the Corporation in 2015 in relation to its need to raise funds to pay off its debts. He testified that he sent a letter dated April 7, 2015 to Adam's attorney, in order to inform Adam on behalf of the Flood Estate that the Corporation intended to increase the number of authorized shares of common stock from 1,000 to 1,000,000,² and to authorize a common stock offering, and would permit the three shareholders to participate in the proposed offering up to each shareholder's pro rata ownership. The letter closed with the instruction that if Adam did not respond by April 17, 2015, it would be assumed that she was not interested in participating.

Scileppi testified that he heard from Adam's attorney on April 14, 2015, in a letter stating, inter alia, that Flood's Estate was reserving its right to make any claims to any or all of the stock of the Corporation, based on Flood's infusion of funds into the Corporation. Accordingly to Scileppi, Vivian Bonfiglio was the only one of the shareholders to contribute funds.

Scileppi did not testify on his direct examination as to the amount of funds Vivian Bonfiglio contributed, and how the calculation of her resulting ownership interest was reached. On cross-examination, Scileppi acknowledged that it would make a difference if Vivian Bonfiglio did not actually deposit money into the Corporation's accounts, but instead directly

² Contrary to this information provided in Scileppi's letter-notification to Adam's attorney about the newly-authorized number of shares, the joint written consent of Vivian Bonfiglio and Dennis Bonfiglio dated April 27, 2015, and the notice of Shareholder Action dated April 30, 2015, authorized not 1 million shares, but 10 million shares.

made a payment to a creditor of the Corporation. However, on redirect he sought to clarify his testimony by explaining that a payment made on behalf of the company “would be essentially a loan and then a capital contribution.” Recognizing this apparent problem as to the issuance of additional shares to Vivian Bonfiglio based on what may have been a loan rather than a capital contribution, defendants argue in their post-trial memorandum that if her contribution was a loan, in that event she would be entitled to receive, in repayment, 100% of the corporation’s remaining assets rather than merely 92.4% of them.

Discussion

The signed Stock Certificates, viewed along with the Consent in Lieu of Annual Meeting for the fiscal year ending December 31, 2012, and the Unanimous Consent of Shareholders dated August 19, 2013, both of which were signed by all three shareholders, establish that Flood was a 34% shareholder in the Corporation at the time of his death, and that Vivian Bonfiglio and Dennis Bonfiglio each owned 33%. Vivian Bonfiglio’s apparent decision to keep information from Adam regarding the Corporation, does not alter the facts of the Corporation’s ownership. Nor is it relevant to their respective ownership percentages that Vivian Bonfiglio apparently believed that a right of survivorship was built into the stock ownership. This Court finds no support for Adam’s suggestion that Flood’s signature on the corporate documents is a forgery. Flood’s contribution of 100% of the funding does not give him any additional ownership interest. Accordingly, plaintiff’s evidence failed to establish a right to the declaratory relief as framed in the complaint, namely, a declaration that all the shares of Lake Marion Point, Inc. are the property of the Flood Estate.

Nor has Adam established viable grounds for this Court to hold that the issuance of

additional issuance of shares in 2015 was invalid. While Adam suggests that Scileppi and the Gunster firm acted improperly in the process of providing for the issuance of additional shares in the Corporation to Vivian Bonfiglio, the two premises of Adam's arguments are without merit. First, at the time, in 2015, the co-defendants legitimately owned a combined 66% of the shares in the Corporation. Second, Adam did not successfully establish that the amounts paid directly to creditors by Vivian Bonfiglio on behalf of the Corporation could not properly be treated as capital contributions unless those funds were deposited first into the corporate account. Adam's reliance on one response in Scileppi's cross-examination is misplaced; after Scileppi indicated on cross-examination that "it would make a difference" if Vivian Bonfiglio directly paid a creditor rather than depositing her capital contribution into the Corporation's accounts, he backtracked on redirect by explaining that a payment made on behalf of the company "would be essentially a loan and then a capital contribution."

However, Adam's failure to establish that actions taken on behalf of the Corporation in 2015 were improper and invalid does not equate to a showing that those actions, in particular, the issuance of additional shares to Vivian Bonfiglio, comported with the applicable standards and procedures for the corporate issuance of additional shares. Since defendants affirmatively seek a declaration that in view of the 2015 issuance of additional shares to Vivian Bonfiglio, the ownership interest of Flood Estate's in the Corporation has been diluted to 3.87% , it is their burden to provide the Court with evidence from which such a determination of law may be made. Their showing in that regard is insufficient.

Notably, their legal argument relies on Vivian Bonfiglio's check for \$387,012.61 (Defendants' Exhibit I) (they did not prove a \$400,000 contribution, as they assert in their post-

trial memorandum). Although the Court finds that Vivian Bonfiglio made that \$387,012.61 payment to Creative Construction on July 15, 2015, for amounts owed to the contractor by the Corporation – and that the handwritten 2014 date on that check was an error – that fact alone is insufficient to demonstrate the propriety of the procedure by which additional shares were purportedly issued to Vivian Bonfiglio. Defendants failed to present evidence establishing how that check was treated and used, and how it served as the basis for the Corporation's issuance of additional shares. Indeed, the problem hinted at by Scileppi's redirect testimony, that the check might not have properly served as a capital contribution, is addressed by defendants' post-trial memorandum in which they hastening to argue in the alternative that if that amount consisted of a loan, and therefore could not serve as the basis for the issuance of additional shares, Vivian Bonfiglio would, by virtue of such a loan, be entitled to repayment of the entire amount, leaving plaintiff without any distribution of assets to the Flood Estate. Whether or not that is correct, and whether Vivian Bonfiglio's estate prevails financially either way, defendants have demonstrated the uncertainty in their position that the Corporation validly issued additional shares to Vivian Bonfiglio in 2015 based on her capital contributions.

Additionally, defendants offered nothing to demonstrate that the number of issued shares was calculated properly, based on a proven capital contribution.

Defendants' motion for a directed verdict at the close of plaintiff's case, pursuant to CPLR 4401, is meritorious insofar as plaintiff Estate brought a derivative claim on behalf of Lake Marion Point, Inc., seeking reimbursement to the corporation, from the estate of Vivian Bonfiglio for a \$65,000 payment made to Vivian Bonfiglio, and from Dennis Bonfiglio for \$9,600 he and Ravon Bonfiglio received from the corporation, for security services. Plaintiff did

not make a prior demand of the corporation with regard to the challenged payments, which was required by Florida law at the time this action was commenced (Florida Business Corporation Act § 607.07401 [2]). That failure precludes the derivative claim (*see Collado v Baroukh*, 226 So 3d 924, 926 [Fla 4th DCA 2017]; *see also Kamen v Kemper Financial Services, Inc.*, 500 US 90, 102 at n.7 (1991). The subsequent amendment of the statute, effective January 1, 2020, to authorize a claim for demand futility, does not retroactively apply to events in 2016. Adam's testimony that she was unable to make such a demand because Vivian Bonfiglio was not speaking to her fails to establish that the required demand to the Board could not have been made.

Moreover, even if the derivative claim were not precluded, plaintiff's evidence failed to sustain her burden of proof by establishing that the challenged payments were improper or unauthorized. Proof that the \$65,000 payment to Vivian Bonfiglio was made does not, in itself, establish that the payment was improper, just because plaintiff finds it to be suspect. While defendants did not offer evidence in support of their suggestion that the \$65,000 check Vivian Bonfiglio wrote to herself in February 2014 on the corporate account was repayment for amounts she previously advanced, it is notable that during the deposition of Vivian Bonfiglio taken before her death, counsel for plaintiff did not ask her to explain or justify the \$65,000 payment. Plaintiff's failure to establish a basis for finding an impropriety precludes the money judgment plaintiff seeks on behalf of the Corporation against Vivian Bonfiglio's estate. Nor did plaintiff sustain her burden of demonstrating that the security services for which Dennis and Ravon Bonfiglio were paid were either unnecessary or fraudulent.

The Flood Estate's claim for declaratory relief is not properly subject to dismissal. A

declaratory judgment cause of action must be disposed of with a declaration, rather than dismissal of the cause of action (*see Kelly & Hayes Elec. Supply v Hanover Ins. Co.*, 223 AD2d 685, 686 [2d Dept 1996]). However, based upon the evidence, Adam is not entitled to the declaration she sought at the outset, that the Flood Estate owns 100% of the Corporation, nor is she entitled to the declaration she seeks at the close of her post-trial memorandum, namely, a determination that all the funds remaining in escrow from the sale of the "improved" lot be turned over to the estate, and that the remaining vacant lot be deemed property of the Flood Estate. The showing made at trial establishes that plaintiff Estate owned 34% of the corporation at the time of Flood's death. As to the plaintiff Estate's percentage of ownership at the time this action was commenced, neither party satisfied their burden of establishing their position. Plaintiff did not submit sufficient evidence to establish that the issuance of additional shares to Vivian Bonfiglio in 2015 was improper, and defendants did not provide evidence establishing that the purported share issuance in 2015 properly comported with all applicable legal requirements.

Defendants' counterclaims for their costs and attorneys' fees are denied. The Court rejects their contention that the action was commenced or maintained without reasonable cause or for an improper purpose; rather, defendants contributed to the perceived need to commence the action, by declining to timely provide Adam with complete documentation, particularly the three signed stock certificates.

Based on the foregoing, it is hereby

ORDERED that plaintiff's derivative claims are dismissed; and it is further

ORDERED that plaintiff's cause of action for a declaratory judgment regarding ownership of the Corporation is granted to the extent of declaring that the Estate owned 34% of

the Corporation's shares at the time of Flood's death, and this Court is unable from the evidence presented to render a determination as to whether that percentage of ownership in the Corporation had been properly altered as of the time this action was commenced; and it is further

ORDERED that defendants' counterclaim for attorney's fees and costs is denied; and it is further

ORDERED that any motion or application not specifically discussed herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 8, 2021


HON. TERRY JANE RUDERMAN, J.S.C.