

Matter of Johnsen v ACP Distribution, Inc.

2005 NY Slip Op 30021(U)

February 3, 2005

Supreme Court, New York County

Docket Number: _300109/5652

Judge: Rosalyn H. Richter

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0109565/2004

PART

24

JOHNSEN, LINDA B.

VS

ACP DISTRIBUTION, INC.

INDEX NO.

SEQ 2

MOTION DATE

SUMMARY JUDGMENT

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

FEB 24 2005

CLERK OF COURT
CLERK'S OFFICE

See Amended decision + order

*Conf. scheduled - Sat 24, 60 Centre
St, 3/2/05, 10:30 Am*

Dated: _____

2/24/05 _____ *Leandra M. ...*
J.S.C.

Check one: FINAL DISPOSITION

FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DO NOT POST

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

-----X
In the Matter of the Application of:

Index No. 109565/04

LINDA B. JOHNSEN, Conservator of the Estate
of Philip A. Garda, Holder of One Half of All
Outstanding Shares Entitled to Vote in an Election
of Directors of ACP DISTRIBUTION, INC.,
a Domestic New York Corporation,

DECISION & ORDER

Petitioner,

against-

ACP DISTRIBUTION, INC., ANDREW T. GARDA,
ANDREW J. GARDA, and BRIAN M. GARDA,

Respondents,

For the Dissolution of ACP Distribution, INC.,
pursuant to BCL §§ 1104(a)(2) and/or 1104(c)

-----X
R. RICHTER, J.:

Petitioner Linda B. Johnson, Conservator of the Estate of Philip A. Garda, brings this proceeding, by order to show cause, pursuant to Business Corporation Law (BCL) § 1104, seeking judicial dissolution of respondent ACP Distribution, Inc. (ACP or the Company). Respondents ACP, Andrew T. Garda, Andrew J. Garda, and Brian M. Garda, move, pursuant to CPLR 3212 (a), for summary judgment on their counterclaim. The counterclaim seeks an injunction requiring petitioner to sell all of the capital stock of ACP owned by Philip A. Garda, in accordance with the terms of a certain Stockholders Agreement (Agreement) that is discussed below. This opinion discusses respondents' motion.

ACP, which conducts a distributorship business of heating, ventilation and air-conditioning (HVAC) supplies, has an exclusive license agreement with non-party Johnstone Supply, a cooperative organization that serves as a master distributor of HVAC supplies for numerous original equipment manufacturers. ACP was initially formed in 1940 by six individuals. By 1966, four of

the six had died, leaving Philip and Andrew T. Garda as the sole, equal owners of the business. In time, Philip and Andrew each had three children. Philip's son, Philip A. Garda, Jr. (Phil Jr.), and Andrew's son, Andrew T. Garda (Drew), came to be employed full-time by the Company. On October 1, 1996, Philip and Andrew entered into the Agreement. Philip and Andrew, thereupon, recapitalized the Company, authorizing it to issue 616 shares of Voting Common Stock and 616 shares of Non-Voting Common Stock, all divided equally between Philip and Andrew. At that time, the Company was being run, on a day-to-day basis, by Phil Jr. and by Drew, Philip having retired in 1978, and Andrew having done so in 1983.

On or about November 1, 1996, Andrew transferred his 308 shares of Voting Common Stock, and his 308 shares of Non-Voting Common Stock to his wife, Bridget Garda. Bridget died shortly thereafter, and bequeathed all of the 308 shares of Voting Common Stock to Drew, and 154 shares of the Non-Voting Common Stock to each of her other children, Joseph Garda and Barbara Jeffers. On or about June 12, 1999, Phil Jr. died unexpectedly. Philip, who now resides in a nursing home, continues to own all of his capital stock. Petitioner has been appointed as her father's conservator under Connecticut law.

By letter, dated August 20, 2003, D. Robert Morris, Esq., a Connecticut attorney retained by petitioner, wrote to Drew, summarizing an earlier telephone conversation in which they had discussed a valuation of the Company, in the context of a possible repurchase of Philip's shares by the Company, or a possible sale of the Company. The letter indicated that, in principle, a repurchase price of \$2 million for Philip's shares would be acceptable. The letter concluded:

We thus believe that you have three options. The first is to reach agreement on the repurchase of [Philip's] shares. The second is to agree that the business should be sold, and to enter into a written agreement under which all stockholders will work together to sell the Company at the highest possible price. The third is to defend an action for dissolution.

By answering letter, dated September 4, 2003, Drew replied that the Company would be willing to redeem Philip's stock for \$1,009,258.50.

Mr. Morris replied, by letter, dated September 11, 2003, that the sides were too far apart to agree on

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a repurchase of Philip's shares, and that, therefore, the remaining options were either to agree on a sale of the Company, or for Philip to commence an action for dissolution. By letter, dated November 22, 2003, petitioner wrote to Drew, reciting that it appeared that they were unable to agree on the terms for a repurchase of her father's shares, and, as conservator of her father's estate, formally requesting Drew, as president of the Company, to call a special meeting of shareholders for the purpose of electing three directors. Drew replied, by letter dated December 5, 2003, that petitioner's request appeared to be a legal stratagem designed to engineer a deadlock; that he had retained a valuation expert to report on the value of the Company as a going concern; and that, upon receipt of that report, he expected to make a new offer for Philip's shares. On June 19, 2004, however, apparently after some further communications with petitioner, Drew wrote to her, purporting to accept "the proposal to purchase your father's shares ..., which, for the reasons hereinafter set forth, have been offered for sale under the terms of the Stockholders' Agreement... ." The Agreement provides that the price at which the Company will repurchase shares of its stock will be book value, minus 30%.

Paragraph 7 (a) of the Agreement provides that:

Except as otherwise expressly provided for herein, no Stockholder shall at any time during the term of this Agreement donate, hypothecate, pledge, transfer or otherwise dispose of his Stock in any manner whatsoever, without first offering the same for sale first to the Company, and if the Company does not wish to purchase same, then to the Remaining Stockholders in the manner hereinafter provided and at the sale price and on the terms hereinafter set forth.

Paragraph 19 of the Agreement provides that "in the event of any breach or threatened breach [of the Agreement], the other parties may apply for injunctive relief or specific performance."

Respondents contend that Mr. Morris's August 20, 2003 letter to Drew constituted an offer to sell Philip's shares, which offer was accepted by Drew's June 19, 2004 letter to petitioner; that Mr. Morris's letter triggered the provisions of paragraph 7 of the Agreement; and that petitioner's commencement of this proceeding triggered paragraph 7 of the Agreement. These contentions will be discussed in turn.

Mr. Morris's letter discussed a possible sale of Philip's shares, as one possibility among

others. it specifically referred to that possibility as "reach[ing] agreement" on such sale. Moreover, the \$2 million sale price that Mr. Morris indicated would be acceptable was "subject ... to being comfortable that the building is valued as you indicate." This was far from constituting a firm and definite offer, the acceptance of which would bind the offeror. See Marlio v McLaughlin, 288 AD2d 97 (1st Dept 2001) (intention to make future offer is not present offer subject to immediate acceptance); see also S.S.I. Investors Ltd. v Korea Tungsten Mining Co. Ltd., 55 NY2d 934 (1982) (bids made in the alternative do not constitute offer).

In any event, neither Drew's September 4, 2003 letter, expressing the Company's willingness to redeem Philip's stock for \$1,009,258.50, nor Drew's June 19, 2004 letter, purporting to accept an offer in accordance with the terms of the Agreement, was an acceptance. "It is a fundamental rule of contract law that an acceptance must comply with the terms of the offer." Gram v Mutual Ins. Co. of New York, 300 NY 375, 382 (1950). If Mr. Morris' letter conveyed an offer, Drew's responses did not comply with the terms thereof.

Nor did Mr. Morris's letter trigger the Company's, or Drew's, right of first refusal, under paragraph 7 of the Agreement. That letter did not "donate, hypothecate, pledge, transfer, or otherwise dispose of" Philip's stock. It was merely an invitation to continue negotiations, an invitation that Drew, in fact, accepted. Compare Malloy v O'Neill, 242 AD2d 260 (2d Dept 1997) (in which the court held that an actual transfer of shares to a third party had triggered a right of first refusal). The parties to the Agreement were Philip, Andrew, and the Company. Accordingly, because parties to a contract are free to modify it by entering into a new contract (see Nassau Trust Co. v Montrose Concrete Prod. Corp., 56 NY2d 175 [1982]), petitioner in her representative capacity, and Drew as president of the Company, were free to negotiate any change to the Agreement that they wished, subject only to the approval of any such change by Andrew.

Citing Doniger v Rye Psychiatric Hosp. Center, Inc. (122 AD2d 873 [2d Dept 1986]), in which the court held that a shareholder's BCL § 1104 petition triggered an obligation to offer the subject shares to the other shareholders, respondents argue that petitioner's commencement of this

proceeding triggered the right of first refusal that is provided for in paragraph 7 of the Agreement. In Doniger, the relevant provision of the governing contract covered, among other things, "the passage or disposition of shares ... under judicial order, legal process, or... ." Id. at 876. Here, by contrast, the Agreement does not expressly refer to a judicial dissolution. Accordingly, Doniger is inapplicable here.

In Matter of Pace Photographers Ltd. [Rosen] (71 NY2d 737 [1988]), the Court of Appeals held that, in the context of a proceeding brought pursuant to BCL § 1104-a, absent an explicit agreement to the contrary, the petition is not equivalent to a voluntary offer to sell the petitioner's stock, and a buy-out provision will not apply. Subsequently, citing Pace Photographers, the United States Bankruptcy Court for the District of Connecticut held that a right of first refusal, contained in a shareholders' agreement, is not triggered by the majority owner's authorization for the filing of a Chapter 11 bankruptcy petition by the subject corporation. In re BBS Norwalk One, Inc., 239 BR 440 (D Conn 1999). The court noted that, as a general matter under New York law, absent an explicit agreement to the contrary, a liquidation, in or out of bankruptcy, is not equivalent to a shareholder's offer to sell shares to a third party. The court relied, in part, on Sands Point Land Co. v Rossmore (43 Misc 2d 368 [Sup Ct, Nassau County 1964]), in which the court explained that:

[t]he restrictive stock agreement is a device to assure the succession in interest of persons most likely to act harmoniously with the other shareholders. In the instant case this rationale does not apply since there will be no succession in interest inasmuch as the corporation is ceasing to exist, is winding up its affairs by dissolution and liquidation of assets to shareholders, as a result of which there will no longer be any stock or stockholders.

Id. at 372 (internal quotation marks omitted). See also Lin v Metromedia, Inc., 139 AD2d 124 (1st Dept 1988), affd 74 NY2d 54 (1989) (primary purpose of first refusal restriction on stock transfers is to prevent shareholder from forcing unknown or unwanted stockholders upon the remaining owners).

Andrew avers in his affidavit in support of respondents' motion that he and Philip agreed upon the minority and marketability discount provisions in the Agreement "because we wanted to assure continuation of the business so long as one of our descendants was still running it, and we

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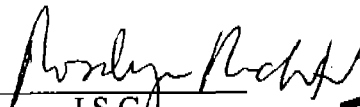
didn't want a family member who might be in the business to be faced with a purchase price so substantial ... that the business might have to be sold off to pay the redemption price." The fact is, however, that Andrew and Philip did not explicitly provide for the continuation of the Company in the face of a petition for its dissolution. In the absence of such an express provision, this Court concludes that a first-refusal provision is not triggered by a petition to dissolve the subject corporation.

Accordingly, it is hereby

ORDERED that respondents' motion for summary judgment is denied. The parties shall appear in Part 24 on March 2, at 10:30 am for a conference on this matter.

Dated: February 3, 2005

ENTER:



J.S.C.

FILED

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