

Tulino v Tulino

2010 NY Slip Op 33431(U)

December 2, 2010

Supreme Court, New York County

Docket Number: 007081/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

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.

TRIAL/IAS, PART 2
NASSAU COUNTY

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MOTION DATE: Sept. 13, 2010
Motion Sequence # 001, 002, 003,
004

The following papers read on this motion:

- Notice of Motion..... XX
- Cross-Motion..... XX
- Affirmation in Opposition..... XX
- Reply Affirmation..... XXX
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

Motion by defendants to compel discovery is **granted** to the extent indicated below. Cross-motion by plaintiff for summary judgment is **denied**. Motion by defendants to dismiss the complaint for lack of capacity and failure to state a cause of action is **denied**. Cross-motion by plaintiff for leave to serve an amended complaint is **granted** to the extent indicated below.

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This action arises 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.

The by-laws of Tulino Realty provide that "All certificates representing shares of the capital stock of the corporation shall be in such form not inconsistent with the certificate of incorporation, these by-laws, or the laws of the State of New York...." However, it is undisputed that stock certificates have never been issued to the shareholders. There is no shareholder agreement restricting transfer of shares.

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. The contract provides that the purchase price for plaintiff's shares is \$700,000. The agreement provides that seller shall deliver to buyer 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, plaintiff seeks an order compelling Michele, who is the president of Tulino, to issue stock certificates to the shareholders. In the second cause of action, plaintiff seeks to recover damages for breach of fiduciary duty based upon Michele's failure to issue the stock certificates. In their answer, defendants assert a counterclaim for breach of fiduciary duty and seek an injunction restraining plaintiff from selling his stock to Acquista.

On November 13, 2009, defendants served a demand for discovery and inspection requesting production of all leases, tax returns, corporate documents, and all other documents relating to Tulino Realty. In response, plaintiff produced a copy of the lease, corporate filing receipt, certificate of incorporation, and corporate by-laws. Plaintiff referred defendants to the corporation's accountant to obtain copies of the tax returns. Plaintiff objected to the other demands as overbroad and unduly burdensome.

Defendants move pursuant to CPLR 3124 to compel plaintiff to produce the remainder of the documents requested and to appear for a deposition. Plaintiff cross-moves for summary judgment on his first cause of action and dismissing defendants' counterclaim.

Defendants move to dismiss the complaint for lack of capacity to sue on behalf of the corporation pursuant to CPLR 3211(a)(3) and failure to state a cause of action pursuant to CPLR 3211(a)(7). Plaintiff cross-moves pursuant to CPLR 3025(b) for leave to serve an amended complaint, asserting a third cause of action for a declaratory judgment that either shareholder is free to sell his interest without the consent of the other shareholder.

A shareholder has no individual cause of action for a wrong against the corporation. Thus, a complaint which confuses a shareholder's derivative and individual rights will be dismissed, though leave to replead may be granted in an appropriate case (*Abrams v Donati*, 66 NY2d 951 [1985]). Plaintiff's claim of entitlement to a stock certificate, as is his proposed claim for declaratory relief as to the alienability of his shares, is individual in nature. While plaintiff has mistakenly styled his complaint as one asserting a derivative claim, the complaint does not confuse plaintiff's derivative and individual rights. Defendants' motion to dismiss the complaint for lack of standing is **denied**.

Business Corporation Law § 508 provides that the shares of a corporation shall be represented by certificates or shall be uncertificated shares. Where the shares of a corporation are certificated, a shareholder may bring an equitable proceeding to compel the corporation to issue him a certificate representing his shares (*Mann v Compania Petrolera*, 34 AD2d 775 [1st Dept 1970]). Tulino Realty's by-laws suggest that the shares of the corporation are to be represented by stock certificates. Defendants' motion to dismiss the complaint for failure to state a cause of action is **denied**.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Based upon the corporate by-laws and other documents submitted to the court, plaintiff has established prima facie that he is the owner of 50% of the Tulino Realty stock and the by-laws require that the shares be represented by stock certificates. Thus, the burden shifts to defendants to show a triable issue as to whether Tulino Realty's shares are

uncertificated.

In opposition to the motion, Michele asserts that issuing the stock certificate would allow Antonio to sell his stock, which action is not in the corporation's interest. Michele also asserts that it was the practice of the shareholders not to follow corporate formalities. Since the stock sale agreement is conditioned upon a corporate resolution signed by all shareholders, the mere issuance of a stock certificate would not allow the deal to go forward.

However, if corporate formalities are customarily dispensed with and the affairs of a close corporation are carried on through informal conferences, decisions reached by all the directors and shareholders at informal conferences bind the corporation (*Leslie, Semple & Garrison v Gavit & Co.*, 81 AD2d 950 [3d Dept 1981]). Michele's affidavit suggests that the shareholders agreed informally that Tulino Realty's shares would be uncertificated. Plaintiff's motion for summary judgment on its first cause of action, to compel the issuance of a stock certificate, is **denied**.

Had the parties reached a shareholder agreement as to the purchase of a shareholder's interest upon his death, or a right of first refusal if a shareholder wished to sell to a third party, the agreement would generally have been enforceable (*In re Penepent Corp.*, 96 NY2d 186, 192 [2001]). However, where there are no restrictions on the disposition of shares, absent fraud or breach of fiduciary duty, a shareholder has the right to sell his interest to whomever he wishes (*Cohen v LeNoble*, 50 AD3d 321 [1st Dept 2008]). Since there are no restrictions on disposition in the corporate documents, plaintiff has established prima facie entitlement to judgment dismissing defendants' counterclaim. The burden shifts to defendants to show a triable issue as to fraud or breach of fiduciary duty which would prevent plaintiff from selling to Acquista at the agreed upon price.

In opposition to the motion, Michele asserts that he offered to match Acquista's price but plaintiff refused the offer. Michele's affidavit also suggests that the \$700,000 price is inadequate consideration for a 50% interest and Acquista secretly agreed to pay plaintiff additional money. Defendants have shown a triable issue as to whether the sale to Acquista would be a fraudulent transaction. Plaintiff's motion for summary judgment dismissing defendants' counterclaim for breach of fiduciary duty is **denied**.

In view of the foregoing, defendants' motion to compel discovery is **granted** to the extent that plaintiff shall produce any documents related to informal meetings of the directors

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or shareholders within 30 days of the date of this order. Plaintiff Antonio Tulino shall appear for a deposition at the office of defendants' counsel on January 12, 2011. Any adjournment of the deposition shall require the Courts consent.

Pursuant to CPLR 3025(b) leave to amend is freely **granted**, unless the proposed amendment is patently without merit. The court notes that while plaintiff's claims are personal, the proposed amended complaint purports to be brought on behalf of the corporation. Accordingly, plaintiff's motion for leave to amend is **granted** to the extent of permitting an amended complaint in plaintiff's individual capacity. Plaintiff may serve a conforming amended complaint within 15 days of service of a copy of this order.

So ordered.

Dated DEC 02 2010

Stephen A. Bucaria
J.S.C.

ENTERED
DEC 06 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE