

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

704

CA 20-01025

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, AND DEJOSEPH, JJ.

MATTHEW G. KAVANAUGH, INDIVIDUALLY AND AS A
DIRECTOR OF CONSUMERS BEVERAGES, INC., A
MEMBER OF KAVCON DEVELOPMENT LLC, AND A
DIRECTOR OF KAVCO DISTRIBUTING COMPANY, INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NEIL KAVANAUGH, ALSO KNOWN AS CORNELIUS
KAVANAUGH, MARTHA KAVANAUGH,
DEFENDANTS-RESPONDENTS-APPELLANTS,
AND MARY ELLEN KAVANAUGH, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

GROSS SHUMAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT NEIL KAVANAUGH, ALSO KNOWN AS CORNELIUS
KAVANAUGH.

ADAMS LECLAIR LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT MARTHA KAVANAUGH.

GARVEY & GARVEY, BUFFALO (DENNIS J. GARVEY OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal and cross appeals from an order of the Supreme Court, Erie
County (Henry J. Nowak, J.), entered June 5, 2020. The order denied
the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that said cross appeals are unanimously
dismissed, the order is reversed on the law without costs, the motion
is granted, and judgment is granted in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that the transfers of
shares and ownership interests in Consumers Beverages, Inc.
and Kavcon Development LLC from defendants Martha Kavanaugh
and Mary Ellen Kavanaugh to defendant Neil Kavanaugh, also
known as Cornelius Kavanaugh, are null and void.

Memorandum: This appeal is part of an extended intra-family
litigation concerning the ownership of two family companies, Consumers
Beverages, Inc. (CBI) and Kavcon Development LLC (Kavcon). The

parties are siblings, and they are all current or former shareholders in CBI and current or former members of Kavcon. The parties are also signatories to the separate agreements that govern the ownership structure of each company.

In 2012, defendant Neil Kavanaugh, also known as Cornelius Kavanaugh, purchased defendant Mary Ellen Kavanaugh's interests in CBI and Kavcon. In 2013, Neil purchased defendant Martha Kavanaugh's interests in CBI and Kavcon. Plaintiff objected to those purchases, and he thereafter commenced this action. Only the first and second causes of action are at issue in this appeal; in those causes of action, plaintiff sought a declaration that the disputed purchases were null and void because they violated the transfer restrictions of the governing agreements. Neil's answer asserted, *inter alia*, affirmative defenses of waiver and estoppel.

Following discovery, plaintiff moved for partial summary judgment on the first and second causes of action. Neil opposed that motion, arguing only that summary judgment in plaintiff's favor was precluded by triable issues of fact with respect to his affirmative defenses of waiver and estoppel. Neil did not cross-move for summary judgment dismissing the first and second causes of action against him. Martha and Mary Ellen both conceded liability and advocated in plaintiff's favor, although neither sister filed any formal motion or cross motion on her own behalf.

Supreme Court determined, as a matter of law, that the disputed purchases violated the transfer restrictions of the governing agreements. Nevertheless, the court denied plaintiff's motion solely on the ground that triable issues of fact existed as to the affirmative defenses of waiver and estoppel. Plaintiff now appeals; Martha and Neil now cross-appeal.

We dismiss Martha's cross appeal for the reasons stated in *Kavanaugh v Kavanaugh* ([appeal No. 1] – AD3d – [Dec. 23, 2021] [4th Dept 2021] [decided herewith]).

We also dismiss Neil's cross appeal. The court refused to grant relief against Neil on plaintiff's motion and, as noted above, Neil did not seek affirmative relief on his own behalf. Thus, Neil is not aggrieved by the order from which he purports to cross-appeal (see *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 664 n 4 [2014]; *MacKay v Paliotta*, 196 AD3d 552, 553 [2d Dept 2021]; see generally CPLR 5511). We recognize that the second decretal paragraph of the subject order purports to deny "Defendants' cross-motion for partial summary judgment," but that is clearly a ministerial error carried over from a separate order in a related action. Indeed, the court's underlying decision correctly indicates that no cross motion was made in this action (see generally *Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546 [4th Dept 2014], *lv dismissed* 24 NY3d 998 [2014]).

On the merits of plaintiff's appeal, we conclude—for the reasons stated in *Kavanaugh* (– AD3d at –)—that the court erred in denying

plaintiff's motion for partial summary judgment on his first and second causes of action. We thus reverse the order and grant that motion.

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court