

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18567  
C/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - February 11, 2008

ROBERT A. SPOLZINO, J.P.  
ANITA R. FLORIO  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON, JJ.

---

2006-08358

DECISION & ORDER

Owen J. Peterson, et al., appellants, v Commerce  
Street Properties, Inc., respondent.

(Index No. 1302/04)

---

Paul L. Brozdowski, LLC, Cortlandt Manor, N.Y., for appellants.

Gerry E. Feinberg, P.C., White Plains, N.Y., for respondent.

In an action for an accounting and a judgment declaring that a contract entered into between the defendant and nonparty T-Bone, Inc., in September 1999 is null and void, the plaintiffs appeal from an order of the Supreme Court, Westchester County (Rudolph, J.), entered July 31, 2006, which granted the defendant's motion for summary judgment on the complaint and on the issue of liability on its counterclaim, and directed an inquest on damages on the defendant's counterclaim.

ORDERED that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Westchester County, for the entry, after an inquest on damages on the defendant's counterclaim, of a judgment, inter alia, declaring that the subject contract is not null and void.

In 1974 the plaintiffs purchased stock from, and entered into a lease with, the defendant corporation to operate an auto parts store in the mini-mall that constituted the corporation's sole asset. The original by-laws of the corporation provided that stock ownership and a lease were inseparable, and that they could only be conveyed as a unit. A "memorandum of agreement" entered into by the parties provided that the plaintiffs had the qualified right to sell their shares and terminate the lease upon assignment to a suitable new tenant/shareholder. In 1995 the defendant's by-laws were amended, inter alia, to sever the connection between the leases in the mini-

March 25, 2008

Page 1.

PETERSON v COMMERCE STREET PROPERTIES, INC.

mall and stock ownership in the corporation, provide for the unencumbered sale of the stocks, and increase the number of shares in the corporation.

In 1998 the plaintiffs defaulted on their lease by failing to pay rent. The plaintiffs entered into a contract for the sale of their stocks and assignment of their lease to a third party. At about the same time, the plaintiffs filed for bankruptcy, and thereafter the bankruptcy court terminated the plaintiffs' lease. The defendant then sold new shares to the plaintiffs' prospective buyer, and entered into a lease with it for the store previously rented by the plaintiffs. The defendant applied the proceeds of the sale to satisfy the plaintiffs' outstanding debt and costs associated with their default, and distributed the remaining proceeds evenly to all of the shareholders, including the plaintiffs.

The complaint alleges that the defendant's sale of stocks and issuance of a lease for the store previously rented by the plaintiffs, in effect, deprived the plaintiffs of the value of their shares. The defendant counterclaimed for the plaintiffs' arrearages and thereafter moved for summary judgment on the complaint and on the issue of liability on its counterclaim. The Supreme Court granted the defendant's motion, and the plaintiffs appeal.

The defendant established its prima facie entitlement to summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The plaintiffs relinquished their claim to proceeds from the sale of the lease by defaulting on the lease, and the defendant's actions did not otherwise violate the memorandum of agreement, the defendant's by-laws, its fiduciary duty, or the Cooperative Corporations Law. In response, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

Since this is an action, in part, for a declaratory judgment, the matter must be remitted to the Supreme Court, Westchester County, for the entry, after an inquest on damages on the defendant's counterclaim, of a judgment, inter alia, declaring that the subject contract is not null and void.

SPOLZINO, J.P., FLORIO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court